12–22–10 Wednesday
Vol. 75 No. 245 Dec. 22, 2010

Pages 80287–80672

Federal Register

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ENVIRONMENTAL PROTECTION AGENCY

2 CFR Part 1536

40 CFR Part 36

[Docket No. EPA–HQ–OARM–2010–0922; FRL– 9242–2]

Environmental Protection Agency Implementation of OMB Guidance on Drug-Free Workplace Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency is removing its regulation implementing the Governmentwide common rule on drug-free workplace requirements for financial assistance. This regulatory action implements the OMB's initiative to streamline and consolidate into one title of the CFR all federal regulations on drug-free workplace requirements for financial assistance. These changes constitute an administrative simplification that would make no substantive change in Environmental Protection Agency policy or procedures for drug-free workplace.

DATES: This final rule is effective on December 22, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–HQ–OARM–2010–0922. All documents in the docket are listed in the *http://*www.regulations.gov index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is publicly available only in hard copy. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Public Reading Room. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744.

FOR FURTHER INFORMATION CONTACT: Elizabeth January, Environmental Protection Agency, 5 Post Office Square, Boston, MA 02109, by phone (617) 918–8655 or by e-mail (*january.elizabeth@epa.gov*).

SUPPLEMENTARY INFORMATION:

I. General Information

Affected Entities: Entities that receive grants from EPA.

II. Background

The Drug-Free Workplace Act of 1988 [Pub. L. 100–690, Title V, Subtitle D; 41 U.S.C. 701, *et seq.*] was enacted as a part of omnibus drug legislation on November 18, 1988. Federal agencies issued an interim final common rule to implement the act as it applied to grants [54 FR 4946, January 31, 1989]. The rule was a subpart of the Governmentwide common rule on nonprocurement suspension and debarment. The agencies issued a final common rule after consideration of public comments [55 FR 21681, May 25, 1990].

The agencies proposed an update to the drug-free workplace common rule in 2002 [67 FR 3266, January 23, 2002] and finalized it in 2003 [68 FR 66534, November 26, 2003]. The updated common rule was redrafted in plain language and adopted as a separate part, independent from the common rule on nonprocurement suspension and debarment. Based on an amendment to the drug-free workplace requirements in 41 U.S.C. 702 [Pub. L. 105–85, div. A, title VIII, Sec. 809, Nov. 18, 1997, 111 Stat. 1838], the update also allowed multiple enforcement options from which agencies could select, rather than requiring use of a certification in all cases.

When it established Title 2 of the CFR as the new central location for OMB guidance and agency implementing regulations concerning grants and agreements [69 FR 26276, May 11, 2004], OMB announced its intention to replace common rules with OMB guidance that agencies could adopt in brief regulations. OMB began that process by proposing [70 FR 51863, August 31, 2005] and finalizing [71 FR 66431, November 15, 2006] Governmentwide guidance on nonprocurement suspension and debarment in 2 CFR part 180.

As the next step in that process, OMB proposed for comment [73 FR 55776, September 26, 2008] and finalized [74 FR 28149, June 15, 2009] Governmentwide guidance with policies and procedures to implement drug-free workplace requirements for financial assistance. The guidance requires each agency to replace the common rule on drug-free workplace requirements that the agency previously issued in its own CFR title with a brief regulation in 2 CFR adopting the Governmentwide policies and procedures. One advantage of this approach is that it reduces the total volume of drug-free workplace regulations. A second advantage is that it collocates OMB's guidance and all of the agencies' implementing regulations in 2 CFR.

Conclusion

As the OMB guidance requires, the Environmental Protection Agency is taking two regulatory actions. First, we are removing the drug-free workplace common rule from 40 CFR part 36. Second, to replace the common rule, we are issuing a brief regulation in 2 CFR part 1536 to adopt the Governmentwide policies and procedures in the OMB guidance.

Statutory and Executive Order Reviews: OMB has determined under Executive Order 12866 (58 FR 51735, October 4, 1993), that this action is not a "significant regulatory action." Because this grants rule is not subject to notice and comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the Regulatory Flexibility Act (5 U.S.C. 601 *et.*). Today's rule contains no Federal mandates (under the regulatory provisions of Title 2 of the Unfunded Mandates Reform Act of 1999 (UMRA)) for State, local, or tribal governments or the private sector that would subject the rule to Sections 202 and 205 of the UMRA) (Pub. L. 104–4). The rule imposes no enforceable duty on any State, local, or Tribal governments or the private sector. In addition, this rule does not significantly or uniquely affect small governments. This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This final rule is

solely an administrative simplification that would make no substantive change in Environmental Protection Agency policy or procedures for drug-free workplace. Thus, Executive Order 13175 (63 FR 67249, November 9, 2000) does not apply to this action. EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. This rule will not have federalism implications, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). Executive Order 12898 (59 FR 7629 (February 16, 1994)) establishes Federal executive policy on environmental justice. EPA has determined that this rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it is a grant rule that does not affect the level of protection provided to human health or the environment. This rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Further, we have concluded that this rule is not likely to have any adverse energy effects. This rule does not involve technical standards; thus, the requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an additional information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Congressional Review Act: The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before certain actions may take effect, the agency promulgating the action must submit a report, which includes a copy of the action, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective on December 22, 2010.

List of Subjects

2 CFR Part 1536

Administrative practice and procedure, Drug abuse, Grant programs, Reporting and recordkeeping requirements.

40 CFR Part 36

Governmentwide requirements for drug-free work-place (financial assistance).

Dated: December 16, 2010.

Howard Corcoran,

Director, Office of Grants and Debarment.

■ Accordingly, for the reasons set forth in the preamble, and under the authority of 5 U.S.C. 301, the Environmental Protection Agency amends the Code of Federal Regulations, Title 2, Subtitle B, Chapter XV, Part 1536, and Title 40, Chapter I, Part 36, as follows:

Title 2—Grants and Agreements

■ 1. Add Part 1536 in Subtitle B, Chapter XV, to read as follows:

PART 1536—REQUIREMENTS FOR DRUG-FREE WORKPLACE (FINANCIAL ASSISTANCE)

Sec.

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Authority: 41 U.S.C. 701–707.

§ 1536.10 What does this part do?

This part requires that the award and administration of Environmental Protection Agency grants and cooperative agreements comply with Office of Management and Budget (OMB) guidance implementing the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701–707, as amended, hereafter referred to as "the Act") that applies to grants. It thereby—

(a) Gives regulatory effect to the OMB guidance (Subparts A through F of 2 CFR part 182) for the Environmental Protection Agency's grants and cooperative agreements; and

(b) Establishes Environmental Protection Agency policies and procedures for compliance with the Act that are the same as those of other Federal agencies, in conformance with the requirement in 41 U.S.C. 705 for Governmentwide implementing regulations.

§ 1536.20 Does this part apply to me?

This part and, through this part, pertinent portions of the OMB guidance in Subparts A through F of 2 CFR part 182 (*see* table at 2 CFR 182.115(b)) apply to you if you are a—

(a) Recipient of a Environmental Protection Agency grant or cooperative agreement; or

(b) Environmental Protection Agency awarding official.

§ 1536.30 What policies and procedures must I follow?

(a) *General.* You must follow the policies and procedures specified in applicable sections of the OMB guidance in Subparts A through F of 2 CFR part 182, as implemented by this part.

(b) *Specific sections of OMB guidance that this part supplements.* In implementing the OMB guidance in 2 CFR part 182, this part supplements four sections of the guidance, as shown in the following table. For each of those sections, you must follow the policies and procedures in the OMB guidance, as supplemented by this part.

Section of OMB guidance	Section in this part where supplemented	What the supplementation clarifies
(1) 2 CFR 182.225(a)	§ 1536.225	Whom in the Environmental Protection Agency a recipient other than an individual must notify if an employee is convicted for a violation of a criminal drug statute in the workplace.
(2) 2 CFR 182.300(b)	§ 1536.300	Whom in the Environmental Protection Agency a recipient who is an individual must notify if he or she is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.
(3) 2 CFR 182.500	§ 1536.500	Who in the Environmental Protection Agency is authorized to determine that a recipient other than an individual is in violation of the requirements of 2 CFR part 182, as implemented by this part.
(4) 2 CFR 182.505	§ 1536.505	Who in the Environmental Protection Agency is authorized to determine that a recipient who is an individual is in violation of the requirements of 2 CFR part 182, as implemented by this part.

(c) *Sections of the OMB guidance that this part does not supplement.* For any section of OMB guidance in Subparts A through F of 2 CFR part 182 that is not listed in paragraph (b) of this section, Environmental Protection Agency policies and procedures are the same as those in the OMB guidance.

Subpart A—Purpose and Coverage [Reserved.]

Subpart B—Requirements for Recipients Other Than Individuals

§ 1536.225 Whom in the Environmental Protection Agency does a recipient other than an individual notify about a criminal drug conviction?

A recipient other than an individual that is required under 2 CFR 182.225(a) to notify Federal agencies about an employee's conviction for a criminal drug offense must notify the EPA award official from each Environmental Protection Agency office from which it currently has an award.

Subpart C—Requirements for Recipients Who Are Individuals

§ 1536.300 Whom in the Environmental Protection Agency does a recipient who is an individual notify about a criminal drug conviction?

A recipient who is an individual and is required under 2 CFR 182.300(b) to notify Federal agencies about a conviction for a criminal drug offense must notify the EPA award official from each Environmental Protection Agency office from which it currently has an award.

Subpart D—Responsibilities of Agency Awarding Officials

§ 1536.400 What method do I use as an agency awarding official to obtain a recipient's agreement to comply with the OMB guidance?

To obtain a recipient's agreement to comply with applicable requirements in the OMB guidance at 2 CFR part 182, you must include the following term or condition in the award:

Drug-free workplace. You as the recipient must comply with drug-free workplace requirements in Subpart B (or Subpart C, if the recipient is an individual) of 2 CFR Subtitle B, Chapter XV, Part 1536, which adopts the Governmentwide implementation (2 CFR part 182) of sec. 5152–5158 of the Drug-Free Workplace Act of 1988 (Pub. L. 100–690, Title V, Subtitle D; 41 U.S.C. 701–707).

Subpart E—Violations of This Part and Consequences

§ 1536.500 Who in the Environmental Protection Agency determines that a recipient other than an individual violated the requirements of this part?

The EPA Administrator or designee is the official authorized to make the determination under 2 CFR 182.500.

§ 1536.505 Who in the Environmental Protection Agency determines that a recipient who is an individual violated the requirements of this part?

The EPA Administrator or designee is the official authorized to make the determination under 2 CFR 182.505.

Title 40—Protection of Environment

Chapter I

PART 36—[REMOVED]

■ 2. Remove Part 36.

[FR Doc. 2010–32134 Filed 12–21–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE–2010–BT–STD–WAV–0045]

Energy Efficiency Program for Consumer Products: Waiver of Federal Preemption of State Regulations Concerning the Water Use or Water Efficiency of Showerheads, Faucets, Water Closets and Urinals

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: The U.S Department of Energy (DOE) waives the general rule of Federal preemption for energy conservation standards under 42 U.S.C. 6297(c) with respect to any State regulation concerning the water use or water efficiency of faucets, showerheads, water closets and urinals if such State regulation is: More stringent than Federal regulation concerning the water use or water efficiency for that same type or class of product; and applicable to any sale or installation of all products in that particular type or class.

DATES: *Effective Date:* This rule is effective December 22, 2010.

ADDRESSES: The public may review copies of all materials related to this rulemaking at the U.S. Department of Energy, Resource Room of the Building Technologies Program, 950 L'Enfant Plaza, SW., Suite 600, Washington, DC, (202) 586–2945, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please call Ms. Brenda Edwards at the above telephone number for additional information regarding visiting the Resource Room.

FOR FURTHER INFORMATION CONTACT: Lucas Adin, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 950

L'Enfant Plaza, SW., Washington, DC 20585–0121, (202) 287–1317, e-mail: *Lucas.Adin@ee.doe.gov*.

Jennifer Tiedeman, Esq., GC–71, U.S. Department of Energy, Office of the General Counsel, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 287–6111, e-mail: *Jennifer.Tiedeman@hq.doe.gov*.

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I. Authority and Discussion

Title III, Part B of the Energy Policy and Conservation Act (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309, as codified), established the Energy Conservation Program for "Consumer Products Other Than Automobiles." [1] The consumer products subject to this program (hereafter "covered products") include faucets, showerheads, water closets and urinals, the subjects of today's notice. Under EPCA, the overall program consists essentially of testing, labeling, and Federal energy conservation standards, including water conservation standards for faucets, showerheads, water closets and urinals. National standards for these water-using products are based on the American Society of Mechanical Engineers (ASME)/American National Standards Institute (ANSI) standards A112.18.1M, for showerheads and faucets, and A112.19.6, for water closets and urinals. 42 U.S.C. 6295(j), (k).

42 U.S.C. 6295(j)(3)(C) and 6295(k)(3)(C) requires that, not later than six months after the conclusion of a five-consecutive-year period during which the ASME/ANSI has not amended these faucet, showerhead, water closet or urinal standards in order to improve water efficiency, DOE must publish a final rule waiving preemption for Federal standards under 42 U.S.C. 6297(c) with respect to any State regulation concerning the water use or water efficiency of such type or class of showerhead, faucet, water closet or urinal if such State regulation meets the following two conditions. First, the State regulation concerning water use or water efficiency for a particular type or class of showerhead, faucet, water closet or urinal must be more stringent than the Federal regulation concerning water use or water efficiency for that same type or class of showerhead, faucet, water closet or urinal. 42 U.S.C. 6295(j)(3)(C)(i), 6295(k)(3)(C)(i). Second, the State regulation concerning the water use or water efficiency for a particular type or class of showerhead, faucet, water closet or urinal must be applicable to any sale or installation of all products in that particular type or class. 42 U.S.C. 6295(j)(3)(C)(ii), 6295(k)(3)(C)(ii).

The provisions in 42 U.S.C. 6295(j)(3)(C) and 6295(k)(3)(C) represent a choice by Congress to deviate from the general rule of Federal preemption, where the relevant industry consensus body has failed to act to improve water efficiency for a significant period of time. ASME/ANSI last made a substantive amendment to its standards regarding the water efficiency requirements for showerheads and faucets on May 29, 1996 (ASME/ANSI A112.18.1M–1996), and for water closets and urinals on April 19, 1996 (ASME/ANSI A112.19.6–1995). Both of these standards were incorporated by reference into the Code of Federal Regulations in a final rule issued by DOE on March 18, 1998. 63 FR 13308. Because more than five years have passed since ASME/ANSI last amended the water efficiency requirements in either of these standards, DOE must issue this final rule waiving the provisions of 42 U.S.C. 6297(c) with respect to any State regulation concerning the water use or water efficiency of a particular type or class of showerhead, faucet, water closet or urinal that is both more stringent than the relevant Federal regulation and is applicable to any sale or installation or all products in that particular type or class.

II. Procedural Requirements

A. Executive Order 12866

Today's regulatory action is not a "significant regulatory action" under section 3(f) of Executive Order 12866, "Regulatory Planning and Review," 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

B. Administrative Procedure Act

The Department of Energy finds good cause to waive prior notice and an opportunity for public comment on these regulations pursuant to 5 U.S.C. 533(b)(B), because such procedures are unnecessary. EPCA imposes a non-discretionary duty on DOE to waive Federal preemption in a defined factual circumstance. That circumstance has occurred. Therefore, this rule is necessary for DOE to implement this statutorily-imposed obligation. Public comment on DOE's implementation of this legal mandate would serve no useful purpose. For the same reason, DOE finds good cause, pursuant to 5 U.S.C. 553(d)(3), to waive the 30-day delay in effective date for this rule. Therefore, these regulations are being published as final regulations and are effective December 22, 2010.

C. National Environmental Policy Act of 1969

DOE has determined that this rule falls into a class of actions that are categorically excluded from review under the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and DOE's implementing regulations at 10 CFR part 1021. This rule at most amends an existing rule without changing its environmental effect, and, therefore, is covered by the Categorical Exclusion A5 found in appendix A to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required. Moreover, a State's promulgation of a regulation concerning water use or water efficiency for a particular type or class of showerhead, faucet, water closet or urinal is not a Federal action subject to NEPA.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that must be proposed for public comment, unless the agency certifies that the rule will have no significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking," 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the

[1] For editorial reasons, upon codification in the U.S. Code, Part B was re-designated Part A.

rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's Web site at *http://www.gc.doe.gov.* Because a notice of proposed rulemaking is not required under the Administrative Procedure Act or other applicable law, the Regulatory Flexibility Act does not require certification or the conduct of a regulatory flexibility analysis for this rule.

E. Paperwork Reduction Act

This rulemaking imposes no new information or recordkeeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act. (44 U.S.C. 3501 *et seq.*)

F. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For proposed regulatory actions likely to result in a rule that may cause expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish estimates of the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) The UMRA also requires a Federal agency to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed "significant intergovernmental mandate." UMRA also requires an agency plan for giving notice and opportunity for timely input to small governments that may be affected before establishing a requirement that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA (62 FR 12820) (also available at *http://www.gc.doe.gov*). Today's final rule contains neither an intergovernmental mandate nor a mandate that may result in the expenditure of $100 million or more in any year, so these requirements do not apply.

G. Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Today's rule would have no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is unnecessary to prepare a Family Policymaking Assessment.

H. Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have Federalism implications. The executive order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. DOE has examined this final rule and determined that it would not preempt State law; in fact, this rule waives preemption of State law and has no negative impact on any State. Executive Order 13132 requires no further action.

I. Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity, (2) write regulations to minimize litigation, (3) provide a clear legal standard for affected conduct rather than a general standard, and (4) promote simplification and burden reduction. Regarding the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation (1) clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in sections 3(a) and 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, this rule meets the relevant standards of Executive Order 12988.

J. Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB's guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Executive Order 13211

Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use," 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. Today's regulatory action is not a significant regulatory action under Executive Order 12866 or any successor order; would not have a significant adverse effect on the supply, distribution, or use of energy; and has not been designated by the Administrator of OIRA as a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

L. Executive Order 12630

Pursuant to Executive Order 12630, "Governmental Actions and Interference with Constitutionally Protected Property Rights," 53 FR 8859 (March 15, 1988), DOE has determined that this rule would not result in any takings that might require compensation under the

Fifth Amendment to the U.S. Constitution.

M. Section 32 of the Federal Energy Administration Act of 1974

Under section 301 of the Department of Energy Organization Act (Pub. L. 95–91), the Department of Energy must comply with section 32 of the Federal Energy Administration Act of 1974 (Pub. L. 93–275), as amended by the Federal Energy Administration Authorization Act of 1977 (Pub. L. 95–70). (15 U.S.C. 788) Section 32 provides that where a proposed rule authorizes or requires use of commercial standards, the notice of proposed rulemaking must inform the public of the use and background of such standards. In addition, section 32(c) requires DOE to consult with the Department of Justice and the Federal Trade Commission concerning the impact of the commercial or industry standards on competition. This final rule to waive the provisions of 42 U.S.C. 6297(c) in certain circumstances is not a proposed rule and does not authorize or require the use of any commercial standards. Therefore, no consultation with either DOJ or FTC is required.

N. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of today's rule. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 804(2).

III. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this final rule.

Issued in Washington, DC, on December 15, 2010.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

[FR Doc. 2010–32116 Filed 12–21–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

10 CFR Part 431

[Docket Number EERE–2008–BT–TP–0008]

RIN 1904–AB71

Energy Conservation Program: Energy Conservation Standards for Electric Motors

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule; technical correction.

SUMMARY: The U.S. Department of Energy (DOE) published a final rule on March 23, 2009, promulgating energy conservation standards for certain electric motors as prescribed in the Energy Policy and Conservation Act, as amended by the Energy Independence and Security Act. This document is being issued to correct the energy efficiency levels that DOE promulgated for NEMA Design B general purpose electric motors that, due to a drafting error, are not consistent with statutory requirements.

DATES: This technical correction is effective as of December 22, 2010.

FOR FURTHER INFORMATION CONTACT: Mr. James Raba, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Telephone: (202) 586–8654. E-mail: *Jim.Raba@ee.doe.gov.*

In the Office of the General Counsel, contact Ms. Ami Grace-Tardy, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue, SW., Washington, DC 20585. Telephone: (202) 586–5709. E-mail: *Ami.Grace-Tardy@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Energy Policy and Conservation Act (EPCA), as amended by section 313(b)(1)(B) of the Energy Independence and Security Act (EISA 2007), requires each National Electrical Manufacturers Association (NEMA) Design B, general purpose electric motor with a power rating of more than 200 horsepower, but not greater than 500 horsepower, manufactured (alone or as a component of another piece of equipment) after December 19, 2010, to have a nominal full load efficiency that is not less than the values in NEMA Standard MG–1 (2006) Table 12–11. (42 U.S.C. 6313(b)(2)(D)) DOE codified this requirement at 10 CFR 431.25(f). 74 FR 12058 (March 23, 2009)

It was recently discovered that the efficiency levels under 10 CFR 431.25(f), for NEMA Design B, six-pole open motors rated 250, 300, and 350 horsepower are not consistent with the EISA 2007 levels as prescribed. Today's final rule conforms these efficiency levels with EPCA, as amended by EISA 2007, by replacing the nominal full load efficiency of "94.5" with "95.4."

II. Need for Correction

As published, the nominal full load efficiency table at 10 CFR 431.25(f) contains three values that deviate from the requirements established by EPCA, as amended by EISA 2007. To correct this error, DOE is amending 10 CFR 431.25(f) to replace the current table with a corrected table of values. In light of the statutory requirement, the change addressed by today's document is technical in nature. In addition, because DOE does not have the discretion to deviate from these statutorily-prescribed requirements, DOE finds that there is good cause under 5 U.S.C. 553(b)(B) to not issue a separate notice to solicit public comment on the changes contained in this document. Issuing a separate notice to solicit public comments would be impractical, unnecessary, and contrary to the public interest.

List of Subjects in 10 CFR part 431

Administrative practice and procedure, Energy conservation, Reporting and recordkeeping requirements.

Issued in Washington, DC, on December 15, 2010.

Cathy Zoi,

Assistant Secretary, Energy Efficiency and Renewable Energy.

■ For the reasons stated in the preamble, DOE amends 10 CFR Part 431 as set forth below.

PART 431—ENERGY EFFICIENCY PROGRAM FOR CERTAIN COMMERCIAL AND INDUSTRIAL EQUIPMENT

■ 1. The authority citation for part 431 continues to read as follows:

Authority: 42 U.S.C. 6291–6317.

■ 2. Section 431.25 is amended by revising paragraph (f) to read as follows:

§ 431.25 Energy conservation standards and effective dates.

* * * * *

(f) Each NEMA Design B general purpose electric motor with a power rating of more than 200 horsepower, but not greater than 500 horsepower, manufactured (alone or as a component of another piece of equipment), on or after December 19, 2010, shall have a nominal full load efficiency that is not less than the following:

FULL-LOAD EFFICIENCIES OF NEMA DESIGN B GENERAL PURPOSE ELECTRIC MOTORS

Motor horsepower	Nominal full load efficiency							
	Open motors (number of poles)				Enclosed motors (number of poles)			
	8	6	4	2	8	6	4	2
250	94.5	95.4	95.4	94.5	94.5	95.0	95.0	95.4
300	.....	95.4	95.4	95.0	.....	95.0	95.4	95.4
350	.....	95.4	95.4	95.0	.....	95.0	95.4	95.4
400	.....	.....	95.4	95.4	.....	.....	95.4	95.4
450	.....	.....	95.8	95.8	.....	.....	95.4	95.4
500	.....	.....	95.8	95.8	.....	.....	95.8	95.4

* * * * *

[FR Doc. 2010–32119 Filed 12–21–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0611; Directorate Identifier 2009–SW–18–AD; Amendment 39–16487; AD 2010–22–08]

RIN 2120–AA64

Airworthiness Directives; Eurocopter France Model AS 350 B, BA, B1, B2, B3, and D, and Model AS355 E, F, F1, F2, and N Helicopters

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

ACTION: Final rule; correction.

SUMMARY: The FAA is correcting an airworthiness directive (AD) that was published in the **Federal Register**. That AD applies to the specified model helicopters. Table 1 of the AD has two part numbers that do not contain the "SC" prefix. This document adds the prefix and corrects that error. In all other respects, the original document remains the same.

DATES: This final rule is effective December 22, 2010. The effective date for AD 2010–22–08 remains November 26, 2010.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The address for the Docket Office (*phone:* 800–647–5527) is Document Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: DOT/FAA Southwest Region, Matt Wilbanks, ASW–111, Aviation Safety Engineer, Rotorcraft Directorate, Regulations and Policy Group, 2601 Meacham Blvd., Fort Worth, Texas 76137, telephone (817) 222–5051, fax (817) 222–5961.

SUPPLEMENTARY INFORMATION: This AD, Amendment 39–16487 (75 FR 65222, October 22, 2010), requires replacing all servo-controls that are identified in the Applicability section, Table 1, of the AD.

As published, two part numbers shown in Table 1 on **Federal Register** page 65224, under item 2. of PART 39—AIRWORTHINESS DIRECTIVES section, are incorrect. The first incorrect part number (P/N) is "5084;" the correct P/N is "SC5084." The second incorrect P/N is "5084–1;" the correct P/N is "SC5084–1." The other P/Ns shown in Table 1 remain unchanged.

No other part of the preamble or regulatory information has been changed; therefore, only Table 1 of the final rule is being published in the **Federal Register**.

The effective date of this AD is November 26, 2010.

Correction of Regulatory Text

§ 39.13 [Corrected]

■ In the **Federal Register** document 2010–26565, filed October 21, 2010 and published on October 22, 2010 (75 FR 65222), on pages 65223 and 65224, Table 1 containing the part numbers 5084 and 5084–1 without the correct prefix "SC" is corrected to read as follows:

TABLE 1

Component	Part No. (P/N)	Serial No. (S/N)
Main rotor servo-control	P/N SC5083	S/N 270M, 272M, 409M, 423M, 452M, or 1573.
	P/N SC5083–1	S/N 2902 through 2921, inclusive.
	P/N SC5084	S/N 30, 84, 104, 186, 438, 575, or 695.
	P/N SC5084–1	S/N 1462 through 1481, inclusive.
Tail rotor servo-control	P/N SC5072	S/N 222M, 306M, or 309.

Issued in Fort Worth, Texas, on December 10, 2010.

Lance T. Gant,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2010–31964 Filed 12–21–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

Bureau of Economic Analysis

15 CFR Part 806

[Docket No. 100217100–0608–02]

RIN 0691–AA74

Direct Investment Surveys: BE–11, Annual Survey of U.S. Direct Investment Abroad

AGENCY: Bureau of Economic Analysis, Commerce.

ACTION: Final rule.

SUMMARY: This final rule amends regulations of the Bureau of Economic Analysis (BEA), Department of Commerce, to set forth the reporting requirements for the BE–11, Annual Survey of U.S. Direct Investment Abroad. BEA conducts the survey annually and obtains sample data on financial and operating data covering the overall operations of U.S. parent companies and their foreign affiliates. BEA is modifying and deleting items on the survey forms and changing the reporting criteria. The changes include a change in the reporting criteria for foreign affiliates with U.S. Parent (U.S. Reporter) ownership between 10 and 20 percent. BEA is also making changes to bring the BE–11 forms and instructions into conformity with the 2009 BE–10, Benchmark Survey of U.S. Direct Investment Abroad.

DATES: This final rule will be effective January 21, 2011.

FOR FURTHER INFORMATION CONTACT: David H. Galler, Chief, Direct Investment Division (BE–50), Bureau of Economic Analysis, U.S. Department of Commerce, Washington, DC 20230; e-mail *David.Galler@bea.gov* or phone (202) 606–9835.

SUPPLEMENTARY INFORMATION: On September 20, 2010, BEA published a notice of proposed rulemaking that set forth revised reporting criteria for the BE–11, Annual Survey of U.S. Direct Investment Abroad (75 FR 57217–57220). No comments on the proposed rule were received. Thus the proposed rule is adopted without change. This final rule amends 15 CFR Part 806.14 to set forth the reporting requirements for the BE–11 annual survey of U.S. direct investment abroad.

BEA, U.S. Department of Commerce, conducts the BE–11 survey under the authority of the International Investment and Trade in Services Survey Act (22 U.S.C. 3101–3108), hereinafter, "the Act." Section 4(a) of the Act (22 U.S.C. 3103(a)) requires that, with respect to United States direct investment abroad, the President shall, to the extent he deems necessary and feasible, conduct a regular data collection program to secure current information on international capital flows and other information related to international investment and trade in services, including (but not limited to) such information as may be necessary for computing and analyzing the United States' balance of payments, the employment and taxes of United States parent companies and their affiliates, and the international investment and trade in services position of the United States.

The BE–11 survey is a sample survey that collects information on a variety of measures of the overall operations of U.S. parent companies and their foreign affiliates, including total assets, sales, net income, employment and employee compensation, research and development expenditures, and exports and imports of goods. The sample data are used to derive universe estimates in nonbenchmark years from similar data reported in the BE–10, Benchmark Survey of U.S. Direct Investment Abroad, which is taken every five years. The data are needed to measure the size and economic significance of direct investment abroad, to measure the changes in such investment, and to assess their impact on the U.S. and foreign economies. The data are disaggregated by country and industry of the foreign affiliate and by industry of the U.S. parent. The BE–11 survey is a mandatory annual survey of U.S. direct investment abroad conducted by BEA under the Act. BEA sends survey forms to potential respondents in March of each year; responses are due by May 31.

Description of Changes

The changes revise the regulations for the BE–11 survey and bring the BE–11 forms and instructions into conformity with the 2009 BE–10, Benchmark Survey of U.S. Direct Investment Abroad. These revisions include changes in reporting thresholds and data items collected, as well as changes in form design. Several of these revisions are part of a larger program to align the data collection program for multinationals with available resources. BEA will also expand the use of sampling to help align the data collection program with resources.

Beginning with the 2010 annual survey, U.S. Reporters will report data on all their foreign affiliates, regardless of industry, on one of four foreign affiliate forms—BE–11B, BE–11C, BE–11D, or BE–11E. Data on foreign affiliates of U.S. Reporters that are banks, bank holding companies, or financial holding companies will be collected on the same survey forms as data on other foreign affiliates. All U.S. Reporters will report data on all domestic operations, on a fully consolidated basis, on Form BE–11A, Report for U.S. Reporter. Also, U.S. Reporters with total assets, sales or gross operating revenues, or net income less than or equal to $300 million will be required to report only certain items on Form BE–11A.

Additionally, BEA will require U.S. Reporters to file reports annually for foreign affiliates in which they own a 10 to 20 percent voting interest. These affiliates, some of which are very large, fall under both U.S. and international definitions for foreign direct investment and must be represented in the statistics, but in the past they have been required to be reported in the annual survey only in the third year following a benchmark survey. Annual reporting will ensure that the activities of these affiliates are accurately reflected in the statistics derived from the survey.

The four foreign affiliate forms are—

(a) Form BE–11B—report for majority-owned foreign affiliates with total assets, sales or gross operating revenues, or net income greater than $60 million, positive or negative; filing of additional items would be required for affiliates with assets, sales, or net income greater than $300 million, positive or negative;

(b) Form BE–11C—report for minority-owned foreign affiliates with total assets, sales or gross operating revenues, or net income greater than $60 million, positive or negative;

(c) Form BE–11D—schedule for foreign affiliates established or acquired by the U.S. Reporter during the current reporting year with total assets, sales or gross operating revenues, or net income greater than $25 million, positive or negative, but for which no one of these items is greater than $60 million, positive or negative; and

(d) Form BE–11E—report for foreign affiliates selected by BEA to be reported on this form in lieu of Form BE–11B. BEA will statistically divide into panels, affiliates with total assets, sales or gross operating revenues, and net income (positive or negative) between $60 million and $300 million. At the

direction of BEA, U.S. Reporters will alternate reporting these affiliates on Form BE–11B and Form BE–11E.

A Form BE–11B, BE–11C, or BE–11E must be filed for a foreign affiliate of the U.S. Reporter that owns another non-exempt foreign affiliate even if the foreign affiliate parent is otherwise exempt. That is, all affiliates upward in the chain of ownership must be reported.

In addition to the changes in the reporting criteria, BEA adds, combines, or deletes some items on the annual survey forms. BEA will no longer collect selected balance sheet items as separate items. BEA also will discontinue collecting a breakdown of the number of employees and amount of employee compensation by occupational classification; the composition of external finances; and wholesale and retail trade items (specifically, the cost of goods purchased for resale and inventory of goods purchased for resale).

BEA also adds several items to be collected in the surveys. First, BEA adds an item on Form BE–11C to collect information about respondents' total liabilities. BEA also adds an item on Form BE–11E to collect property, plant, and equipment expenditure information, and adds a schedule on Form BE–11B to collect a list of foreign affiliates in which the affiliate being reported has a direct equity interest, but which are not fully consolidated into the reported foreign affiliate. Completion of this list will be required only for foreign affiliates with total assets, sales or gross operating revenues, or net income greater than $300 million at the end of, or for, the fiscal year.

The changes to the BE–11A, U.S. Reporter annual survey form, largely parallel the above-described changes to the foreign affiliate forms. For the BE–11A, BEA will no longer collect the breakdown of number of employees and amount of employee compensation by occupational classification and no longer collect wholesale and retail trade items (specifically, the cost of goods purchased for resale and inventory of goods purchased for resale). BEA also adds a question to Form BE–11A asking if the Reporter is a bank, and will add questions to collect information on assets, liabilities, and interest receipts and payments that are related to banking activities.

Executive Order 12866

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

Executive Order 13132

This final rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under E.O. 13132.

Paperwork Reduction Act

The collection of information in this final rule has been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). OMB approved the information collection under control number 0608–0053.

Notwithstanding any other provisions of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection-of-information subject to the requirements of the PRA unless that collection displays a currently valid OMB control number.

The BE–11 survey is expected to result in the filing of reports from approximately 1,750 respondents, which is an increase from the 1,550 respondents that were required to file reports for the 2008 BE–11 annual survey. The respondent burden for this collection of information will vary from one company to another, but is estimated to average 86 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The total respondent burden of the survey is estimated at 150,550 hours, which is a decrease from the 153,800 hours estimated for the 2008 BE–11 annual survey. The reduction in burden is due to a decrease in the estimated average hours per response that resulted from the changes in reporting requirements. Written comments regarding the burden-hour estimates or any other aspects of the collection-of-information requirements contained in the final rule should be sent both to the Bureau of Economic Analysis via mail to U.S. Department of Commerce, Bureau of Economic Analysis, Office of the Chief, Direct Investment Division, BE–50, Washington, DC 20230; via e-mail at *David.Galler@bea.gov*; or by FAX at (202) 606–5311, and to the Office of Management and Budget, O.I.R.A., Paperwork Reduction Project 0608–0053, Attention PRA Desk Officer for BEA, via e-mail at *pbugg@omb.eop.gov*, or by FAX at (202) 395–7245.

Regulatory Flexibility Act

The Chief Counsel for Regulation, Department of Commerce, has certified to the Chief Counsel for Advocacy, Small Business Administration (SBA), under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this final rule will not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding the certification or the economic impact of the rule more generally. No final regulatory flexibility analysis was prepared.

List of Subjects in 15 CFR Part 806

Economic statistics, Multinational corporations, Penalties, Reporting and recordkeeping requirements, U.S. investment abroad.

Dated: November 29, 2010.

J. Steven Landefeld,

Director, Bureau of Economic Analysis.

■ For the reasons set forth in the preamble, BEA amends 15 CFR Part 806 as follows:

PART 806—DIRECT INVESTMENT SURVEYS

■ 1. The authority citation for 15 CFR Part 806 continues to read as follows:

Authority: 5 U.S.C. 301; 22 U.S.C. 3101–3108; E.O. 11961 (3 CFR, 1977 Comp., p. 86), as amended by E.O. 12318 (3 CFR, 1981 Comp., p. 173) and E.O. 12518 (3 CFR, 1985 Comp., p. 348).

■ 2. Amend § 806.14 by revising paragraphs (b)(1) and(f)(3) to read as follows:

806.14 U.S. direct investment abroad.

* * * * *

(b) * * *

(1) The affiliates are in the same BEA 4-digit industry as defined in the Guide to Industry Classifications for International Surveys, 2007; or

* * * * *

(f) * * *

(3) BE–11—Annual Survey of U.S. Direct Investment Abroad: A report, consisting of Form BE–11A and Form(s) BE–11B, BE–11C, BE–11D and/or BE–11E, is required of each U.S. Reporter that, at the end of the Reporter's fiscal year, had a foreign affiliate reportable on Form BE–11B, BE–11C, BE–11D or BE–11E. Forms required and the criteria for reporting on each are as follows:

(i) Form BE–11A (Report for U.S. Reporter) must be filed by each U.S. person having a foreign affiliate reportable on Form BE–11B, BE–11C, BE–11D or BE–11E. If the U.S. Reporter is a corporation, Form BE–11A is required to cover the fully consolidated U.S. domestic business enterprise.

(A) If for a U.S. Reporter any one of the following three items—total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for U.S. income taxes—was greater than $300 million (positive or negative) at the end of, or for, the Reporter's fiscal year, the U.S. Reporter must file a complete Form BE–11A. It must also file a Form BE–11B, BE–11C, BE–11D or BE–11E, as applicable, for each nonexempt foreign affiliate.

(B) If for a U.S. Reporter no one of the three items listed in paragraph (f)(3)(i)(A) of this section was greater than $300 million (positive or negative) at the end of, or for, the Reporter's fiscal year, the U.S. Reporter is required to file on Form BE–11A only items 1 through 26 and Part IV. It must also file a Form BE–11B, BE–11C, BE–11D, or BE–11E as applicable, for each nonexempt foreign affiliate.

(ii) Forms BE–11B, BE–11C, BE–11D, and BE–11E (Report for Foreign Affiliate).

(A) Form BE–11B must be reported for each majority-owned foreign affiliate, whether held directly or indirectly, for which any one of the following three items—total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for foreign income taxes—was greater than $60 million (positive or negative) at the end of, or for, the affiliate's fiscal year, unless the foreign affiliate is selected to be reported on Form BE–11E.

(B) Form BE–11C must be reported for each minority-owned foreign affiliate, whether held directly or indirectly, for which any one of the three items listed in paragraph (f)(3)(ii)(A) of this section was greater than $60 million (positive or negative) at the end of, or for, the affiliate's fiscal year.

(C) Form BE–11D must be reported for each majority- and minority-owned foreign affiliate, whether held directly or indirectly, established or acquired during the year for which any one of the three items listed in paragraph (f)(3)(ii)(A) of this section was greater than $25 million (positive or negative), but for which no one of these items was greater than $60 million (positive or negative), at the end of, or for, the affiliate's fiscal year. Form BE–11D is a schedule; a U.S. Reporter would submit one or more pages of the form depending on the number of affiliates that are required to be filed on this form.

(D) Form BE–11E must be reported for each foreign affiliate that is selected by BEA to be reported on this form in lieu of Form BE–11B. BEA statistically divides into panels, affiliates for which any one of the three items listed in paragraph (f)(3)(ii)(A) of this section was greater than $60 million (positive or negative), but for which no one of these items was greater than $300 million (positive or negative), at the end of, or for, the affiliate's fiscal year. At the direction of BEA, U.S. Reporters would alternate reporting these affiliates on Form BE–11B and Form BE–11E.

(iii) Based on the preceding, an affiliate is exempt from being reported if none of the three items listed in paragraph (f)(3)(ii)(A) of this section exceeds $60 million (positive or negative). However, affiliates that were established or acquired during the year and for which at least one of the items was greater than $25 million but not over $60 million must be listed, and key items reported, on schedule-type Form BE–11D.

(iv) Notwithstanding paragraph (f)(3)(iii) of this section, a Form BE–11B, BE–11C, or BE–11E must be filed for a foreign affiliate of the U.S. Reporter that owns another non-exempt foreign affiliate of that U.S. Reporter, even if the foreign affiliate parent is otherwise exempt. That is, all affiliates upward in the chain of ownership must be reported.

* * * * *

[FR Doc. 2010–32027 Filed 12–21–10; 8:45 am]

BILLING CODE 3510–06–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 232

[Release No. 33–9165; File No. S7–18–10]

RIN 3235–AK70

Extension of Filing Accommodation for Static Pool Information in Filings With Respect to Asset-Backed Securities

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission is adopting an amendment to Rule 312 of Regulation S–T to further extend its application for eighteen months. Rule 312 provides a temporary filing accommodation for filings with respect to asset-backed securities that allows static pool information required to be disclosed in a prospectus of an asset-backed issuer to be provided on an Internet Web site under certain conditions. Under this rule, such information is deemed to be included in the prospectus included in the registration statement for the asset-backed securities. As a result of the extension, the rule will apply to filings with respect to asset-backed securities filed on or before June 30, 2012.

DATES: *Effective Date:* December 31, 2010.

FOR FURTHER INFORMATION CONTACT: Jay Knight, Attorney-Adviser, Division of Corporation Finance, at (202) 551–3370, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3720.

SUPPLEMENTARY INFORMATION: We are adopting an amendment to Rule 312 [1] of Regulation S–T.[2]

I. Background and Discussion of the Amendment

In December 2004, we adopted new and amended rules and forms to address the registration, disclosure and reporting requirements for asset-backed securities ("ABS") under the Securities Act of 1933 [3] (the "Securities Act") and the Securities Exchange Act of 1934 [4] (the "Exchange Act").[5] As part of this rulemaking, we adopted Regulation AB,[6] a new principles-based set of disclosure items forming the basis for disclosure with respect to ABS in both Securities Act registration statements and Exchange Act reports. Compliance with the revised rules was phased in; full compliance with the revised rules became effective January 1, 2006. One of the significant features of Regulation AB is Item 1105, which requires, to the extent material, static pool information to be provided in the prospectus included in registration statements for ABS offerings.[7] While the disclosure required by Item 1105 depends on factors such as the type of underlying asset and materiality, the information required to be disclosed can be extensive. For example, a registrant may be required to disclose multiple performance metrics in periodic increments for prior securitized pools of the sponsor for the same asset type in the last five years.[8]

[1] 17 CFR 232.312.

[2] 17 CFR 232.10 *et seq.*

[3] 15 U.S.C. 77a *et seq.*

[4] 15 U.S.C. 78a *et seq.*

[5] *See Asset-Backed Securities,* Release No. 33–8518 (Dec. 22, 2004) [70 FR 1506] (adopting release related to Regulation AB and other new rules and forms related to asset-backed securities) (hereinafter, the "2004 Adopting Release").

[6] 17 CFR 229.1100 *et seq.*

[7] *See* Form S–1 (17 CFR 239.11) and Form S–3 (17 CFR 239.13) under the Securities Act. Static pool information indicates how groups, or static pools, of assets, such as those originated at different intervals, are performing over time. By presenting comparisons between originations at similar points in the assets' lives, the data allows the detection of patterns that may not be evident from overall portfolio numbers and thus may reveal a more informative picture of material elements of portfolio performance and risk.

[8] 17 CFR 229.1105.

As described in the 2004 Adopting Release, in response to the Commission's proposal to require material static pool information in prospectuses for ABS offerings, many commentators representing both ABS issuers and investors requested flexibility in the presentation of such information. In particular, commentators noted that the required static pool information could include a significant amount of statistical information that would be difficult to file electronically on EDGAR as it existed at that time and difficult for investors to use in that format. Commentators accordingly requested the flexibility for ABS issuers to provide static pool information on an Internet Web site rather than as part of an EDGAR filing.[9] In response to these comments, we adopted Rule 312 of Regulation S–T, which permits, but does not require, the posting of the static pool information required by Item 1105 on an Internet Web site under the conditions set forth in the rule.[10] We recognized at the time that a Web-based approach might allow for the provision of the required information in a more efficient, dynamic and useful format than was currently feasible on the EDGAR system. At the same time, we explained that we continued to believe at some point for future transactions the information should also be submitted with the Commission in some fashion, provided investors continue to receive the information in the form they have requested. Accordingly, we adopted Rule 312 as a temporary filing accommodation applicable to filings filed on or before December 31, 2009.[11] We explained that we were directing our staff to consult with the EDGAR contractor, EDGAR filing agents, issuers, investors and other market participants to consider how static pool information could be filed with the Commission in a cost-effective manner without undue burden or expense that still allows issuers to provide the information in a desirable format. We also noted, however, that it might be necessary, among other things, to extend the accommodation.[12]

On December 15, 2009, we adopted a one-year extension of the filing accommodation.[13] In the adopting release for the extension ("2009 Static Pool Extension Adopting Release"), we noted the staff's experience with the rule and that a vast majority of residential mortgage-backed security issuers and a significant portion of ABS issuers in other asset classes have relied on the accommodation provided by the rule to disclose static pool information on an Internet Web site. We also noted that the staff of the Division of Corporation Finance was, at the time, engaged in a broad review of the Commission's regulation of ABS including disclosure, offering process, and reporting of ABS issuers and that along with this review, the staff of the Division of Corporation Finance was continuing to explore whether it was feasible to provide a filing mechanism for static pool information that fulfills the Commission's objectives. We also stated our belief that a proposal for a longer-term solution for providing static pool disclosure would be better considered together with other proposals on the regulations relating to the offer and sale of ABS.

On April 7, 2010, we proposed significant revisions to Regulation AB and other rules regarding the offering process, disclosure and reporting for asset-backed securities (the "2010 ABS Proposals").[14] In that release, we proposed to revise Rule 312 to remove the temporary accommodation set to expire on December 31, 2010. In lieu thereof, under the proposal, ABS issuers would be required to file all static pool information on EDGAR; however, we proposed to allow that such information be filed in Portable Document Format (PDF).[15] Also, in lieu of providing the static pool information in the prospectus, we proposed to allow issuers to file the disclosure on Form 8–K and incorporate it by reference. The comment period for the 2010 ABS Proposals expired on August 2, 2010.

On August 30, 2010, we proposed to extend the temporary filing accommodation set forth in Rule 312 of Regulation S–T for eighteen months so that it would apply to filings with respect to ABS filed on or before June 30, 2012.[16] We received three comment letters that addressed the proposed extension.[17] All three commentators expressed support for the Rule 312 filing accommodation and the proposed extension.[18] The ASF cited the strong preference among both its issuer and investor members for Web-based presentation of static pool information due to its utility and effectiveness and the current lack of an adequate filing alternative.[19] SIFMA and CNH Capital agreed that a long-term solution for providing static pool disclosure would be better considered together with other proposals to revise the regulations governing the offer and sale of ABS.[20] With regard to the duration of an extension, ASF requested that the filing accommodation be made permanent or, in the alternative, extended for five years; [21] CNH Capital requested that the duration of the extension be synchronized with the timing of implementation of the other disclosure requirements that were proposed in the 2010 ABS Proposing Release but have not yet been adopted; [22] and SIFMA supported the Commission's proposal to extend the temporary accommodation for the filing of static pool information for eighteen months.[23]

We are adopting as proposed an eighteen-month extension to the temporary filing accommodation provided by Rule 312. As we stated in the Proposing Release, we believe a proposal for a long-term solution for providing static pool disclosure would be better considered together with other proposals to revise the regulations governing the offer and sale of ABS. Additionally, on July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act").[24] Among other things, the Act mandates a number of significant changes to the regulation of ABS offerings. In order to provide

[9] *See* 2004 Adopting Release, Section III.B.4.b.

[10] 17 CFR 232.312(a). Instead of relying on Rule 312, an issuer can include information required by Item 1105 of Regulation AB physically in the prospectus or, if permitted, through incorporation by reference from an Exchange Act report.

[11] 17 CFR 232.312(a); *see also* 2004 Adopting Release, Section III.B.4.b.

[12] 2004 Adopting Release, Section III.B.4.b.

[13] *Extension of Filing Accommodation for Static Pool Information in Filings With Respect to Asset-Backed Securities,* Release No. 33–9087 (Dec. 15, 2009) [74 FR 67812] (the "2009 Static Pool Extension Adopting Release").

[14] *Asset-Backed Securities,* Release No. 33–9117 (Apr. 7, 2010) [75 FR 23328] (the "2010 ABS Proposing Release").

[15] Portable Document Format (PDF) is a file format created by Adobe Systems in 1993 for document exchange. PDF captures formatting information from a variety of desktop publishing applications, making it possible to send formatted documents and have them appear on the recipient's monitor or printer for free as they were intended. To view a file in PDF format, you need Adobe Reader, an application distributed by Adobe Systems.

[16] *Extension of Filing Accommodation for Static Pool Information in Filings With Respect to Asset-Backed Securities,* Release No. 33–9137 (Aug. 30, 2010) [75 CFR 54059] (hereinafter, the "Proposing Release").

[17] The public comment letters we received are available online at *http://www.sec.gov/comments/s7-18-10/s71810.shtml.*

[18] *See* letters from the American Securitization Forum ("ASF"), CNH Capital America LLC ("CNH Capital"), and the Securities Industry and Financial Markets Association ("SIFMA").

[19] *See* letter from ASF.

[20] *See* letters from SIFMA and CNH Capital.

[21] *See* letter from ASF.

[22] *See* letter from CNH Capital.

[23] *See* letter from SIFMA.

[24] Public Law 111–203, 124 Stat. 1376 (July 21, 2010).

ample time for the Commission and its staff to give proper consideration to comments received on the 2010 ABS Proposals and in light of the changes to the regulations of ABS offerings that are mandated by the Act, we are adopting the extension to the temporary filing accommodation set forth in Rule 312 of Regulation S–T for an additional eighteen months so that it would apply to filings with respect to ABS filed on or before June 30, 2012. Although we are adopting an eighteen-month extension of Rule 312, we may take action on the 2010 ABS Proposals, including the static pool proposal, at any time before the expiration of the extension.

Under the extension, the temporary filing accommodation set forth in Rule 312 of Regulation S–T will apply to filings with respect to ABS filed on or before June 30, 2012. During the extension, the existing requirements of Rule 312 will continue to apply. Pursuant to these requirements, the registrant must disclose its intention to provide static pool information through a Web site in the prospectus included in the registration statement at the time of effectiveness and provide the specific Internet address where the static pool information is posted in the prospectus filed pursuant to Rule 424.[25] The registrant must maintain such information on the Web site unrestricted and free of charge for a period of not less than five years, indicate the date of any updates or changes to the information, undertake to provide any person without charge, upon request, a copy of the information as of the date of the prospectus if a subsequent update or change is made to the information and retain all versions of the information provided on the Web site for a period of not less than five years in a form that permits delivery to an investor or the Commission. In addition, the registration statement for the ABS must contain an undertaking pursuant to Item 512(l) of Regulation S–K[26] that the information provided on the Web site pursuant to Rule 312 is deemed to be part of the prospectus included in the registration statement.[27]

The Administrative Procedure Act generally requires that an agency publish an adopted rule in the **Federal Register** 30 days before it becomes effective. This requirement, however, does not apply if the agency finds good cause for making the rule effective sooner.[28] Because the temporary filing accommodation expires on December 31, 2010, we believe it is necessary to make the amendment effective December 31st so that there is no gap between which an issuer would be required to convert its static pool data into an EDGAR filing. In addition, this extension creates no new requirements but maintains a voluntary accommodation that relieves a registrant from the obligation to file static pool data on EDGAR, provided it makes the information available on a Web site. The Commission therefore believes the extension grants or recognizes an exemption or relieves a restriction. On the basis of the foregoing, the Commission finds good cause to make the amendment effective December 31, 2010.

II. Paperwork Reduction Act

Rule 312 of Regulation S–T was adopted in 2004 along with other new and amended rules and forms to address the registration, disclosure and reporting requirements for ABS under the Securities Act and the Exchange Act. In connection with this prior rulemaking, we submitted a request for approval of the "collection of information" requirements contained in the amendments and rules to the Office of Management and Budget ("OMB") in accordance with the Paperwork Reduction Act of 1995 ("PRA").[29] OMB approved these requirements.[30]

Item 1105 of Regulation AB[31] requires certain static pool information, to the extent material, to be provided in prospectuses included in registration statements for ABS offerings.[32] Rule 312 is a temporary filing accommodation that permits the posting of the static pool information required by Item 1105 on an Internet Web site under the conditions set forth in the rule.[33] The amendment to Rule 312 further extends the existing temporary filing accommodation provided by the rule for an additional eighteen months. As is the case today, issuers may choose whether or not to take advantage of the accommodation. The conditions of Rule 312 remain otherwise unchanged. The disclosure requirements themselves, which are contained in Forms S–1 and S–3 under the Securities Act and require the provision of the information set forth in Item 1105 of Regulation AB, also remain unchanged. Therefore, the amendment will not result in an increase or decrease in the costs and burdens imposed by the "collection of information" requirements previously approved by the OMB. No commentator suggested the extension would impose any new paperwork burden.

III. Benefit-Cost Analysis

In this section, we examine the benefits and costs of the amendment. In the Proposing Release, we requested that commentators provide views, supporting information and estimates on the benefits and costs that may result from the adoption of the proposed amendment. No commentator addressed the cost-benefit analysis of the Proposing Release.

A. Benefits

We initially adopted the filing accommodation provided by Rule 312 of Regulation S–T because commentators requested flexibility in the presentation of required static pool information. Given the large amount of statistical information involved, those commentators argued for a Web-based approach that would allow issuers to present the information in an efficient manner and with greater functionality and utility than might have been available if an EDGAR filing was required. We believe this greater functionality and utility has enhanced an investor's ability to access and analyze the static pool information because investors have been able to access static pool information in more user-friendly formats than was initially capable with filings on EDGAR and also removed the burden on issuers of duplicating the information in each prospectus as well as easing the burdens of updating such information.[34] As we discussed in the 2004 Adopting Release, since the information is deemed to be part of the prospectus included in the registration statement, the rule is designed to give investors access to accurate and reliable information.

By further extending the accommodation provided by Rule 312, these benefits to both issuers and investors will continue to apply. As noted in the 2009 Static Pool Extension Adopting Release, based on the staff's experience since Rule 312 became

[25] 17 CFR 230.424.

[26] 17 CFR 229.512(*l*).

[27] 17 CFR 232.312. As we indicated in the 2004 Adopting Release, if the conditions of Rule 312 are satisfied, then the information will be deemed to be part of the prospectus included in the registration statement and thus subject to all liability provisions applicable to prospectuses and registration statements, including Section 11 of the Securities Act [15 U.S.C. 77k]. 2004 Adopting Release, Section III.B.4.b.

[28] *See* 5 U.S.C. 553(d).

[29] 44 U.S.C. 3501 *et seq.*

[30] The collections of information to which Rule 312 of Regulation S–T relates are "Form S–1" (OMB Control No. 3235–0065) and "Form S–3" (OMB Control No. 3235–0073).

[31] 17 CFR 229.1105.

[32] *See* Form S–1 and Form S–3 under the Securities Act.

[33] 17 CFR 232.312(a).

[34] *See* Section I above and 2004 Adopting Release, Section V.D.

effective in 2006, the vast majority of residential mortgage-backed security issuers and a significant portion of ABS issuers in other asset classes have relied on the accommodation provided by the rule to disclose static pool information on an Internet Web site.[35] If we did not further extend the accommodation provided by Rule 312 as we are doing today, static pool information would have been required in EDGAR filings beginning on January 1, 2011. We believe this would have resulted in costs for issuers as they attempt to adjust their procedures in a short period of time in order to present the information in a format acceptable to the EDGAR system and could have resulted in costs to investors if the information filed on EDGAR was presented in a less useful format.

As indicated above, on April 7, 2010, we issued a release proposing to require the filing of static pool information on EDGAR at the same time we proposed other amendments addressing the disclosure, offering process and reporting of ABS issuers.[36] We believe that the eighteen-month extension to the temporary filing accommodation contained in Rule 312 will benefit both investors and issuers by maintaining a consistent approach to the filing of static pool information while we and our staff consider comments received on the proposed amendment to static pool filing together with our other proposals regarding the offering and sale of asset-backed securities and in light of the changes to the regulations of ABS offerings that are mandated by the Dodd-Frank Act.

B. Costs

We do not believe the eighteen-month extension of the Rule 312 accommodation will impose any new or increased costs on issuers. In the Cost-Benefit Analysis section of the 2004 Adopting Release, we noted that ABS issuers electing the Web-based accommodation provided by Rule 312 would incur costs related to the maintenance and retention of static pool information posted on a Web site and might also incur start-up costs.[37] While it is likely that certain of those costs will continue to impact ABS issuers that elect the Web-based approach during the extension period, we do not believe the amendment will impose any new or increased costs for ABS issuers because it does not change any other conditions to the accommodation or the underlying filing and disclosure obligations. As a result of the extension of the accommodation, ABS issuers will be able to continue their current practices for an additional eighteen months.

For investors, there may be costs associated with the static pool information not being electronically filed with the Commission. For example, when information is electronically filed with the Commission, investors and staff can access the information from a single, permanent, and centralized location, the EDGAR Web site.[38] We think these costs are mitigated by the fact that ABS issuers relying on the Rule 312 accommodation must ensure that the prospectus for the offering contains the Internet Web site address where the static pool information is posted, the Web site must be unrestricted and free of charge, such information must remain on the Internet Web site for five years with any changes clearly indicated and the issuer must undertake to provide the information to any person free of charge, upon request, if a subsequent update or change is made. Furthermore, because the information is deemed included in the prospectus under Rule 312, it is subject to all liability provisions applicable to prospectuses and registration statements.

Investors and issuers may have incurred costs to adjust their processes in anticipation of the lapse of the Rule 312 accommodation and potential reversion to a requirement to file static pool information on EDGAR. In this case, benefits to investors or issuers of not having to change their procedures regarding static pool reporting in a short time frame would be diminished by any costs already incurred in anticipation of the change. We believe such anticipatory action and any associated costs are minimal.

IV. Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 2(b) of the Securities Act requires us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider whether the action will promote efficiency, competition, and capital formation.

As discussed in greater detail above, Rule 312 of Regulation S–T was adopted as a temporary filing accommodation so that issuers of ABS could present static pool information on an Internet Web site. The amendment to Rule 312 of Regulation S–T that we are adopting today further extends its application for eighteen months. We are not changing the conditions of Rule 312 or to the disclosure obligations to which it applies. We do not believe that the eighteen-month extension will impose a burden on competition. We also believe the extension of the filing accommodation will continue to promote efficiency and capital formation by permitting ABS issuers to disclose static pool information in a format that is more useful to investors and cost-effective and not unduly burdensome for ABS issuers.

We requested comment on whether the proposed amendment, if adopted, would promote efficiency, competition, and capital formation. We did not receive any comments directly responding to this request.

V. Regulatory Flexibility Act Certification

In Part VII of the Proposing Release, the Commission certified pursuant to 5 U.S.C. 605(b) that the proposed amendment to Rule 312 of Regulation S–T would not have a significant economic impact on a substantial number of small entities. While the Commission encouraged written comments regarding this certification, no commentators responded to this request or indicated that the amendment as adopted would have a significant economic impact on a substantial number of small entities.

VI. Statutory Authority and Text of the Amendment

The amendment described is being adopted under the authority set forth in Sections 6, 7, 10, 19 and 28 of the Securities Act of 1933 (15 U.S.C. 77f, 77g, 77j, 77s and 77z–3).

List of Subjects in 17 CFR Part 232

Reporting and recordkeeping requirements, Securities.

Text of the Amendment

■ For the reasons set out in the preamble, the Commission hereby amends title 17, chapter II, of the Code of Federal Regulations as follows:

[35] *See* Section I of the 2009 Static Pool Extension Adopting Release.

[36] *See* 2010 ABS Proposing Release.

[37] *See* 2004 Adopting Release, Section V.D.

[38] *See, e.g.,* comment letter from EDGAROnline dated December 9, 2009, on the *Extension of Filing Accommodation for Static Pool Information in Filings With Respect to Asset-Backed Securities,* Release No. 33–9074 (Oct. 19, 2009) [74 FR 54767] (the "2009 Static Pool Extension Proposing Release"). EDGAROnline commented that extending the filing accommodation will hinder the quality and comparability of information because investors will not be able to depend on a common repository for cross issuer comparisons. The public comments on the 2009 Static Pool Extension Proposing Release are available at *http://www.sec.gov/comments/s7-23-09/s72309.shtml.*

PART 232—REGULATION S–T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

■ 1. The authority citation for part 232 continues to read, in part, as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 77z–3, 77sss(a), 78c(b), 78*l,* 78m, 78n, 78o(d), 78w(a), 78*ll,* 80a–6(c), 80a–8, 80a–29, 80a–30, 80a–37, and 7201 *et seq.;* and 18 U.S.C. 1350.

* * * * *

■ 2. Amend § 232.312 paragraph (a) introductory text by removing "December 31, 2010" and in its place adding "June 30, 2012" in the first sentence.

By the Commission.

Dated: December 16, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–32098 Filed 12–21–10; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 342

[Docket No. RM10–25–000]

Five-Year Review of Oil Pipeline Pricing Index

Issued December 16, 2010.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order establishing index for oil price change ceiling levels.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is issuing this Final Order concluding its third five-year review of the oil pricing index, established in Order No. 561. After consideration of the initial, reply and supplemental comments, the Commission has concluded that an index level of Producer Price Index for Finished Goods plus 2.65 percent (PPI–FG+2.65) should be established for the five-year period commencing July 1, 2011. At the end of this five-year period, the Commission will once again initiate review of the index to determine whether it continues to measure adequately the cost changes in the oil pipeline industry.

ADDRESSES: Secretary of the Commission, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

FOR FURTHER INFORMATION CONTACT:

Andrew Knudsen (Legal Information), Office of the General Counsel, 888 First Street, NE., Washington, DC 20426, (202) 502–6527;

Michael Lacy (Technical Information), Office of Energy Market Regulation, 888 First Street, NE., Washington, DC 20426, (202) 502–8843.

SUPPLEMENTARY INFORMATION:

Before Commissioners: Jon Wellinghoff, Chairman; Marc Spitzer, Philip D. Moeller, John R. Norris, and Cheryl A. LaFleur.

Order Establishing Index for Oil Price Change Ceiling Levels

1. On June 15, 2010, the Commission issued a Notice of Inquiry (NOI),[1] in which it proposed to continue using the Producer Price Index for Finished Goods plus 1.3 percent (PPI–FG+1.3) for the next five-year period beginning July 1, 2011. The Commission applies the index to existing oil pipeline transportation rates to establish new annual rate ceiling levels for pipeline rate changes. The NOI invited interested persons to submit comments on the continued use of PPI–FG+1.3 and to propose, justify, and fully support, any alternative indexing proposals. Comments and reply comments were due August 20, 2010, and September 20, 2010, respectively. Based upon full consideration of the comments and reply comments received, and for the reasons discussed below, the Commission finds that an index of PPI–FG plus 2.65 percent (PPI–FG+2.65) should be established for the five-year period commencing July 1, 2011.

I. Background

A. Establishment of the Indexing Methodology

2. Congress in the Energy Policy Act of 1992 (EPAct 1992) required the Commission to establish a "simplified and generally applicable" ratemaking methodology for oil pipelines[2] that was consistent with the just and reasonable standard of the Interstate Commerce Act (ICA).[3] On October 22, 1993, the Commission issued Order No. 561,[4] promulgating regulations pertaining to the Commission's jurisdiction over oil pipelines under the ICA and fulfilling the requirements of the EPAct 1992. In Order No. 561, the Commission developed an indexing methodology for the purpose of allowing oil pipelines to change rates without making cost-of-service filings. The Commission found that the indexing methodology adopted in the final rule simplified and expedited the process of changing rates. The Commission further determined that the indexing methodology would ensure compliance with the just and reasonable standard of the ICA by subjecting the chosen index to periodic monitoring and, if necessary, adjustment. After extensive analysis of proposals from interested parties, the Commission adopted an index of PPI–FG minus 1 percent (PPI–FG–1), which was supported by a methodology developed by Dr. Alfred E. Kahn (Kahn Methodology) on behalf of a group of shippers. The Commission also committed to review every five years the continued appropriateness of the index in relation to industry costs.

3. In the first five-year review, which established the index level for 2001–2006, the Commission deviated from the Kahn Methodology, and, based upon a different analysis, concluded that the index should be retained as PPI–FG–1.[5] The U.S. Court of Appeals for the District of Columbia (D.C. Circuit) reviewed and remanded the Commission's order because the Commission failed to justify a departure from the Kahn Methodology used in Order No. 561.[6] On remand, the Commission used the Kahn Methodology to set an index level of an unadjusted PPI–FG for the five-year period beginning July 2001. This order on remand was upheld by the D.C. Circuit.[7]

4. In the second five-year review, the Commission proposed to retain the rate of an unadjusted PPI–FG. However, based upon the data presented during that proceeding, the Commission adopted an index of PPI–FG+1.3, which was again calculated using the Kahn Methodology.[8]

B. The Kahn Methodology

5. The Kahn Methodology measures changes in operating and capital costs

[1] *Five-Year Review of Oil Pipeline Pricing Index,* 75 FR 34959 (June 21, 2010), FERC Stats. & Regs. ¶ 35,566 (2010) (NOI).

[2] Public Law 102–486, 106 Stat. 3010, § 1801(a) (Oct. 24, 1992). The EPAct 1992's mandate of establishing a simplified and generally applicable method of regulating oil transportation rates specifically excluded the Trans-Alaska Pipeline System (TAPS), or any pipeline delivering oil, directly or indirectly, into it. *Id.* § 1804(2)(B).

[3] 49 U.S.C. app. 1 (1988).

[4] *Revisions to Oil Pipeline Regulations Pursuant to the Energy Policy Act,* Order 561, FERC Stats. & Regs. ¶ 30,985 (1993), *order on reh'g,* Order No. 561–A, FERC Stats. & Regs. ¶ 31,000 (1994), *aff'd, Association of Oil Pipe Lines* v. *FERC,* 83 F.3d 1424 (D.C. Cir. 1996) (AOPL I).

[5] *Five-Year Review of Oil Pipeline Pricing Index,* 93 FERC ¶ 61,266 (2000) (First Five-Year Review), *aff'd in part and remanded in part sub nom. AOPL* v. *FERC,* 281 F.3d 239 (DC Cir. 2002) (AOPL II).

[6] *AOPL II,* 281 F.3d 239.

[7] *Five-Year Review of Oil Pipeline Pricing Index,* 102 FERC ¶ 61,195 (2003) (First Five-Year Review Remand Order), *aff'd sub nom. Flying J Inc.* v. *FERC,* 363 F.3d 495 (DC Cir. 2004).

[8] *Five-Year Review of Oil Pipeline Pricing Index,* 114 FERC ¶ 61,293 (2006) (Second Five-Year Review).

on a per barrel-mile basis using Form No. 6 data from the prior five-year period (for example, between 2004 and 2009 in this proceeding).[9] The Kahn Methodology does not include direct measures of the capital costs related to rate of return on investment or income taxes; as a proxy for this data, the Kahn Methodology relies upon changes over the five year period in net carrier property per barrel-mile.

6. The Kahn Methodology assigns a weight to the Form No. 6 operating expenses relative to the net plant using an "operating ratio." [10] The weighted operating expense and the weighted net plant are then added together to establish the cumulative cost change for each pipeline.[11]

7. Once these cumulative cost changes have been calculated for each pipeline with sufficient Form No. 6 data, the Kahn Methodology culls a data set consisting of pipelines with cumulative per-barrel-mile cost changes in the middle 50 percent of all pipelines. Later applications of the index also culled a data set consisting of pipelines with cumulative cost changes in the middle 80 percent of all pipelines. This trimming is done to remove statistical outliers, or spurious data points that could bias the sample in either direction.

8. For each of the two data sets (the middle 50 percent and the middle 80 percent), the Kahn Methodology considers three different measures of central tendency. One measure is the median of each data set. Another measure, the weighted mean, calculates an average barrel-mile cost change in which each pipeline's cost change is weighted by its barrel-miles. A third measure, the un-weighted average, calculates the simple average of the percentage cost change per barrel-mile for each pipeline. For each data set, a composite, is calculated by taking the simple average of the median, the weighted mean, and the un-weighted mean. Table 1 provides a description of the statistical values of central tendency used by parties to develop the index.

TABLE 1

Line	Middle 80 percent	Middle 50 percent
A	Median	Median.
B	Weighted Mean	Weighted Mean.
C	Un-weighted Mean	Un-weighted Mean.
D	Composite of 80 percent = (A+B+C)/3	Composite of 50 percent = (A+B+C)/3.

In the most recent index review, the industry-wide cost index differential was calculated by averaging the middle 50 composite and the middle 80 composite on Line D and then comparing that value to the PPI–FG index data over the same period. The index level was then set at PPI–FG plus (or minus) this differential.

9. The Kahn Methodology has evolved during the course of prior index reviews. In Order Nos. 561 and 561–A, the Commission only considered the middle 50 percent and did not consider the middle 80 percent. In the first and second five-year index reviews, the Commission considered both the middle 50 percent and the middle 80 percent. Also, in Order Nos. 561 and 561–A, as well as the first review, the Commission merely cited Kahn's Methodology to demonstrate that it produced index levels that were close, although not exactly the same as, the proposed index levels of PPI–FG–1 (in Order Nos. 561 and 561–A) and an unadjusted PPI–FG (in the first review). In the second five-year review, the Commission used the Kahn Methodology itself to set the precise index levels by averaging the middle 50 and middle 80 composites relative to PPI–FG over the prior five-year period.

II. Comments From Industry

10. Comments were filed by the American Trucking Associations, National Propane Gas Association (NPGA), Tesoro Refining and Market Company and Sinclair Oil Corporation (Sinclair/Tesoro, collectively), Air Transport Association of America (ATA), Society for the Preservation of Oil Pipeline Shippers (SPOPS), the Association of Oil Pipe Lines (AOPL), Valero Marketing and Supply (Valero), and Navajo Refining Company, L.L.C. (Navajo).

11. Reply Comments were filed by the Canadian Association of Petroleum Producers (CAPP), the Pipeline Safety Trust, Sinclair/Tesoro, Platte Pipe Line Company (Platte), ATA, Navajo, AOPL, and SPOPS.

12. On September 24, 2010, the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA) filed a Motion for Leave to File Out-of-Time and Comments and NPGA filed late Reply Comments.

13. On October 8, 2010, Valero filed Supplemental Reply Comments and on October 20, 2010, AOPL filed a Response (October 20 Response).

A. Proposals for New Index Rates

14. In comments and reply comments, several parties proposed departures from existing index levels. AOPL proposes an index of PPI–FG plus 3.64 percent (PPI–FG+3.64) as the oil pipeline pricing index for the five-year period beginning July 1, 2011. AOPL states that its witness, Dr. Ramsey Shehadeh, applied the Kahn Methodology to a data set including an initial sample of 110 pipelines,[12] calculating the following data regarding pipeline cost changes for the 2004–2009 period:

TABLE 2 [13]

Line	Middle 80 percent	Middle 50 percent
Median	4.26	4.26
Weighted Mean	9.91	7.07
Un-weighted Mean	8.81	5.74
Composite	7.66	5.69

[9] Specifically, this data is drawn from the Form No. 6: Carrier Property, page 110; Accrued Depreciation, page 111; Operating Revenues and Operating Expenses, page 114; Crude and Products Barrel-Miles, page 600. To the extent this information is incomplete, alternate data reported in the Form No. 6 has been substituted.

[10] The "operating ratio" = ((Operating Expense at Year 1/Operating Revenue at Year 1) + (Operating Expense at Year 5/Operating Revenue at Year 5))/2. If the operating ratio is greater than one, then it is assigned the value of 1 under the Kahn Methodology.

[11] Cumulative Cost Change = (1-operating ratio) * net plant + operating ratio * operating expenses.

[12] AOPL states that Dr. Shehadeh began his analysis using cost data reported by the oil pipelines in the Form No. 6 for the years 2004 through 2009. According to AOPL, Dr. Shehadeh then removed from this data set any pipelines that did not report data for any year in that period, as well as the Trans Alaska Pipeline System carriers and any pipelines that had FERC Form No. 6 reporting errors or incomplete FERC Form No. 6 data.

15. AOPL calculated an average annual pipeline cost growth rate of 6.68 percent based upon the middle 50 composite growth rate and the middle 80 composite growth rate. AOPL notes that the PPI–FG geometric mean rate of growth for the years 2004 through 2009 is 3.04 percent. AOPL concludes actual oil pipeline cost increases during the years 2004 through 2009 exceeded PPI–FG at a rate of 3.64 percent (6.68 minus 3.04). Thus, Dr. Shehadeh proposes an index rate for the five-year period beginning July 1, 2011, of PPI–FG+3.64.

16. In contrast, Valero and its expert, Mr. Matthew O'Loughlin, contend that an index equal to an unadjusted PPI–FG more accurately reflects pipelines' actual cost changes. Valero states that Mr. O'Loughlin applies a modified version of the Kahn Methodology. First, Mr. O'Loughlin proposes to exclude pipelines that experienced large rate base changes from the data set used to calculate index levels. Second, to determine cost changes between 2004 and 2009, Mr. O'Loughlin measures the cost change per barrel-mile between 2004 and 2009 using the "Total Cost of Service" and barrel-miles reported on page 700. Unlike the other Form No. 6 data used in the Kahn Methodology, the page 700 data includes an interstate total cost of service calculated under the Opinion No. 154–B Methodology used to determine oil pipeline rates. Following these procedures, Mr. O'Loughlin derives the following data:

TABLE 3 [14]

Line	Middle 80 percent	Middle 50 percent
Median	2.6	2.6
Weighted Mean	4.9	3.3
Unweighted Mean	3.9	2.9
Composite	3.8	2.9

17. Mr. O'Loughlin notes that the middle 50 composite of 2.9 percent is very close to the PPI–FG of 3.0 percent over the last five years and supports an index of an unadjusted PPI–FG. In Mr. O'Loughlin's view, the middle 50 is the most appropriate for determining index levels, and should be used instead of the composite of the middle 50 and the middle 80.

18. Other parties endorsed either the views expressed by AOPL or Valero. Platte states that it is a member of AOPL and filed to provide further support for AOPL's request of an index of PPI–FG+3.64. On the other hand, NPGA states that it supports the arguments and recommendations espoused by Mr. O'Loughlin on behalf of Valero, including the use of a PPI–FG without any adjustment. Navajo states that it prefers Valero's proposal to establish an index level of PPI–FG.

19. Other parties also proposed differing index levels. In reply comments, CAPP and its expert Mark Pinney state that if AOPL's analysis is reproduced using constant 2004 barrel-miles instead of the recession-influenced 2009 data, the annual cost increase between 2004 and 2009 is PPI–FG plus 1.62 percent (PPI–FG+1.62), which CAPP observes is much closer to the current PPI–FG+1.3 than the index level proposed by AOPL. SPOPS asserts that the index should be set at zero until all pipeline over-recoveries are at just and reasonable levels and Navajo proposes to deny index increases to pipelines that are currently over-recovering. Navajo also proposes to base the index upon changes in operating and maintenance costs and to allow indexed increases only to the proportion of the pipeline's rate that can be attributed to such operating and maintenance costs.

20. Other parties, as discussed below, without proposing particular index levels, urge the Commission to reassess the index methodology to avoid over-recoveries. Some parties also raised procedural concerns and argued for various changes to the Commission's Form No. 6 reporting requirements.

III. Discussion

21. The Commission adopts an index level of PPI–FG+2.65. The Commission rejects the procedural challenges to the validity of the NOI and to consideration of any modifications to the Kahn Methodology. The Commission's proposed index level of PPI–FG+2.65 is supported by the Kahn Methodology as applied by AOPL, except that the Commission adopts Valero's proposal to calculate the index using only the middle 50 percent and not the middle 80 percent of the data set.

A. Procedural Arguments

1. The Validity of the Notice of Inquiry

a. Comments

22. The American Trucking Association and Sinclair/Tesoro challenge the validity of the NOI. These parties state that the NOI contains no justification for the index of PPI–FG+1.3 specified in the NOI. Sinclair/Tesoro emphasizes that an agency must reveal an adequate explanation of the basis for its proposal and that the rulemaking is procedurally defective and should be withdrawn. Sinclair/Tesoro avers that the Commission provided no data analysis or support showing that it has evaluated the reasonableness of PPI–FG+1.3 as the appropriate index for determining rate ceilings.

23. AOPL asserts that these criticisms of the NOI are baseless. AOPL posits that the Commission's methodology for calculating its index is well-known to industry participants and that there exists an "opportunity for interested parties to participate in a meaningful way in the discussion and final formulation of rules." [15] AOPL further emphasizes that Dr. Shehadeh has provided data supporting his result pursuant to the established methodology and states the Commission can rely upon these calculations and data.

b. Commission Determination

24. The Commission rejects the assertion that the NOI is procedurally defective. The Commission inaugurated its five-year review of the indexation methodology proposing to continue the existing indexing level of PPI–FG+1.3 while inviting interested parties "to propose, justify, and fully support, any alternative indexing proposals." [16] By soliciting comments on the current index level, the Commission follows the same procedure that it used in the previous five-year review proceeding for allowing parties to present evidence that the index level should be modified.[17]

25. Moreover, the Commission subsequently received extensive on-the-record comments and workpapers from AOPL, Valero, and other parties. The analysis contained within these findings is based upon Form No. 6 data, which is publically available on the Commission Web site and was utilized extensively by both AOPL and Valero. Furthermore, although the Commission's mechanisms for assessing revisions to the index may evolve over time, the parties are familiar with the types of data that have been considered by the Commission in the past, including the variants of the Kahn

[13] Shehadeh August 20 Decl. at Exhibit A5.

[14] O'Loughlin August 20 Aff. ¶ 6. Mr. O'Loughlin explains that he only reports data to the nearest tenth because, in his view, more precision is not useful given the wide ranging distribution of annual percentage cost changes experienced by the pipelines in the measurement group. O'Loughlin September 20 Aff. ¶ 5 n.3.

[15] AOPL Reply Comment at 38 (quoting *Connecticut Light and Power Co.* v. *Nuclear Regulatory Commission,* 673 F.2d 525, 528 (DC Cir.)).

[16] NOI, FERC Stats. & Regs. ¶ 35,566 at P 4.

[17] The current indexing level of PPI–FG+1.3 was developed in the Commission's prior five-year review proceeding. Second Five-Year Review, 114 FERC ¶ 61,293. This proceeding involved extensive record evidence and comments from shippers, and the record from that proceeding remains available on the Commission Web site.

Methodology. The Commission has considered comments, reply comments, supplemental reply comments, and an even later response, giving each party more than adequate opportunity to respond. Both the data used in this proceeding and any potential changes from the methodology used in the past index review have been subject to ample opportunity for examination and comment. It is clear that the technical support for the index level adopted in this proceeding has been provided to the parties with adequate opportunity for analysis and comment.

2. Scope of This Proceeding

a. Comments

26. In reply comments, AOPL argues that the Commission must adhere to the methodology applied in prior proceedings, and AOPL contends that the changes proposed by Valero and its expert Mr. O'Loughlin (using page 700 data, excluding pipelines with large rate base changes, and using only the middle 50 percent) are beyond the scope of the five-year review initiated by the NOI.

27. AOPL contends that in the prior five year review, the Commission limited the purpose of the review to adjustments to the index, not whether the index should be changed. AOPL adds that because the existing methodology was promulgated as part of a Commission rulemaking, replacing that methodology requires a new rulemaking. AOPL asserts that in the NOI, the Commission requested comments on the appropriate index level, but gave no indication it was changing its methodology. Moreover, AOPL adds that to the extent the Commission departs from its prior methodology, the Commission must establish that the methodology is justified. In contrast to Mr. O'Loughlin's proposal, AOPL states that Dr. Shehadeh derived the index of PPI–FG +3.64 with the same methodology used by Dr. Kahn and adopted by the Commission in prior proceedings and accepted by the D.C. Circuit.

28. In supplemental reply, citing *FCC* v. *Fox Television Stations, Inc.,*[18] Valero states that the Commission only needs to establish that the new policy is permissible under the statute, that there are good reasons for the new policy, and that the agency believes it to be a better policy. Valero emphasizes that the most reasonable course of action available to an agency is not always to maintain its current policy unchanged.

29. Valero also dismisses AOPL's argument that a new rulemaking process is required to adopt Mr. O'Loughlin's proposals. Valero reiterates that it is not proposing a change to this legislative rule embodied in the regulations, but only a change in data inputs to that methodology. Valero also contends that all parties, including AOPL, are on notice of the alternative proposals before the Commission.

30. Additionally, Valero disagrees with AOPL's contention that the NOI does not contemplate an analysis such as the O'Loughlin approach. Valero states that the Commission invited parties to submit comments proposing, among other things, alternative indexing proposals. Valero argues that AOPL mistakes Mr. O'Loughlin's improvements to data sources as a change in the methodology itself. Rather, Valero contends Mr. O'Loughlin's approach constitutes a better approach to utilizing the same methodology.

31. Similarly, on reply, Navajo avers that FERC adopted the Kahn Methodology only upon the express caveat that its initial conclusions were not necessarily "a choice for all time" and that the ICA required monitoring of the index. Navajo adds that an agency may depart from past policy or precedent so long as the Commission acknowledges the change and supports its new decision with reasoned decision-making and substantial evidence. SPOPS also emphasizes that the Commission has the flexibility to modify its indexing methodology.

32. In its response, AOPL reiterates that Mr. O'Loughlin's methodology is a fundamental departure from the established methodology and would require a new rulemaking initiated by a Notice of Proposed Rulemaking. AOPL states that Fox Television also made clear that an agency must still provide a reasoned explanation for its decisions and that a more detailed justification is required when the prior policy engendered serious reliance interest. Valero, according to AOPL, downplays this reliance inappropriately. AOPL states that the reliance interest was not a reliance on any precise pricing index, but rather that the pipelines have a continued expectation that the Commission will apply the established methodology in calculating the index.

b. Commission Determination

33. The Commission rejects AOPL's assertion that modifications to the methodology for evaluating changing pipeline costs are beyond the scope of this proceeding. The NOI invited "interested persons to submit comments on the continued use of PPI+1.3 and to propose, justify, and fully support, any alternative indexing proposals." [19] Thus, by inviting parties to submit "to propose, justify, and fully support any alternative indexing proposals," the Commission provided notice to AOPL and others that the Commission would consider different methodologies for calculating the Index, such as the proposals advanced by Valero, among others.[20] Although the DC Circuit rejected in 2003 proposed changes to the Kahn Methodology for assessing changing pipeline costs, the Court rejected this proposal because the Commission had neither addressed concerns regarding the new methodology nor justified its methodological shift.[21] The Court did not hold that the Commission cannot make justified modifications to the Kahn Methodology. As the Commission did in prior five-year reviews of the indexing level, the Commission will give consideration to alternative methodologies for calculating the index.[22]

B. Proposed Changes to the Kahn Methodology

1. Rate Base Screening Methodology

a. Valero Initial and Reply Comments

34. To develop the data set for the Index, Valero urges the Commission to apply a "rate base screening" methodology that excludes pipelines experiencing both: (a) A rate base increase (through expansion) or decrease (through divestiture) greater

[18] 129 S.Ct. 1800 (2009).

[19] NOI, FERC Stats. & Regs. ¶ 35,566 at P 4.

[20] AOPL has been given an opportunity to respond to these proposals, and AOPL has filed reply comments and an October 20 Response that vigorously critique the proposed alterations to the Kahn Methodology.

[21] *AOPL II,* 281 F.3d at 248.

[22] AOPL argues that in the last indexing review, the Commission stated that the purpose of the five-year review was to determine "what extent the PPI–FG should be adjusted to better reflect those cost changes, *not whether the method for determining* pipeline costs should be changed." Second Five-Year Review, 114 FERC ¶ 61,293 at P 46 (emphasis added). However, in that passage, the Commission was referring to a proposal by the shipper parties for an entirely new rulemaking to re-assess the means for tracking pipeline costs justified, in part, by criticism of the data in Form No. 6. *Id. See also* ATA, Lion Oil Company, National Cooperative Refinery Association, Sinclair/Tesoro, Response, Docket No. RM05–22, at 13–14 (filed January 23, 2006). However, elsewhere in Second Five-Year Review, when parties did not propose a new rulemaking and instead proposed changes using the existing information reported to the Commission, as Mr. O'Loughlin has done here, the Commission evaluated those changes and did not find them to be beyond the scope of the five-year review process. Second Five-Year Review, 114 FERC ¶ 61,293 at P 30–36 (rejecting proposal to use "the arithmetic average of the geometric mean of each pipeline's cumulative unit cost change, as opposed to Dr. Kahn's method of calculating the geometric mean of the arithmetic average of cumulative unit cost change.").

than 50 percent during the 2004–2009 period and (b) recovery of cost changes during the 2004–2009 period through some means other than incremental rate increases via the index, such as a cost-of-service filing or a settlement agreement.[23] For pipelines with rate base changes greater than 50 percent, Valero also excluded (a) any pipeline with a major divestiture or (b) any pipeline that acquired another pipeline where the pipeline divesting the assets continued to exist after the divestiture. In conducting the assessment of pipelines with major rate base changes, Mr. O'Loughlin also excluded pipelines with what he concluded were unreliable data.

35. Valero justifies the rate base screening methodology because, citing Order Nos. 561 and 561–A, Valero avers that the index is intended for normal, not extraordinary, changes. Valero contends that large rate base changes are "extraordinary" and that cost changes of this nature are typically recovered by a cost-of-service filing or settlement, not incremental rate changes pursuant to the index.

36. Thus, if the index level reflects cost data from the pipelines experiencing rate base changes, Valero argues that pipelines receiving annual index increases that did not construct major expansions would obtain a windfall due to an index inflated for cost changes not experienced by normal pipelines. Furthermore, Valero argues that pipelines that constructed major expansions would receive double compensation, first, through a cost-of-service or other rate changing methodology related to the expansion and, second, through an inflated index. Furthermore, regarding divestitures and acquisitions, Valero and its witness O'Loughlin also aver that comparisons between the period before the divestitures or acquisitions and after those transactions are meaningless because the systems being compared are different.

37. Valero argues that measures taken by the Commission in prior proceedings do not fully correct the biases caused by the inclusion of these pipelines. For example, Valero asserts the usage of the middle 80 percent or middle 50 percent of the sample data set in the prior rate proceedings does not adequately mitigate the effect of the inclusion of the pipelines with major rate base changes.

38. Valero states that otherwise applying Dr. Shehadeh's methodology, while using Valero's rate base screening methodology reduces his recommended index from PPI–FG+3.64 to PPI–FG+2.6. Valero also states that excluding the pipelines with large rate base expansions would not frustrate expectations because these pipelines do not typically use indexing to recover increased costs, and the index has never previously been set at PPI–FG+3.64 and there could have been no expectation that this index level would be approved.

b. AOPL Reply Comments

39. AOPL states that if a pipeline experiencing a rate base change is truly a statistical outlier, it will be excluded by using the middle 50 and middle 80 data sets as applied in the Kahn Methodology. AOPL states that Mr. O'Loughlin's "rate screening methodology" is a highly subjective, results-driven attempt to eliminate pipelines with higher cost changes. This, AOPL argues, biases the data set downward before any application of statistical measures. AOPL emphasizes that an appropriate statistical method for excluding outliers must be systematic and objective.

40. AOPL contends Mr. O'Loughlin's "double-recovery" argument lacks consistency with the structure of the index methodology. According to AOPL, under the Commission's regulations, if a pipeline files a cost-of-service rate increase, those rates form the ceiling for that year, but in the next index year, the pipeline must apply the applicable index, whether it is higher or lower. AOPL asserts that, rather than reflecting "double recovery," this merely follows the appropriate operation of the index under the Commission's regulations, which permit annual changes in rate ceilings due to actual industry-wide cost changes as compared to PPI–FG. AOPL further argues that Mr. O'Loughlin's double-recovery argument would also discourage pipeline expansions and improvements by excluding pipelines that would undertake significant expansion projects or that incur significant expenses in compliance with safety regulations.

41. AOPL also contends that the inclusion of pipelines with large rate base changes in the data set does not create a windfall because, under the indexing methodology, pipeline costs are merely increasing to reflect increased costs across the industry. AOPL's witness Dr. Shehadeh states that whether a pipeline "used a rate mechanism other than indexation is irrelevant to the value of the information that these pipelines can provide as evidence for indexing pipeline costs."[24]

42. AOPL further claims that in Order No. 561, the Commission established the Index level at PPI–FG–1 to account for a wave of asset retirements that resulted in significant rate base changes. AOPL states that it would now be inconsistent to exclude rate base changes when those changes relate to pipeline expansions. AOPL states that the disqualification from the data set pipelines that undertake significant expansion will discourage pipeline expansions and improvements.

c. Other Shipper Reply Comments

43. In reply comments, NPGA, ATA and Navajo expressed support for Valero's rate base screening methodology.

d. Valero Supplemental Reply Brief

44. Responding to AOPL, Valero disputes the assertion that the rate base screening methodology understates cost changes experienced by a typical pipeline operator. Valero states that Mr. O'Loughlin's analysis applied an objective filter which removed pipelines experiencing cost increases and cost decreases of more than 50 percent. Valero notes that pipelines that underwent expansions and major capital investments often sought to recover those costs by means other than the price index; to Valero, this suggests that the cost increases were extraordinary.

45. In response to AOPL's and Dr. Shehadeh's argument that volume increases offset the cost increases, Valero states that it would not have been necessary or cost-justified to adopt increased cost-based rates if increased volumes fully offset any new costs. Valero adds that if volumes had increased commensurately with costs on these pipelines, then the pipelines with large rate base changes would not be at the high end of the measurement group in terms of cost-of-service per barrel-mile changes.

46. Valero also avers that Dr. Shehadeh's claim that the rate base screening methodology would have increased the index adjustment factor established in Order No. 561 contradicts his claim that Mr. O'Loughlin's methodology biases results downward and leads to an inappropriately low index.

[23] Using the rate base screening methodology, Mr. O'Loughlin excluded 25 pipelines that he states experienced major rate base changes during the 2004–2009 period. O'Loughlin August 20 Aff. ¶ 10. Twelve pipelines with rate base changes of more than 50 percent remained in the data set because, according to Mr. O'Loughlin, they did not appear to have requested alternative ratemaking treatment and no major acquisition or divestiture was identified. O'Loughlin October 8 Aff. ¶ 15.

[24] Shehadeh September 20 Decl. at 11.

e. AOPL October 20, 2010 Response

47. AOPL states that once an initial rate is set for a pipeline expansion, indexing becomes the primary method for changing oil pipeline rates. According to AOPL, there is no reason to exclude pipelines filing a cost-of-service or settlement rate when examining industry-wide cost changes and that the presence of ratemaking alternatives do not justify setting the index below overall industry levels. AOPL avers that if pipelines undertaking significant infrastructure investment are excluded from the measurement of cost changes, the index will be inappropriately low, causing more pipelines to use other ratemaking methods and undermining the purpose of the index.

f. Commission Determination

48. The Commission will not adopt Valero's proposal to exclude pipelines experiencing major rate base changes from the data set. To determine which pipelines should be trimmed from the data sample, the Commission has relied upon the level of the cost changes, not the reasons why a particular pipeline's changing costs might be anomalous. Thus, in assessing Form No. 6 data in prior index proceedings, the Commission has trimmed the data sets to remove outliers, such as the 25 percent of pipelines with the greatest cost increases per barrel-mile and the 25 percent with the greatest decreases. As discussed below, the Commission in this proceeding will trim the data set to pipelines in the middle 50 percent of cost changes. To the extent that a particular pipeline's cost change is an anomalous outlier compared to the changes on other pipelines, using the middle 50 percent of cost changes, should remove any distorting impact resulting from the pipeline's presence in the index.[25]

49. In contrast to this simplified methodology, the rate base screening methodology proposed by Valero selectively emphasizes one factor that may cause a substantial change in pipeline costs per barrel-mile while ignoring other factors. There is no doubt that substantial changes in rate base can alter the per barrel-mile costs of a particular pipeline. However, costs per barrel-mile can also be altered by shifting customer demand, increased competition, economic changes, or changing product supplies. As Valero's expert Mr. O'Loughlin notes, there is a wide range in the changes in pipeline per barrel-mile costs,[26] and much of this variability [27] is unrelated to the significant rate base changes cited for exclusion by Mr. O'Loughlin. By selectively modifying the data set based upon one potential cause for cost changes, Mr. O'Loughlin risks distorting the index calculation.

50. Moreover, the index is pursuant to a Congressional mandate to develop a "simplified and generally applicable ratemaking methodology* * *." [28] Consistent with this mandate of general applicability, the Commission is reluctant to inquire into the particular circumstances of every pipeline and selectively remove pipelines that experienced cost changes due to one particular factor from the data set used to calculate the index.[29]

51. Furthermore, large rate base changes can reflect changing pipeline costs. The cost of new investment associated with rate base increases reflects industry cost experience related to pipeline infrastructure on a barrel-mile basis. These rate base changes also provide important information regarding industry capital requirements. A rate base change, like any other change in the business circumstances of a pipeline, is only an outlier if a pipeline's per barrel costs change in a manner disproportionate to those changes experienced by other pipelines.

52. Moreover, the index serves as a means of recovery for some pipelines with significant rate base changes. According to data provided by Mr. O'Loughlin, several of the pipelines that Mr. O'Loughlin identified as experiencing significant rate base changes relied upon indexed rates (or at least did not seek some other form of recovery, such as a cost-of-service filing).[30] The fact that a non-trivial number of pipelines experiencing rate base changes continued to use the indexing methodology reinforces the inclusion of pipelines with rate base changes in the data set.

53. Additionally, merely because a pipeline seeks recovery of rates outside the indexing methodology, for example through a cost-of-service, does not establish that the pipeline should be excluded from the data set used to develop the index. The changing costs that compelled the pipeline to seek recovery outside the indexing methodology nonetheless reflect industry cost experience. Moreover, for those pipelines with significant rate base increases, Mr. O'Loughlin's decision to include only those pipelines where the pipeline opted to continue to use the index could skew the index downward; this is because the pipelines continuing to use the index are more likely to be the pipelines where the rate base change decreased per-barrel mile costs.

54. Valero repeatedly cites language in Order Nos. 561 and 561–A that the index accounts only for "normal," not "extraordinary" changes.[31] However, this language does not support Valero's proposal to exclude pipelines experiencing major rate changes from the data set used to determine the index level. In these passages, "extraordinary" referred to pipelines experiencing changed per barrel-mile costs that were greater than the changing costs experienced by other pipelines regardless of the causes underlying any particular pipeline's cost changes. Thus, even though a rate base change of 50 percent is a significant occurrence, it is only "extraordinary" as Order Nos. 561 and 561–A used that term to the extent that it causes an anomalous change in costs per barrel-mile.

55. Valero's contention that including pipelines with rate base changes in the data set used to determine index will lead to double-recovery is without merit. After making a cost-of-service filing, the cost-of-service rate becomes the ceiling rate for that year [32] and pipelines are authorized to increase their rates pursuant to the index in

[25] To the extent that large rate base changes are associated with disproportionately large cost shifts, AOPL's expert Dr. Shehadeh explains that 18 of the 25 pipelines removed by Mr. O'Loughlin due to rate base changes were excluded when the data set was reduced to the middle 50 percent using Dr. Shehadeh's methodology. Shehadeh September 20 Decl. at 12.

[26] O'Loughlin August 20 Aff. ¶¶ 44–45, Figure 14.

[27] For example, Mr. O'Loughlin explains that, using his own methodology, of the 97 pipelines in his data set, which has been culled pursuant to the rate base screening methodology, there "are 20 pipelines that experienced average cost increases greater than 10% per year and 10 pipelines that experienced average cost decreases of more than 10% per year over the five-year period." O'Loughlin August 20 Aff. ¶ 45.

[28] Energy Policy Act of 1992 Public Law 102–486 Sec. 1801(a), 106 Stat. 3010 (Oct. 24, 1992).

[29] The D.C. Circuit has previously recognized the importance of an index that is relatively simple to derive. *AOPL II,* 281 F.3d at 247 (quoting EPAct 1992, at § 1801(a)). The complexity of Mr. O'Loughlin's rate base screening methodology is demonstrated by Appendix F of his September 20 Affidavit, in which Mr. O'Loughlin examines the circumstances of 37 pipelines that experienced rate base changes greater than 50 percent. To apply the rate base screening methodology, for each pipeline with a change in rate base exceeding 50 percent, Mr. O'Loughlin examined tariff filings, assessed acquisition and divestiture activity, probed into the reliability of the pipeline's reported data, researched whether the pipeline had sought rate increases pursuant to the index, and generally sought to determine why the rate base changes occurred.

[30] O'Loughlin September 20 Aff. ¶ 54 n.75, Appendix F at 8–10.

[31] Valero Supplemental Reply Comment at 14–15 (citing Order No. 561–A, FERC Stats. & Regs. ¶ 31,000 at 31,097).

[32] 18 CFR 342.3(d)(5).

subsequent years.[33] Valero's argument ultimately rests upon the contention that the index is inflated by the inclusion of pipelines experiencing rate base changes. However, as noted previously, such inflation of the index only occurs if the rate base changes lead to changes in per barrel-mile costs that are anomalous. To the extent that the rate base change leads to an anomalous cost increase or decrease, it will be excluded by the data set trimming as discussed below.

2. Data Trimming and the Middle 50

a. Valero Initial and Reply Comments

56. Valero urges the Commission to calculate the index using a data sample trimmed to the middle 50 percent, i.e. removing the 25 percent of pipelines with the greatest cost increases and the 25 percent of pipelines with the greatest cost decreases. Although Valero acknowledges that recent index proceedings have considered both the middle 50 and middle 80 percent, Valero contends that trimming the data set to the middle 80 percent inadequately accounts for outliers due to the widely varying average annual cost changes. Valero adds that the middle 80 includes pipelines with anomalous characteristics, such as very high costs per barrel-mile or the absence of rate base.

b. AOPL Reply Comments

57. AOPL opposes trimming the sample data set to the middle 50 percent of pipelines. Dr. Shehadeh responds to Mr. O'Loughlin's proposal by stating that the wide distribution of pipeline cost changes (as opposed to a normalized bell curve) does not support ignoring the middle 80 percent in favor of the middle 50 percent. Rather, Dr. Shehadeh claims that the wide distribution supports the use of the middle 80 percent, rather than the middle 50 percent because it would be more inclusive and represent a larger number of pipelines.

c. Valero Supplemental Reply Comments

58. Valero contends, contrary to AOPL's assertions, that Mr. O'Loughlin's use of the middle 50 percent data set is justified and consistent with Commission policy. Valero asserts that the Commission's methodology has varied over the years, and in Order Nos. 561 and 561–A, the Commission used an analysis of only the middle 50 percent of the data set, not a composite of the middle 50 percent and middle 80 percent of the data set. Valero's Mr. O'Loughlin emphasizes that the middle 50 percent better serves the goal of excluding extraordinary data points. Mr. O'Loughlin also identifies an additional three pipelines in the middle 80 percent that he states have unusual characteristics, such as a cost of capital under two percent or, in another case, no rate base yet a positive depreciation expense.

d. AOPL's October 20, 2010 Response

59. In its response, AOPL reiterates its position that both the middle 50 percent and middle 80 percent should be used. AOPL reiterates its contention that the wide distribution of pipeline cost changes does not support assigning no weight to the middle 80 percent. AOPL also challenges the three pipelines Mr. O'Loughlin identified as anomalous, noting that one was excluded from Dr. Shehadeh's data set and that the others showed overall cost changes that were not all that different from other pipelines. AOPL states that as the Form No. 6 data has improved, there is no merit to limiting the data set.

e. Commission Determination

60. The Commission will use the middle 50 percent of the data set to determine the appropriate index level. This use of the middle 50 percent is consistent with the Commission's approach when it adopted the indexing methodology. In Order Nos. 561 and 561–A, the initial rulemaking establishing the indexing methodology, the Commission used only the middle 50 percent of the data set to determine the appropriate indexation level. In that proceeding, neither the Commission nor Dr. Kahn considered the middle 80 percent. In the second review, Dr. Kahn introduced the middle 80 percent to his analysis.[34] Given that the two data sets supported the same resulting index-level of an unadjusted PPI–FG, using both (as opposed to just the middle 50) was not discussed or contested, as there was little substantive impact from this departure from the Order No. 561 methodology.[35] In the second and most recent 5-year review, the composite usage of the middle 50 and the middle 80 reoccurred, but again the relative merits of the middle 50 and middle 80, and the departure from the prior Order No. 561 methodology were not weighed or discussed.

61. Given the more fully developed record presented here, the Commission returns to its approach in Order Nos. 561 and 561–A to use the middle 50 percent as the most appropriate method for trimming the data sample. The purpose of the index is to permit a simplified recovery for normal cost changes, not to enable recovery for extraordinary cost increases or decreases.[36] The middle 50 percent more appropriately adjusts the index levels for "normal" cost changes as opposed to the middle 80 percent, which, by definition, includes pipelines relatively far removed from the median. Furthermore, some of these more dramatic cost changes may be due to circumstances on a particular pipeline that are not broadly shared across the industry. Even when accurate data is reported, pipelines in the middle 80, as opposed to the middle 50, are more likely to have cost changes resulting from factors particular to that pipeline, such as a rate base expansion, plant retirement, or localized changes in supply and demand. Using the middle 50 ensures that pipelines with relatively large cost increases or decreases do not distort the index.

62. The Commission further observes that our adoption of the middle 50 provides a better remedy for some of the concerns Mr. O'Loughlin used to justify his rate base screening methodology. Of the 25 pipelines Mr. O'Loughlin seeks to exclude via the rate base screening methodology, 18 are excluded by using the middle 50 percent in the Kahn Methodology as applied by Dr. Shehadeh.[37] More generally, the adoption of the middle 50 is a less subjective and more simplified method (consistent with the EPAct 1992) of removing potentially anomalous data than selective removal of certain pipelines with particular characteristics from the data sample. The middle 50 also is preferable to such selective screening methods because it avoids the risk that the index is skewed because certain cost changes (such as rate base changes) are selectively excluded while

[33] However, further undermining Valero's double-recovery argument, the Commission has denied an increase pursuant to the index when the cost-of-service filing supporting the existing rate already incorporated the cost changes covered by the index. *See SFPP, L.P.,* 117 FERC ¶ 61,271 (2006) (denying an index increase because the cost-of-service rate, which used a 2005 base period, already reflected the 2005 cost changes covered by the index).

[34] Kahn Decl. at 13 (August 31, 2000) (Docket No. RM00–11–000).

[35] The composite of the middle 50 and middle 80 were very similar in that proceeding at 1.32 percent and 1.2 percent, respectively. *Id.*

[36] Order No. 561–A, FERC Stats. & Regs. ¶ 31,000 at 31,097 (noting that the purpose of the Index is to ensure recovery of "normal" cost changes, not "extraordinary" cost changes).

[37] Shehadeh September 20 Decl. at 12. Only 13 of the 25 are excluded in the middle 80 percent. *Id.* The number of excluded pipelines include four companies that Dr. Shehadeh removed due to missing data. Shehadeh September 20 Decl. at 12 n.15.

other significant changes (changes in local supply and demand) are incorporated.

63. The Commission accordingly concludes that the middle 50 provides a robust data sample for determining changing barrel-mile costs. The middle 50 percent of pipelines represents 76 percent of total barrel-miles in 2004 subject to the index,[38] and thus for this index calculation, the Commission finds it unnecessary to include the middle 80 percent to obtain a representative sample of the data. Finally, the use of the middle 50 minimizes the risk of including pipelines that experienced either large increases or decreases in cost (or errant data) that may be included in an 80 percent sample, while still capturing changes from a broad spectrum of the pipeline industry.

3. Page 700 Data

a. Valero's Initial and Reply Comments

64. Valero and Mr. O'Loughlin aver that the Commission should adopt page 700, which uses the Opinion No. 154–B methodology to derive a total cost-of-service for interstate pipeline companies. Valero states there are several advantages to using the page 700 data as opposed to the other Form No. 6 data relied upon by the Commission in the past.

65. Valero asserts that by relying upon page 700 data, the Commission can avoid using net carrier property as a proxy for actual changes in allowed return and income tax. Valero notes that the Commission has previously questioned the effectives of net carrier property as a proxy for changes in capital costs. Valero further states that Mr. O'Loughlin's analysis shows that the change in net plant is typically greater than the change in allowed return and income tax. Additionally, Valero argues that net plant data reported on Form No. 6 can also include purchase accounting adjustments (PAAs), which the Commission does not allow for ratemaking purposes absent a showing of substantial benefits to ratepayers.

66. Valero also contends that the "operating ratio" weighting methodology as applied by Dr. Shehadeh leads to a distorted analysis. The operating ratio is set between zero and one based upon the ratio of operating expenses to revenues. If operating expenses exceed revenues, then the operating ratio is set to one, meaning that no weight is assigned to capital costs (net plant under the prior methodology) in the formula. Thus, Valero contends that for fifteen pipelines in Dr. Shehadeh's data set, the weight for the index of changes in net plant is zero percent, making the index of changes in net plant irrelevant. Valero contends that its proposed methodology using data from page 700 obviates the need for the operating ratio because the total cost of service on page 700 incorporates both operating and capital costs.

67. Valero explains that operating expense, net carrier property, and barrel-mile data, which are reported on pages 110–111, 300–303, and 600–601 of the Form No. 6, include intrastate, as well as interstate, pipeline information. The solution, Valero contends, is to use the data on page 700 of the Form No. 6, which includes only interstate information.

b. Other Shipper Comments

68. In their comments, other parties addressed Valero's proposal to use page 700. ATA emphasized that any analysis of costs should be based on the interstate costs reported on page 700. ATA emphasizes that page 700 contains the information available to shippers to provide a screening tool to determine whether a "pipeline's cost of service or per-barrel/mile costs" are so divergent from revenues as to warrant a challenge to the rates. ATA stresses that it is appropriate to use the same data to develop the index as is used to determine whether a pipeline is recovering its costs.

69. NPGA likewise submits that any proper analysis of operating costs should be based on interstate operations and costs and not on costs that reflect intrastate operations. Thus, NPGA urges the use of page 700 data.

70. In reply comments, SPOPS urges that to the extent the Commission continues to apply its methodology, the Commission should use the primary source for the jurisdictional costs of service for the pipelines, the page 700 and the underlying workpapers, not the secondary source methodology demanded by AOPL.

c. AOPL's Reply Comments

71. AOPL opposes the use of page 700 data. AOPL argues that the page 700 data is more volatile due to the return element underlying the page 700 total cost-of-service data. Specifically, AOPL contends that stock market fluctuations make the rate of return highly sensitive to the end-year selected by the Commission (*i.e.,* 2008 versus 2009) for calculating the index. According to AOPL, the Form No. 6 net carrier property data is preferable because it reflects actual changes in capital costs while assuming that the competitive cost of capital remains constant.

72. AOPL also argues that if rate of return from page 700 is used to measure cost increases, increases in pipeline efficiency will not result in lower indexation levels. AOPL explains that pipeline returns are based on a proxy group and as the profitability increases for companies in the proxy group, returns will likely increase. As a result, using return from page 700 will tend to increase, as oppose to decrease, future index levels.

73. AOPL also disagrees with Mr. O'Loughlin's claim that page 700 data is superior to Form No. 6 data because page 700 data does not include intrastate costs. AOPL counters that oil pipelines often make intrastate and interstate movements through the same pipeline segments. Thus, AOPL believes that it is reasonable to assume that both interstate and intrastate cost changes are likely to be representative of interstate cost changes.

74. AOPL argues that Mr. O'Loughlin mistakenly describes the page 700 data as new and instead suggests that the information Mr. O'Loughlin proposes to use has been available to the Commission for many years.

d. Valero Supplemental Reply

75. Responding to AOPL, Valero asserts that pipeline efficiency gains will not distort the return information from page 700 because basic finance theory provides that an increase in a company's current and future cash flow increases the equity value of the company. Regarding AOPL's contention that volatility in the page 700 return data will skew results, Valero argues that Dr. Shehadeh, by analyzing the rate of return in isolation from the allowed return and income tax allowance, obtained a result that is not fully indicative of a pipeline's capital costs. Valero further argues that recessionary declines in petroleum demand increased the average cost of service per barrel mile for 2009. Valero concludes that if the recessionary volatility in barrel-miles is reflected in developing unit costs, the prevailing rates of return as reported in the cost-of-service calculations on page 700 of the Form No. 6, must also be used.

76. Valero disputes AOPL's contention that an interstate cost-of-service value was reflected on page 700 as early as 1994. Valero states that a reliable total interstate-only cost-of-service data and the specific line items composing the interstate cost of service, including jurisdictional rate base, were not available until 2000. Valero states that the Commission has not previously

[38] AOPL Comments at 14–15; Dr. Shehadeh August 20 Decl. at 10 n.23.

addressed the possibility of using this interstate, page 700 data in the index.

77. Valero also challenges Dr. Shehadeh's claim that the interstate-only operating and maintenance expense and depreciation expense data reported on page 700 are unsuitable for the rate index methodology because the data contain various accounting, allocation, and normalizing assumptions. Rather, Valero contends that because the calculations of operating and maintenance expense must be consistent with the Commission's Opinion No. 154–B methodology and because changes in those components impact the costs a pipeline can recover in rates, those considerations are appropriate for determining the price index.

78. Valero states that Dr. Shehadeh's preferred data source, the operating and maintenance expense data on page 114 of the Form No. 6, can contain accounting reserves that are not permitted for ratemaking. Valero states that carriers should not be permitted to use these discretionary changes in accounting reserves to influence the change in unit costs used to determine the level of index to be used for annual adjustments.

e. AOPL October 20, 2010 Response

79. AOPL renews its arguments that (a) intrastate costs are representative of interstate costs; (b) inclusion of the rate of return from page 700 would make the index more volatile; (c) net plant is a preferable measure of return for the purposes of establishing the index than the page 700 data; and (d) the page 700 data has been available during prior indexing proceedings.

80. AOPL also argues that Valero's proposed usage of page 700 ignores serious accounting issues. AOPL states that, in order to derive a unit cost for each carrier, Mr. O'Loughlin divides the total cost-of-service reported on page 700 by the total throughput reported on page 700. AOPL states that the page 700 cost-of-service figure provides each carrier's interstate cost-of-service using an Opinion No. 154–B methodology. However, AOPL states that the barrel-mile data on page 700 includes interstate and intrastate volumes. AOPL explains that the instructions on page 700 indicate that the barrel-mile figure should be the same as that reported on page 600, and the barrel-mile figure on page 600 includes "all oils" received by the pipeline, not just interstate oils. AOPL contends that there could be a mismatch between the interstate only costs and the interstate and intrastate volumes.

81. AOPL defends the data in Form No. 6. AOPL states that while PAAs reflected in Form No. 6 are generally not allowed to be reflected in regulated rates, these adjustments are appropriate when calculating cost changes because the PAAs reflect the opportunity cost of capital. Moreover, AOPL states that PAAs do not create the perverse incentives in the calculation of an industry-wide index that they do when calculating an individual pipeline's rates. Also, AOPL also contends that although the accounting reserves in Form No. 6 present timing issues for the purposes of a ratemaking proceeding, they also represent real costs of doing business that are properly reflected in the calculation of the rate index.

82. AOPL also defends the usage of the operating ratio. AOPL states that applying a weight of one to operating expenses and zero to net plant is appropriate for a company where operating costs are greater than revenue.

f. Commission Determination

83. The Commission does not adopt Mr. O'Loughlin's proposal to use page 700 data because there is a mismatch between the page 700 total cost-of-service, which includes only interstate data, and the page 700 throughput data, which includes interstate and intrastate data.

84. As the shipper parties emphasize, the total cost of service data on page 700 relates solely to interstate costs. However, the throughput data used by Mr. O'Loughlin from page 700 reports a combination of interstate and intrastate volumes. As AOPL explains in its October 20 Response, the barrel-mile information listed on page 700 provides that the barrel-mile figure should be the same as that reported on line 33a of page 600 of the Form No. 6. The instructions for page 600 refer to the inclusion of "all oils received" by the pipeline and makes no distinction between interstate and intrastate volumes. Consequently, pipelines may be reporting both interstate and intrastate volumes on page 700.

85. Thus, Mr. O'Loughlin's calculations compare one set of costs (interstate costs) with a different set of throughput (combined interstate and intrastate). Changes in transported throughput on a particular movement cause changes in the costs related to the very same movement. Thus, it is an axiomatic rule of ratemaking that the same set of costs and volumes must be used to determine rates. To obtain an accurate measurement of changing per barrel-mile costs for purposes of establishing an index level, the methodology must match the throughput used in the methodology to the costs incurred to transport the throughput used in the methodology. Given that page 700 does not match interstate costs with interstate volumes, the Commission rejects its usage in the methodology.

4. Adjustments for Declining Throughput

a. Comments

86. In reply comments, CAPP asserts that the index should not be inflated by the decline in throughput between 2004 and 2009. CAPP contends that the widespread recession caused the reduction in 2009 barrel miles and that such throughput declines cannot be expected to continue for another five years. CAPP states that its expert Mark Pinney replicated AOPL's analysis using constant 2004 barrel miles and the resulting increase equated to PPI–FG plus 1.62 percent. CAPP argues that it is inconsistent with the purpose of an inflation adjusted index to allow changes in volumes to affect index levels and that increasing the index due to declining volumes will be self-perpetuating. CAPP also argues that allowing a generic index increase based on 2009 barrel-mile data contradicts Commission ratemaking policy for new pipeline facilities by using barrel-mile data instead of capacity as billing determinants.

87. Also in reply, ATA states that U.S. Energy Information Administration (EIA) estimates project an increase in total crude oil and petroleum consumption from 2010 to 2011. ATA thus advocates establishing an index using constant 2009 volumes for 2011 through 2016 as a "conservative" approach more favorable to pipelines.

88. In its October 20 Response, AOPL contends that adjusting actual historical throughput to assume constant volume levels is speculative and directly contrary to the Commission's established methodology. AOPL also challenges CAPP's suggestion that the Commission uses capacity to measure costs instead of actual throughput, stating that because the oil pipeline industry is a highly capital intensive industry, when throughput declines, costs do not decline proportionally. AOPL adds that CAPP treats volumes as remaining constant but makes no attempt to adjust for fuel and power costs that are dependent upon volume levels. Moreover, AOPL adds that contrary to CAPP's assertion that the decline resulted from the 2009 recession, more than 60 percent of the throughput decline occurred between 2004 and 2005. Thus, AOPL states that

capacity should not be used to measure costs.

b. Commission Determination

89. The Commission rejects CAPP's and ATA's proposal to use constant barrel-miles in the Kahn Methodology rather than the actual barrel-mile levels.

90. The Commission finds it appropriate to continue to rely upon historical data in applying the Kahn Methodology. The DC Circuit has upheld the Commission's reliance upon historical data finding that the usage of historical data is consistent with the mandate to apply "a simplified and generally applicable ratemaking methodology." [39]

91. Moreover, CAPP's and ATA's analysis of cost changes assuming constant volumes are problematic because they utilize asynchronous data. Regarding CAPP's proposal to use constant 2004 barrel-miles, the 2009 costs reflect the expenses associated with the lower 2009 volume levels. Since certain costs (such as fuel and power) increase and decrease with volume levels, using 2004 data volume data with 2009 operating costs will not present an accurate depiction of the change in per barrel-mile costs. By applying an upward adjustment to 2009 volumes without adjusting for the costs that would have been incurred as a result of those higher volumes, CAPP imposes a downward distortion on the change in pipeline costs calculated under the Kahn Methodology. Similarly, ATA's proposal to assume constant 2009 volumes is defective because it does not adjust 2004 costs so that the 2004 costs reflect the lower 2009 volumes.

92. The Commission further rejects CAPP's argument that it is inappropriate to allow the indexing methodology to be calculated based upon declining volumes. Declining volumes require pipelines to increase rates in order to meet revenue needs and, for existing oil pipelines, the Commission uses existing volumes, not capacity, to determine rates.[40] Thus, much as in a cost-of-service, such declining volumes should lead to increased pipeline recovery levels in the indexing methodology.

93. Finally, CAPP fails to demonstrate that the declining throughput for the 2004–2009 period resulted primarily from the unusual economic conditions in 2008 and 2009 as opposed to changes reflected throughout the prior five-year period. As Dr. Shehadeh demonstrates, more than 60 percent of the decline in barrel-miles during the 2004–2009 period recorded on Form 6 occurred between 2004 and 2005,[41] and was unrelated to the recession in 2008 and 2009. Thus, it is not the case that the index level has been distorted by the recession in 2008 and 2009.

5. Applying the Index Only to Operations and Maintenance Costs

a. Comments

94. In its comments and reply comments, Navajo urges the Commission to apply the index only to operating and maintenance costs and not to costs attributable to depreciation, return, and income tax allowances. Navajo asserts that depreciation is not affected by inflation because depreciation is based upon equity investment, a historical cost. Navajo further contends that the two components of return—return on equity (in the form of increased deferred return) and cost of debt—already incorporate an inflation component. Thus, Navajo asserts that automatically granting pipelines an additional inflation-based index increase would enable pipelines to "double-dip" the inflation element. Third, Navajo asserts that the income tax allowance should not be increased automatically by an index, because one of its two components (the tax rate) generally is fixed by law and does not vary based on inflation, and the second component (rate of return on equity) already accounts for inflation.

95. Instead, Navajo avers that the index should only be applied to operating and maintenance (operating and maintenance expense) costs. Navajo acknowledges that the Commission previously rejected this approach as too complicated in Order Nos. 561 and 561–A, but Navajo notes that the Commission now collects categorical cost data from pipelines on page 700 of Form No. 6 and the Commission could apply the index only to operating and maintenance costs as recorded on page 700. Thus, Navajo states that the Commission could use the change in operating and maintenance expense costs identified by O'Loughlin to develop the indexed rate.[42] Navajo explains that under its proposal, for each pipeline seeking an annual index increase, the index rate could be applied to the part of the rate attributable to operating and maintenance expense. Navajo elaborates that if the operating and maintenance expense costs were 40 percent of a pipeline's cost of service on page 700 of its Form No. 6, the index-based rate increase should equal the pre-existing ceiling rate times the index multiplied by "0.4."

96. In reply comments, ATA states that it agrees that applying an index adjustment to items not subject to inflation misaligns cost recovery with cost increases. ATA also alleges this provides a disincentive to invest in infrastructure.

97. In reply comments and its October 20 Response, AOPL asserts that the Commission has twice rejected the selective indexing proposal advocated by Navajo. AOPL states that Navajo's proposal is beyond the scope of this proceeding. Moreover, AOPL asserts that because the Commission measures capital cost changes by comparing changes in net carrier property, the Kahn Methodology does not incorporate inflation for either return or income tax allowance as alleged by Navajo. Rather, AOPL asserts, the methodology is based upon the assumption that the competitive rate of return on capital does not change.

98. AOPL adds that the Commission has twice previously rejected Navajo's proposal, first in Order No. 561 and in the first five year review on the basis that it would be difficult to administer and create perverse incentives. AOPL states that Navajo has provided the Commission with no valid reason to reverse its prior rulings. Furthermore, AOPL asserts that under Navajo's proposal, each pipeline would be required to perform calculations to determine its own pipeline specific index, a fundamental change from the "generally applicable" ratemaking methodology required by the EPAct 1992.

b. Commission Determination

99. The Commission rejects Navajo's proposal. The Commission has twice rejected proposals similar to the one advocated by Navajo. In Order No. 561 as affirmed by the D.C. Circuit, the Commission concluded that limiting index increases to operating and maintenance costs would create perverse incentives for pipelines to direct a disproportionate amount of their spending to operating and maintenance costs and to neglect capital expenditures.[43] Moreover, because new

[39] *AOPL II,* 281 F.3d at 247 (2003) (quoting EPAct 1992, at § 1801(a)).

[40] *See* 18 CFR 346.2(b)(2). Moreover, it is not clear how this capacity information could be obtained in the application of the index, since pipelines report throughput in Form No. 6, not capacity.

[41] Shehadeh October 20 Decl. at 29.

[42] To derive this rate, Navajo relies upon Mr. O'Loughlin's showing a change in the O&M costs for the middle 50 percent of oil pipelines of 5.0 percent and a change for the composite of the 50 and 80 percent of 5.4 percent. O'Loughlin August 20 Aff. ¶ 49, Figure 15.

[43] Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,951–52, *aff'd AOPL I,* 83 F.3d at 1437. The

Continued

investment may be substantial and would not be covered by the index, many companies would be required to file cost-of-service cases to recover significant increases in cost.[44]

100. In addition to creating perverse incentives, the Commission's prior orders noted that Navajo's proposal would also undermine the statutory mandate to establish a generally applicable and simplified methodology.[45] The availability of page 700 data does not change this conclusion. Under Navajo's proposal, the index would not be generally applicable. Each pipeline would receive its own annual index adjustment to the ceiling rate dependent upon the pipeline's specific level of operating costs as reported on page 700. Navajo's proposal is also contrary to the purpose of a simplified methodology. Requiring pipelines to multiply the index level by the ratio of "operating and maintenance" expenses to "total cost-of-service" on page 700 before applying the index to a pipeline's existing ceiling rate will increase the likelihood of disputes in each annual application of the index as parties challenge those particular components of page 700 data.

101. Furthermore, Navajo's arguments are theoretically unsound. Capital costs are a component of a pipeline's total costs, and any index that tracks actual cost changes must account for changing capital costs. The Commission also rejects Navajo's argument that for income tax and rate of return, the index double-counts inflation. The Kahn Methodology uses net carrier property as a proxy for income tax and rate of return, and net carrier property does not contain any internal inflation-related adjustments.[46]

6. Separate Indices for Crude and Product Pipelines

a. Comments

102. In its comments, Valero and its witness O'Loughlin recommend one index for crude and product pipelines. However, Valero avers that differences in cost changes experienced between crude and product pipelines could argue in favor of separate indices for these two groups. Valero states that using his methodology, Mr. O'Loughlin determined that the median annual change in unit costs is 2.1 percent for products pipelines and 3.3 percent for crude pipelines. The composite index for the middle 50 percent of the datasets is 2.3 percent for products pipelines and 4.3 percent for crude pipelines.

103. In reply comments, ATA advocates the adoption of separate indices for crude and product pipelines, asserting that separate indices would allocate costs more equitably among shippers. ATA emphasizes that doing otherwise would force product shippers to subsidize crude shippers. The ATA urges that the data to produce separate indices is readily available, noting that of the 97 pipelines included within Mr. O'Loughlin's analysis, 31 were classified as crude pipelines and 45 were classified as product pipelines. NPGA also states that, as established by Mr. O'Loughlin, the disparity in cost changes between crude pipelines and product pipelines supports the development of separate indices.

104. In its reply comments and October 20 Response, AOPL represents that the Commission has previously rejected separate indices and emphasizes that Valero witness O'Loughlin ultimately concluded that the Commission should apply one index to all oil pipelines.

b. Commission Determination

105. Mr. O'Loughlin has provided some evidence to indicate that product and crude pipelines have experienced different levels of cost change. However, neither Mr. O'Loughlin, ATA, nor NPGA offered an explanation for why this cost disparity between crude and product pipelines exists. ATA and NPGA rely upon Mr. O'Loughlin's testimony, but Mr. O'Loughlin recommends using one index for all pipelines,[47] and ATA and NPGA otherwise have failed to demonstrate that the Commission should depart from its prior policy applying one uniform index to all pipelines. Thus, on the record presented here, the Commission will continue to apply one index to both crude and product pipelines.

C. Allegations of Pipeline Over-Recovery

1. Comments

106. In their comments, several shippers—Sinclair/Tesoro, the Trucking Association, ATA, NGPA, SPOPS, and Navajo—reject the notion that the index reflects actual pipeline cost changes. Sinclair/Tesoro argues that it is unlikely the pipeline industry is experiencing cost increases equal to the broader economy since the last review. In support, Sinclair/Tesoro cites depressed cost levels in areas specific to pipeline operation, such as labor, energy, and materials used in pipeline construction. In contrast, Sinclair/Tesoro represents that PPI–FG has recovered more rapidly, almost completely rebounding to its mid-2008 peak. Thus, Sinclair/Tesoro states that it is not appropriate to maintain the prior period rate ceiling of PPI–FG+1.3.

107. In its comments, ATA states that, based upon a sample of 73 Commission-regulated pipelines, over 30 pipelines have reported over-recoveries for some or all of the years from 2002–2009, and that these pipelines reported over-recoveries of approximately $1.9 billion. ATA asserts that this could cause parties to defer capital expenditures because returns on depreciated assets exceed those provided by new investments. Moreover, ATA suggests it is suspicious that pipelines that are under-recovering by substantial amounts have not filed a cost-of-service rate increase. In Reply Comments, ATA further emphasizes that pipelines experience non-uniform cost changes. ATA states that the Commission should be "careful" in designing any index to be applied to pipelines generally.

108. In addition to reiterating ATA's concerns regarding over-recovery, NPGA states that the major propane pipelines are now controlled by one company and that as a result shippers have experienced a pattern of increased costs through new fees, reduced service, sale of necessary assets to a pipeline affiliate, and operating penalties. Although NPGA acknowledges that pipelines as a whole are reporting an under-recovery, NPGA states that this does not relieve the Commission of its duty to ensure that each individual carrier's rates are just and reasonable and the existence of such a disparity merely indicates that the index does not reflect actual changes in pipeline cost. NPGA and ATA urge the Commission to require pipelines showing over-recoveries to show cause why their rates should not be considered unjust and unreasonable.

109. Similarly, SPOPS avers that oil pipelines are consistently over-recovering their costs. Accordingly, SPOPS proposes an index rate of zero until pipeline profits return to a just and reasonable level. SPOPS states that since the inception of the index the Commission has allowed pipelines to

Commission returned to the issue in the first five year review, again rejecting the proposal on the basis that it could cause perverse consequences. First Five-Year Review, 93 FERC at 61,854–55.

[44] Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,952.

[45] Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,951–52; First Five-Year Review, 93 FERC at 61,854–55.

[46] Because it is not presented by the facts here, the Commission does not address whether using rate of return data that incorporated an inflation component would, in fact, be inappropriate for deriving the index. Similarly, the Commission does not address issues related to using actual page 700 tax allowance data because the index currently uses a proxy for income tax costs.

[47] O'Loughlin August 20 Aff. ¶ 61.

increase their rates by 39 percent, even though by 2009, 41 oil pipelines reported excess profits totaling over $200 million per year. In its comments, SPOPS includes in these profits the income tax allowance for Master Limited Partnerships (MLP), which do not incur income taxes. SPOPS states that it is difficult to challenge rate increases pursuant to the index. SPOPS states, as a result, the Commission has abdicated its responsibility under the ICA, emphasizing that not even "a little unlawfulness" is permitted, and that the Commission index as applied by the Commission tolerates unlawfulness.

110. In reply, Navajo states that it has reservations about basing the index on PPI–FG. Navajo states that nothing in the record demonstrates that pipeline costs inherently correlate with general rates of producer price inflation. In addition to claiming that pipelines have been over-recovering, on reply, Navajo also state that pipelines should not receive the benefit of automatically-approved rate increases when the pipeline reports that it is over-recovering. Navajo states that withholding the index from pipelines that are over-recovering can be accomplished through page 700, and thus is not any less administratively efficient than the Commission's current approach nor, in Navajo's view, does it increase litigation.

111. AOPL in its Reply Comments and October 20 Response states that the Commission properly rejected similar arguments during the prior 5-year review. AOPL notes that the Commission's rationale in past proceedings accepts that some pipelines may over-earn while others under-earn as an inherent attribute of the index. AOPL asserts that the pertinent issue is not the overall level of pipeline cost, but rather how the index compensates for changes in pipeline costs. AOPL also states although page 700 data may show excess revenues, it does not mean a pipeline rates are not just and reasonable. According to AOPL, there are several other mechanisms other than an Opinion No. 154–B methodology to establish a pipeline's rates, including market-based rates and negotiated rates. In addition, AOPL contends the shippers' allegations do not reflect actual pipeline cost recovery. Based on Dr. Shehadeh's calculations, AOPL claims approximately two-thirds of pipelines' page 700 calculations report under-earning on an Opinion No. 154–B basis. AOPL responds to Sinclair's claim that the pipeline industry experienced cost changes in alignment with the global economic recession by stating it is speculative and is contrary to actual changes in costs as Dr. Shehadeh shows in his calculations using the Kahn Methodology.

2. Commission Determination

112. The fact that some pipelines may be over-recovering is not contrary to the establishment of a general index level for all pipelines. The purpose of the index is to track cost changes using a generally applicable and simple method, and does not involve an assessment of whether each of the various pipelines are over- or under-recovering their costs. This can be seen in the application of the index. When a pipeline proposes an indexed rate change, the Commission is not subject to a statutory duty to examine the whole rate.[48] Rather, the Commission's inquiry is limited to a comparison of the changes in the rates and costs from year to year.

113. As the Commission explained previously, inherent to the application of any industry-wide pipeline index, some pipelines will over-earn while others will under-earn.[49] However, the Kahn Methodology ensures that that indexed changes are consistent with recent industry-wide historical norms.[50] To the extent that the customers of a particular pipeline determine that the underlying rates on a particular pipeline are unjust and unreasonable, those parties may file a complaint against that particular pipeline's rates pursuant to the ICA and the Commission regulations. Moreover, even when considering pipeline over-recoveries and under-recoveries (as opposed to cost changes), Dr. Shehadeh presented evidence that in 2009, the oil pipeline industry as a whole was under-earning by approximately 17 percent.[51]

D. Other Factors Affecting Pipeline Costs Raised by the Parties

114. Although not linked to any particular modification of the index methodology, the comments urged the Commission to consider general issues related to pipeline integrity and the MLP business structure.

1. Pipeline Integrity and Regulatory Safety Costs

AOPL Initial Comments

115. AOPL states that costs have increased due to assessment and re-assessment of pipeline structural integrity and remediation required by the Pipelines and Hazardous Materials Safety Administration (PHMSA), an agency of the United States Department of Transportation. AOPL, supported by the Declaration of William R. Byrd, stresses that assessment requires expensive technology (including rental of inline inspection tools), labor intensive processes (involving excavation and manual inspection), and remediation. Mr. Byrd represents that "compliance with the integrity management regulations is likely to be the largest single variable cost item for most pipelines and these costs show no signs of decreasing."[52]

116. Mr. Byrd projects pipeline integrity costs to continue increasing because inline inspection tools are becoming more expensive and more likely to detect pipeline anomalies requiring correction. AOPL states that PHMSA has imposed increasingly stringent obligations and that new or expanded regulatory requirements may be imposed by Congress during the reauthorization of the Pipeline Safety Act, which AOPL expects to occur later in 2010 or 2011.

117. AOPL and Mr. Byrd identify other regulatory obligations over the past five years that have increased costs, including public awareness program regulations and operator qualification regulations. AOPL and Mr. Byrd explain that costs in the next five years are likely to increase due to new PHMSA control room management regulations, new PHSMA guidelines regarding land-use on or near pipeline rights-of-way, new chemical facility anti-terrorism standards promulgated by the Department of Homeland Security, and issues regarding greenhouse gas emissions issued by the Environmental Protection Agency.

118. In separate comments, PHMSA also represents that pipeline safety and integrity regulations have imposed significant compliance costs over the past eight years. Further, PHMSA notes the possibility of future regulatory changes and that it anticipates the cost of these activities will continue to impose significant financial burdens.

b. Reply Comments

119. Several reply comments noted increased costs related to pipeline

[48] Second Five-Year Review, 114 FERC ¶ 61,293 at P 57. This is consistent with the grandfathering of the then-existing rates under the EPAct 1992. EPAct 1992, at § 1803.

[49] Order No. 561, FERC Stats. & Regs. ¶ 30,985 at 30,948–49; Second Five-Year Review, 114 FERC ¶ 61,293 at P 57.

[50] Contrary to Sinclair/Tesoro's claims and Navajo's allegations, as discussed above, the empirical evidence presented using the Kahn Methodology demonstrates that pipeline costs per barrel-mile have increased at a rate exceeding changes in PPI–FG over the past five-years. There is no indication that an adjusted PPI–FG is inadequate for tracking cost changes.

[51] Shehadeh September 20 Decl. at 32–33.

[52] AOPL Comment at 19 (quoting Byrd Decl. at 7).

integrity. Platte, an interstate liquids pipeline, expects to incur more than $2 million above historic levels of integrity related costs for the foreseeable future. Platte notes that significant additional costs may appear in damage prevention initiatives, valve spacing, leak detection, and increased focus on preventing small releases. The Pipeline Safety Trust notes that it is currently recommending that Congress increase PHMSA's jurisdiction over hazardous liquid pipelines and that Congress direct PHMSA to expand integrity management and other safety-related requirements.

120. Other parties challenged AOPL's contention that the pipeline integrity costs supported an elevated index level. Valero notes that accounting treatment of pipeline costs was not consistent prior to 2006, when the Commission clarified the accounting practices for integrity programs.[53] Thus, Valero states that AOPL, by comparing changes in account 320 between 2004 and 2009, overstates the changes in pipeline integrity costs. Valero also emphasizes that account 320 costs, which include both interstate and intrastate data, are only 14.4 percent of the total cost-of-service. Moreover, Valero notes that the Commission has previously rejected adjustments to the index based upon estimates of anticipated increases in pipeline integrity costs.[54] Lastly, Valero asserts that claims of future increases in regulatory expenses are speculative.

121. ATA, in its reply, states that pipeline integrity cost increases are already appropriately accounted for in the years 2004 through 2009. ATA states that the Pipeline Integrity Management program was established in 2002, and that the program required hazardous liquid pipeline operators to develop a written plan to initially assess the integrity of their pipelines over a roughly five year period with baseline assessments to be 50 percent completed by September 30, 2004, and 100 percent completed by March 31, 2008. After the baseline assessment, the assessments are to be repeated every five year period.

122. SPOPS also avers that future costs are speculative and inconsistent with a backward looking methodology. SPOPS asserts that a large increase rewards pipelines with unjust and unreasonable rates and that the pipelines not recovering their costs are free to file for rate increase. Sinclair/Tesoro also assert that more stringent safety regulations are not unique to pipelines as environmental regulations have also imposed costs on shippers, and that it is unfair to impose these costs alone on shippers.

c. AOPL October 20, 2010 Response

123. AOPL states that it relies on Mr. Byrd's declaration to explain that Dr. Shehadeh's calculations are consistent with real-world industry experience, and to show that establishing an index below PPI–FG+3.64 would frustrate expectations on which past pipeline investments have been made, among other things.

124. AOPL also states that Mr. Byrd's testimony is consistent with the comments of PHMSA, which state, among other things, that regulations have imposed significant compliance costs and events, including the Deepwater Horizon oil spill, have also caused PHMSA to expand its integrity management regulations. AOPL disagrees with SPOPS' suggestion that pipelines should seek to recover these safety and integrity management costs through cost-of-service filings, arguing that such an approach is inconsistent with the implementation of a generally applicable ratemaking methodology. AOPL argues that if pipelines were required to use cost-of-service filings to recover these kinds of costs, the efficiency gains which were intended by EPAct in implementing the generally applicable index methodology would be lost.

d. Commission Determination

125. AOPL and other parties have submitted this information regarding future costs for Commission consideration, but they have not proposed to depart from the Kahn Methodology's reliance upon historic data. Moreover, future costs projections related to regulatory changes are speculative and inappropriate for inclusion in the index.[55] Accordingly, the evidence presented regarding prospective regulatory changes does not alter the Commission's determination regarding the appropriate index level as calculated based upon historic costs.

2. Master Limited Partnerships

126. CAPP contends that the Commission should not grant an increased allowance merely to enhance cash flow requirements that may be attributable to the MLP form of business. CAPP states that due to federal tax laws, MLPS generally distribute all available cash flow to unit holders in the form of quarterly distributions. CAPP argues that the form of business organization and operation may create a tension between how a pipeline makes prudent safety and integrity-related decisions without contravening cash distribution constraints. CAPP argues that the Commission should not view the cash requirements of MLPs as a legitimate basis for increasing the revenue flow generated by regulated rates. SPOPS also claims that the MLP structure attracts capital to the pipeline industry but, rather than making investments in infrastructure, diverts the equity capital away in payouts to the general and limited partner investors.

127. AOPL responds in its Supplemental Reply Comments that shippers made substantially similar arguments during the prior five-year review period, and the Commission rejected them. Furthermore, AOPL states it is not seeking "an increased allowance" to enhance MLP cash flow requirements. AOPL asserts neither the cash flow requirements of MLPs nor the dividend policies of corporate-owned pipelines are part of the calculation of changes in oil pipelines costs. Nor is there any "tension" between pipeline safety and capital investment and MLP cash distribution requirements, as CAPP contends. AOPL contends the issue is not about the pipeline organizational structure, but whether pipelines will be able to recover sufficient revenue to fund their operations. Accordingly, AOPL argues shippers provide no valid basis to abandon the established methodology.

a. Commission Determination

128. All pipelines, regardless of business form, experience changes in cost. The index is designed to enable pipelines be able to recover sufficient revenue to fund their operations, whether or not the pipeline's business form is as an MLP. The middle 50 Kahn Methodology allows the Commission to appropriately exclude outliers and to track general changes in pipeline costs whatever the form of the business. Accordingly, the discussion regarding MLPs does not alter the Commission's determination regarding the appropriate index level.

E. Revisions to Form No. 6

1. Comments

129. ATA and NPGA aver that Form No. 6 should be revised to segregate cost and revenue for each regulated common carrier and or system and to supply separate page 700 data for each oil pipeline or system included in the report. To enhance transparency, ATA and NPGA also asserts that Form No. 6 should be revised to require the pipeline

[53] Valero Reply Comment at 8 (citing *Jurisdictional Public Utilities and Licensees, Natural Gas Companies, and Oil Pipeline Companies,* 111 FERC ¶ 61,501 (2005)).

[54] Valero Reply Comment at 10 (citing *AOPL II,* 281 F.3d at 247).

[55] *AOPL II,* 281 F.3d at 247.

to file all workpapers that fully support the data reported on Form No. 6 page 700, including a total cost-of-service. ATA and NPGA also assert that pipelines must file Form No. 6 before initiating an index rate increase. ATA and NPGA also argue that the Commission should change the interest rates applicable to refunds as provided in 18 CFR § 340.1(c)(2)(i) to reflect the pipeline's rate of return as reported on Form No. 6, page 700.

130. SPOPS urges, in its reply comments, that shippers and customers should be allowed access to the workpapers underlying page 700. SPOPS also contends that the page 700 data should reveal both the nominal and the real rate of return on equity, including the amount of dollars of equity both collected in rates and dollars placed in rate base. SPOPS states that the current rate of return on equity must be known to determine the need for the index increase to attract capital.

131. In reply comments, AOPL argues that the Commission has addressed and rejected the proposal regarding segmented data and workpapers. AOPL states the Commission in its ruling explained that page 700 is designed to be a preliminary screening tool for pipeline rate filings and not form the basis of a decision or demonstrates the just and reasonableness of proposed or existing rates. AOPL asserts the Commission has revisited this issue as recently as December 2008 and upheld its initial views.

2. Commission Determination

132. The Commission finds that the proposals to modify Form No. 6 are outside the scope of this proceeding, which is to set the going-forward index level.

The Commission orders: Consistent with our review and verification of the sample pipeline Form No. 6 data, and the application of the previously approved Order No. 561 methodology to that data, the Commission determines that the appropriate oil pricing index for the next five years, July 1, 2011 through June 30, 2016, should be PPI–FG+2.65.

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–32062 Filed 12–21–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF JUSTICE

28 CFR Part 16

[CPCLO Order No. 006–2010]

Privacy Act of 1974; Implementation

AGENCY: Federal Bureau of Investigation, Department of Justice.

ACTION: Final rule.

SUMMARY: The Federal Bureau of Investigation (FBI), a component of the Department of Justice, issued a proposed rule for a new Privacy Act system of records entitled, the "Data Integration and Visualization System (DIVS)," JUSTICE/FBI–021, 75 FR 53262 (August 31, 2010). DIVS is exempt from the subsections of the Privacy Act listed below for the reasons set forth in the following text. Information in this system of records related to matters of law enforcement and the exemptions are necessary to avoid interference with the national security and criminal law enforcement functions and responsibilities of the FBI. This document addresses a public comment on the proposed rule.

DATES: *Effective Date:* December 22, 2010.

FOR FURTHER INFORMATION CONTACT: Erin Page, Assistant General Counsel, Privacy and Civil Liberties Unit, Office of the General Counsel, FBI, Washington, DC 20535–0001, telephone 202–324–3000.

SUPPLEMENTARY INFORMATION:

Background

On August 31, 2010, the FBI published notice of a new Privacy Act system of records entitled, "Data Integration and Visualization System (DIVS)," JUSTICE/FBI–021, which became effective on October 1, 2010. In conjunction with publication of the DIVS system of records notice, the FBI initiated a rulemaking to exempt DIVS from a number of provisions of the Privacy Act, in accordance with subsections 553a(j) and/or (k). On August 31, 2010, the FBI published at 75 FR 53262 a proposed rule exempting records in the DIVS from Privacy Act subsections (c)(3), and (4); (d)(1), (2), (3) and (4); (e)(1), (2) and (3); (e)(4)(G), (H) and (I); (e)(5) and (8); (f) and (g).

Public Comment

The FBI received one comment on the proposed rule. The commenter concurred with the exemptions cited but requested that the FBI provide more information explaining the FBI's "internal controls" in protecting the data itself from improper violations. The FBI determined that the public comment merited no change in the rule, as the commenter concurred with the exemptions claimed, and because an exemption rule does not provide an appropriate venue for the discussion requested.

Regulatory Flexibility Act

This proposed rule relates to individuals as opposed to small business entities. Pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–612, therefore, the proposed rule will not have a significant economic impact on a substantial number of small entities.

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, codified as a note to 5 U.S.C. 601, requires the FBI to comply with small entity requests for information and advice about compliance with statutes and regulations within FBI jurisdiction. Any small entity that has a question regarding this document may contact the person listed in **FOR FURTHER INFORMATION CONTACT**. Persons can obtain further information regarding SBREFA on the Small Business Administration's Web page at *http://www.sba.gov/advo/archive/sum_sbrefa.html.*

Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), requires that the FBI consider the impact of paperwork and other information collection burdens imposed on the public. There is no current or new information collection requirements associated with this proposed rule. The records that are contributed to DIVS are created by the FBI or other law enforcement and intelligence entities and sharing of this information electronically will not increase the paperwork burden on the public.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, 109 Stat. 48, requires Federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments, and the private sector. UMRA requires a written statement of economic and regulatory alternatives for proposed and final rules that contain Federal mandates. A "Federal mandate" is a new or additional enforceable duty, imposed on any State, local, or tribal government, or the private sector. If any Federal mandate causes those entities to spend,

in aggregate, $100 million or more in any one year, the UMRA analysis is required. This proposed rule would not impose Federal mandates on any State, local, or tribal government or the private sector.

List of Subjects in 28 CFR Part 16

Administrative practices and procedures, Courts, Freedom of Information Act, Government in the Sunshine Act, and the Privacy Act.

■ Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order 2940–2008, 28 CFR Part 16 is amended as follows:

PART 16—[AMENDED]

■ 1. The authority citation for part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 552(b)(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

Subpart E—Exemption of Records Systems Under the Privacy Act

■ 2. Section 16.96 is amended to add new paragraphs (v) and (w) to read as follows:

§ 16.96 Exemption of Federal Bureau of Investigation Systems—limited access.

* * * * *

(v) The following system of records is exempt from 5 U.S.C. 552a(c)(3) and (4); (d)(1), (2), (3) and (4); (e)(1), (2) and (3); (e)(4)(G), (H) and (I); (e)(5) and (8); (f) and (g) of the Privacy Act:

(1) Data Integration and Visualization System (DIVS), (JUSTICE/FBI–021).

(2) These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a(j) and/or (k). Where compliance would not appear to interfere with or adversely affect the intelligence and law enforcement purpose of this system, and the overall law enforcement process, the applicable exemption may be waived by the FBI in its sole discretion.

(w) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3), the requirement that an accounting be made available to the named subject of a record, because this system is exempt from the access provisions of subsection (d). Also, because making available to a record subject the accounting of disclosures from records concerning him/her would specifically reveal any investigative interest in the individual by the FBI or agencies that are recipients of the disclosures. Revealing this information could compromise ongoing, authorized law enforcement and intelligence efforts, particularly efforts to identify and defuse any potential acts of terrorism or other potential violations of criminal law. Revealing this information could also permit the record subject to obtain valuable insight concerning the information obtained during an investigation and to take measures to impede the investigation, *e.g.*, destroy evidence or flee the area to avoid the investigation.

(2) From subsection (c)(4) notification requirements because this system is exempt from the access and amendment provisions of subsection (d) as well as the access to accounting of disclosures provision of subsection (c)(3). The FBI takes seriously its obligation to maintain accurate records despite its assertion of this exemption, and to the extent it, in its sole discretion, agrees to permit amendment or correction of records, it will share that information in appropriate cases.

(3) From subsection (d)(1), (2), (3), and (4), (e)(4)(G) and (H) because these provisions concern individual access to and amendment of law enforcement, intelligence and counterintelligence, and counterterrorism records, and compliance could alert the subject of an authorized law enforcement or intelligence activity about that particular activity and the investigative interest of the FBI and/or other law enforcement or intelligence agencies. Providing access could compromise sensitive information classified to protect national security; disclose information which would constitute an unwarranted invasion of another's personal privacy; reveal a sensitive investigative or intelligence technique; could provide information that would allow a subject to avoid detection or apprehension; or constitute a potential danger to the health or safety of law enforcement personnel, confidential sources, and witnesses.

(4) From subsection (e)(1) because it is not always possible to know in advance what information is relevant and necessary for law enforcement and intelligence purposes, and a major tenet of DIVS is that the relevance and utility of certain information that may have a nexus to terrorism or other crimes may not always be evident until and unless it is vetted and matched with other sources of information that are necessarily and lawfully maintained by the FBI.

(5) From subsection (e)(2) and (3) because application of this provision could present a serious impediment to efforts to solve crimes and improve national security. Application of these provisions would put the subject of an investigation on notice of that fact and allow the subject an opportunity to engage in conduct intended to impede that activity or avoid apprehension.

(6) From subsection (e)(4)(I), to the extent that this subsection is interpreted to require more detail regarding the record sources in this system than has been published in the **Federal Register**. Should the subsection be so interpreted, exemption from this provision is necessary to protect the sources of law enforcement and intelligence information and to protect the privacy and safety of witnesses and informants and others who provide information to the FBI. Further, greater specificity of properly classified records could compromise national security.

(7) From subsection (e)(5) because in the collection of information for authorized law enforcement and intelligence purposes, it is impossible to determine in advance what information is accurate, relevant, timely and complete. With time, seemingly irrelevant or untimely information may acquire new significance when new details are brought to light. Additionally, the information may aid in establishing patterns of activity and providing criminal or intelligence leads. It could impede investigative progress if it were necessary to assure relevance, accuracy, timeliness and completeness of all information obtained during the scope of an investigation. Further, some of the records searched by and/or contained in DIVS may come from other agencies and it would be administratively impossible for the FBI to vouch for the compliance of these agencies with this provision.

(8) From subsection (e)(8) because to require individual notice of disclosure of information due to compulsory legal process would pose an impossible administrative burden on the FBI and may alert the subjects of law enforcement investigations, who might be otherwise unaware, to the fact of those investigations.

(9) From subsections (f) and (g) to the extent that the system is exempt from other specific subsections of the Privacy Act.

Dated: November 2, 2010.

Nancy C. Libin,

Chief Privacy and Civil Liberties Officer.

[FR Doc. 2010–32108 Filed 12–21–10; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1926

Compliance Directive for Fall Protection in Residential Construction

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

ACTION: Notice of Significant Enforcement Policy Change; Rescission of Interim Fall Protection Compliance Directive for Residential Construction.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is issuing compliance directive STD 03–11–002 Fall Protection in Residential Construction. This directive rescinds compliance directive STD 03–00–001, Plain Language Revision of OSHA Instruction STD 3.1, Interim Fall Protection Compliance Guidelines for Residential Construction, effective on June 18, 1999. There continue to be high numbers of fall-related fatalities in residential construction. The Advisory Committee on Construction Safety and Health, the National Association of Home Builders, and the Occupational Safety and Health State Plan Association have recommended the withdrawal of directive STD 03–00–001.

DATES: *Effective date:* June 16, 2011.

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

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

Electronic copies of this **Federal Register** *notice:* Go to OSHA's Web site (*http://www.osha.gov*), and select "Federal Register," "Date of Publication," and then "2010."

SUPPLEMENTARY INFORMATION:

Background. Under 29 CFR 1926.501(b)(13), workers engaged in residential construction six (6) feet or more above lower levels generally must be protected by conventional fall protection (*i.e.,* guardrail systems, safety net systems, or personal fall arrest systems). However, if an employer can demonstrate that such fall protection is infeasible or presents a greater hazard, it may implement a written fall protection plan meeting the requirements of § 1926.502(k).

After OSHA promulgated § 1926.501(b)(13) in 1994, representatives of the residential construction industry argued that they needed more compliance flexibility than the standard allowed. As a result, OSHA issued Instruction STD 3.1 on December 8, 1995. STD 3.1 set out an interim compliance policy that permitted employers engaged in certain residential construction activities to use specified alternative procedures instead of conventional fall protection. These alternative procedures could be used without a prior showing of infeasibility or greater hazard and without a written, site-specific fall protection plan.

On June 18, 1999, the Agency issued STD 3–0.1A (subsequently re-designated STD 03–00–001), which was a plain language replacement for STD 3.1. And shortly after issuing STD 03–00–001, OSHA published an Advanced Notice of Proposed Rulemaking (ANPR). (64 FR 38077, July 14, 1999). The Agency noted that publication of that notice marked the "begin[ning] [of its] * * * evaluation * * * of" STD 03–00–001. In the ANPR, the Agency noted that there had been "advances in the types and capability of commercially available fall protection equipment" since the promulgation of § 1926.501(b)(13) (64 FR at 38080), and stated that it "intend[ed] to rescind * * * [STD 03–00–001] unless persuasive evidence * * * [was] submitted * * * demonstrating that for most residential construction employers complying with * * * [§ 1926.501(b)(13)] is infeasible or presents significant safety hazards." (64 FR at 38078).

Summary of Action. In Directive STD 03–11–002 OSHA rescinds STD 03–00–001. In the new directive, OSHA describes the comments it received in response to the ANPR and concludes that it did not receive "persuasive evidence" showing a continued need for STD 03–00–001. OSHA notes that there continue to be high numbers of fall-related fatalities in residential construction. Directive STD 03–11–002, also describes more recent developments, including recommendations from the Advisory Committee on Construction Safety and Health, the National Association of Home Builders, and the Occupational Safety and Health State Plan Association, that provide independent support for the Agency's decision to rescind STD 03–00–001.

Directive STD 03–11–002 sets forth OSHA's interpretation of "residential construction" for purposes of 29 CFR 1926.501(b)(13) and explains that existing compliance guidance referencing STD 03–00–001 will be withdrawn or revised as appropriate.

Authority and Signature

This document was prepared under the authority of David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, pursuant to Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, and 657), and Secretary of Labor's Order 4–2010 (75 FR 55355).

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2010–32154 Filed 12–21–10; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 208

RIN 1510–AB26

Management of Federal Agency Disbursements

AGENCY: Financial Management Service, Fiscal Service, Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury (Treasury), Financial Management Service (FMS), is amending its regulation to require recipients of Federal nontax payments to receive payment by electronic funds transfer (EFT), effective May 1, 2011. The effective date is delayed until March 1, 2013, for individuals receiving Federal payments by check on May 1, 2011; and for individuals who file claims for Federal benefits before May 1, 2011, and request check payments when they file. Individuals who do not choose direct deposit of their payments to an account at a financial institution would be enrolled in the Direct Express® Debit MasterCard® card program, a prepaid card program established pursuant to terms and conditions approved by FMS. Treasury waives the EFT requirement for recipients born prior to May 1, 1921, who are receiving payments by paper check on March 1, 2013; for payments not eligible for deposit to a Direct Express® prepaid card account; and for recipients whose Direct Express® card has been suspended or cancelled. In addition, this rule establishes the criteria under which a payment recipient may request a waiver if the

EFT requirement creates a hardship due to his or her mental impairment or remote geographic location.

DATES: This rule is effective February 22, 2011.

ADDRESSES: You can download this rule at the following Web site: *http://www.fms.treas.gov/eft.* You may also inspect and copy this rule at: Treasury Department Library, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. Before visiting, you must call (202) 622–0990 for an appointment. In accordance with the U.S. government's eRulemaking Initiative, FMS publishes rulemaking information on *http://www.regulations.gov.* Regulations.gov offers the public the ability to comment on, search, and view publicly available rulemaking materials, including comments received on rules.

FOR FURTHER INFORMATION CONTACT: Walt Henderson, Director, EFT Strategy Division; Natalie H. Diana, Senior Counsel; or Ronda Kent, Senior Counsel, at *eft.comments@fms.treas.gov* or (202) 874–6619.

SUPPLEMENTARY INFORMATION: On June 17, 2010, the Department of the Treasury (Treasury), Financial Management Service (FMS), published a notice of proposed rulemaking (NPRM) at 75 FR 34394, requesting comment on a proposed amendment to 31 CFR part 208 (Part 208), which implements the requirements of 31 U.S.C. 3332. Section 3332, title 31, United States Code, as amended by subsection 31001(x)(1) of the Debt Collection Improvement Act of 1996 (Pub. L. 104–134) (Section 3332), generally requires that all Federal nontax payments be made by electronic funds transfer (EFT), unless waived by the Secretary. The Secretary must ensure that individuals required to receive Federal payments by EFT have access to an account at a financial institution "at a reasonable cost" and with "the same consumer protections with respect to the account as other account holders at the same financial institution." *See* 31 U.S.C. 3332(f), (i)(2). Direct deposit is the primary method used to make EFT Federal payments.

The NPRM proposed to amend Part 208 to require all recipients of Federal nontax payments to receive payments by EFT, effective March 1, 2011, with a delayed effective date of March 1, 2013 for individuals receiving Federal payments by check on March 1, 2011, and for individuals who file claims for Federal benefits before March 1, 2011 and request check payments when they file. Recipients receiving payments by direct deposit prior to March 1, 2011, would continue to do so under the proposed rule.

Treasury's proposed rule stated that a Federal payment recipient could choose to have payments directly deposited to his or her own account at the recipient's financial institution. The NPRM stated that individuals who did not choose direct deposit of their payments to an account at a financial institution would be enrolled in the Direct Express® [1] Debit MasterCard® card program, a prepaid card program established pursuant to terms and conditions approved by FMS. The proposed rule contemplated that, beginning on March 1, 2013, all recipients of Federal benefit and other non-tax payments would receive their payments by direct deposit, either to a bank account or to a Direct Express® card account.

Treasury sought comment on all aspects of the proposed rule, and specifically requested comments regarding (1) exceptional circumstances where specific types of individual EFT waivers could be needed, (2) the costs to recipients for accessing their benefit payments received by paper check compared to those received by EFT, and (3) alternative phase-in approaches.

Treasury is finalizing the proposal in the NPRM to require, in general, that all Federal nontax payment recipients receive payments by EFT. The March 1, 2011 effective date has been changed to May 1, 2011. There remains a delayed effective date of March 1, 2013, for: (1) individuals receiving Federal payments by check on May 1, 2011; and (2) individuals who file claims for Federal benefits before May 1, 2011 and request check payments when they file. In addition, after consideration of the comments received, Treasury is modifying its proposed elimination of all individual waivers from the EFT requirement. Instead, Treasury will automatically waive the EFT requirement for: (1) A recipient born prior to May 1, 1921, who is receiving Federal payments by check on March 1, 2013; (2) a payment that is not eligible for deposit to a Direct Express® prepaid card account; and (3) a recipient whose Direct Express® card has been suspended or cancelled. Also, the final rule establishes the criteria under which a payment recipient may request a waiver if the EFT requirement creates a hardship due to his or her mental impairment or remote geographic location.

[1] Direct Express® is a registered service mark of the Financial Management Service, U.S. Department of the Treasury. The Direct Express® Debit MasterCard® card is issued by Comerica Bank, pursuant to a license by MasterCard International Incorporated. MasterCard® and the MasterCard® Brand Mark are registered trademarks of MasterCard International Incorporated.

I. Background

Part 208 sets forth the general rule requiring Federal payments to be made by EFT and the requirements for accounts to which Federal payments may be sent by EFT. "Federal payment" means any nontax payment made by an agency, including, but not limited to, Federal wage, salary, and retirement payments; vendor and expense reimbursement payments; benefit payments; and miscellaneous payments. *See* 31 CFR 208.2(g). Federal payments include payments made to representative payees and other authorized payment agents. *See* 31 CFR 210.5(b)(1). For Part 208 purposes, "agency" means any department, agency, or instrumentality of the United States Government, or a corporation owned or controlled by the Government of the United States. *See* 31 CFR 208.2(a).

As explained in the NPRM, Part 208 provides that any individual who receives a Federal benefit, wage, salary, or retirement payment is eligible to open an Electronic Transfer Account (ETA) at a financial institution that offers such accounts, and establishes the responsibilities of Federal agencies and recipients under the regulation. Part 208 also sets forth a number of waivers to the general requirement that Federal payments be delivered by EFT. *See* 31 CFR 208.4. Among the waivers previously included in the regulation were waivers for situations in which an individual determined that payment by EFT would impose a hardship due to a physical or mental disability or a geographic, language or literacy barrier, or would impose a financial hardship. *See* 31 CFR 208.4(a).

Treasury has reviewed the comments received in response to the NPRM, and, as described in more detail below, modified its proposal to eliminate all individual waivers from the EFT requirements. The Secretary's waiver authority remains unchanged, and Federal agencies continue to have the ability to waive payment by direct deposit or other EFT method in the circumstances described in paragraphs (b) through (g) of § 208.4, namely, for situations where the infrastructure in a foreign country does not support EFT, for certain disaster or military situations, for situations in which there may be a security threat or for valid law enforcement reasons, for non-recurring payments, and for unusual and/or urgent situations where the Government would be seriously injured unless payment is made by a method other

than EFT. The final rule revises the criteria for the agency waiver related to non-recurring payments, as described below.

II. Summary of NPRM Comments

Treasury received 33 comment letters and 1,087 comments solicited by and sent to a consumer advocate organization via its Web site. Of the 33 comment letters, three were from consumer advocate groups. One of the groups submitted its comments on behalf of its low-income clients, another consumer advocate organization, and 23 national, state, and local advocates for low and moderate income recipients of Federal benefits. While the consumer advocate groups generally acknowledged the benefits of EFT, all three groups opposed the complete elimination of waivers for individuals for whom EFT might impose a hardship and suggested improvements to the Direct Express® card and changes to the Direct Express® card terms and conditions. In addition, the three groups recommended that Treasury issue consumer protection rules for individuals whose benefit payments are delivered electronically to prohibit predatory loans, the unlawful freezing or garnishing of benefit payments legally exempt from garnishment, and the offsetting of overdraft and other bank fees against benefit payments.

Three comment letters were from associations that represent financial institutions. One commenter supported Treasury's proposal, provided that payments would be delivered, by default, to a recipient's existing bank account and that recipients would be allowed to elect direct deposit to reloadable prepaid cards issued by insured depositary institutions. Another commenter supported Treasury's proposal, including the alternative debit card option, because of the potential cost savings to credit unions. The third association commenter also supported Treasury's proposal and urged Treasury not to include individual waivers in the final rule.

A national electronic payments association and one financial institution submitted comment letters supporting Treasury's proposal. The electronic payments association supported the Direct Express® card as a safe, convenient, and reasonably priced alternative for unbanked Federal benefit recipients. The financial institution urged Treasury to consider expanding its regulations to allow direct deposit of Federal payments to general purpose reloadable prepaid debit cards.

Fourteen attorneys and an association that represents Social Security claimants' representatives recommended that Treasury waive the EFT requirements for attorneys and other representatives who receive fee payments for representing Social Security claimants. The association and the attorneys stated that, when fee monies are electronically deposited into an attorney's account, the attorney does not receive adequate information to determine which client the fee payment is for. In addition, the association and the attorneys stated that many attorneys and other representatives, as associates or employees of a firm, are precluded from accepting direct deposit of representative fees into their own personal bank account. These fee payments must be deposited directly to accounts owned by their firms. This is problematic because the Social Security Administration will only make representative fee payments to individual attorneys or representatives, most of whom are not the owners of their firm's bank account, and therefore cannot accept or direct payments to them.

A national trade association representing neighborhood financial service providers, such as check cashers, remittance servicers, short-term lenders and bill payment providers, did not support Treasury's proposal. It viewed the proposal as depriving Americans of the right of choice with respect to the delivery of Federal nontax payments, disproportionately affecting low- and moderate-income individuals.

Treasury received six comment letters from individual or unidentified commenters with various concerns. One of these commenters, a coordinator of a local Volunteer Income Tax Assistance program, supported the proposed rule, encouraged Treasury to discontinue the ETA program, and suggested modifying the Direct Express® card program to provide at least one surcharge-free automated teller machine (ATM) withdrawal at any ATM. Another commenter, a certified public accountant, raised concerns about whether the proposed rule would create problems if nursing homes are unable to clearly identify the resident for whom a benefit payment has been directly deposited to the nursing home's trust account. Another individual suggested that Treasury clarify that it continues to support the ETA as an option for receiving Federal benefit payments by direct deposit. Another individual suggested that Treasury require financial institutions to allow recipients of Federal funds to obtain the full amount of their payment in one transaction with minimal charge. An individual attorney raised a concern that direct deposit of Social Security disability or SSI benefits could inadvertently lead to disqualification from Medicaid whereas an individual receiving a paper check payment can control when the payment is deposited into his or her account. An unidentified individual opposed the proposed rule primarily because the commenter believed that benefit recipients are entitled to choose to receive their payments by paper check, and did not agree with Treasury's underlying rationale for the proposed rule.

In addition to its own comment, one consumer advocate organization sent Treasury 1,087 comments it solicited and received through its Web site. Sixty-three of the Web site commenters expressed support for Treasury's proposed rule, but most of the commenters opposed the proposal for one or more of the following reasons: (1) 845 of the commenters cited a preference for allowing those who wish to continue to receive a paper check to do so (more than 140 of the commenters already receive their payments electronically, but were concerned for others who may choose not to do so); (2) 615 of the commenters cited an objection to bank fees, including Direct Express® card fees, with approximately 482 commenters objecting to requiring a benefit recipient to pay fees to receive a monthly paper statement; (3) 558 commenters cited concerns about requiring benefit recipients to bank online and/or discomfort with adapting to new payment technologies, especially for older benefit recipients; (4) 475 commenters cited concerns about whether electronic banking would lead to increased identity theft; (5) 410 commenters cited concerns about providing bank account information to the Social Security Administration or other Federal agencies; and (6) 134 commenters were concerned about the ability of elderly benefit recipients to change the way they receive their benefit payments. Approximately 125 of the commenters simply expressed general opposition to Treasury's proposal. Other miscellaneous reasons for opposing Treasury's proposal included preference for checks (65 commenters), concerns about EFT processing (13 commenters) and improper garnishment (6 commenters), opposition to prepaid cards (21 commenters), concerns about access to the banking system (35 commenters), need for access to a free account (18 commenters), and hardship (10 commenters).

Finally, three Federal government agencies submitted comments for Treasury's consideration. One agency

expressed uncertainty about whether recipients of payments from that agency would qualify for the Direct Express® card. Two agencies raised concerns about making payments to recipients who reside in geographically remote areas with no access to electronic financial services.

III. Treasury's Responses to NPRM Comments

In developing the final rule, Treasury has attempted to implement the requirements of Section 3332 on balance with concerns expressed by different commenters. The final rule essentially adopts the core provisions of the proposed rule, and also makes available several important waivers for individuals in circumstances in which Treasury finds that requiring EFT could create a significant hardship for those individuals. The final rule reflects the view of the commenters who generally agree that receiving payments by EFT is beneficial to recipients and taxpayers for the reasons described in the NPRM and this final rule. Treasury has addressed the concerns raised by those opposed to the EFT requirement, and will continue to monitor carefully whether recipients are subject to additional hardships in the future because of the requirements of this final rule. Treasury's responses to the NPRM comments are as follows.

1. Retain Paper Check as a Payment Option

Many commenters voiced a preference for Treasury to allow recipients the choice of a paper check as a way to receive their Federal payments. Treasury recognizes that the paper check has been an important Federal payment instrument for at least 150 years. Treasury also recognizes that choice, as expressed by many of the commenters, is an important American value. While Congress mandated that all non-tax payments be made electronically, Part 208 continues to offer payment recipients the choice of how to receive their payments in an electronic format. Payment recipients have many financial account options available to them, and in fiscal year 2010, more than 80% of all non-tax payment recipients selected their own accounts for the purpose of receiving payments by EFT. Further, Congress conditioned its mandate on Treasury making available to payment recipients an account at a financial institution "at a reasonable cost" and with "the same consumer protections with respect to the account as other account holders at the same financial institution." *See* 31 U.S.C. 3332(f), (i)(2).

The Direct Express® card, which is now a nationwide option for most Federal benefit recipients, meets these statutory account requirements. There are no monthly fees and most services are free, so it is possible for an individual to use the Direct Express® card for free. There are no fees for cardholders to sign up for or activate the card; receive deposits; make purchases at retail locations, online or by telephone; get cash at retail locations and financial institutions; or check the card's balance at an ATM, by telephone or online. Transaction history and other account information are available at no cost online or by telephone, but if desired, a cardholder may receive a monthly paper statement for $ .75 per month. There are no fees for declined transactions and, in rare instances when overdrafts occur, there are no overdraft fees.

Cardholders can choose to receive free automated text, email or telephone "low balance" alerts or "deposit notifications" when money is deposited to their card account. Cardholders may close their Direct Express® card account at any time without a fee. There are no inactivity fees and there is no charge for bank teller cash withdrawals at MasterCard® member banks. The free services and minimal fees are fully disclosed on the Direct Express® Web site (*www.USDirectExpress.com*), in materials available to interested applicants, and in materials that are sent to new cardholders along with the card. Fee and features information are also available by calling the Direct Express® toll-free call center.

Cardholders may make purchases anywhere Debit MasterCard® is accepted, including millions of retail locations worldwide, online, or by telephone. The Direct Express® card provider does not impose any limits on the number of transactions a cardholder may conduct with a card. Similarly, cardholders may make cash withdrawals and check their account balances at ATMs. A cardholder is allowed one free ATM cash withdrawal for every Federal payment the cardholder receives, valid until the end of the month following the month of receipt. For subsequent ATM cash withdrawals, a cardholder pays a fee to the card issuer of $.90 per ATM withdrawal in the United States. ATM owners often charge ATM users additional fees, known as "surcharge fees;" however, a Direct Express® cardholder may make cash withdrawals at more than 53,000 Direct Express® card surcharge-free network ATMs without paying any surcharge fees. The Direct Express® card surcharge-free ATM network consists of ATMs owned by a variety of entities who have agreed to offer surcharge-free ATM access to Direct Express® cardholders. Cardholders are provided with information on how to recognize the various logos that identify a surcharge-free ATM, the Direct Express® card Web site has an ATM locator feature to assist cardholders in finding a surcharge-free ATM, and cardholders may call the customer service department with any questions on how to locate a surcharge-free ATM. The Direct Express® card provider does not impose a daily limit for ATM withdrawals, although many ATM owners do set limits on the maximum amount of cash that may be withdrawn by any debit cardholder. ATM owners' daily ATM withdrawal limits typically range from $200 to $1,000.

Direct Express® cardholders are protected by the Federal Reserve Board's Regulation E (12 CFR part 205, which implements the Electronic Funds Transfer Act (Regulation E)), which generally provides certain protections to a cardholder whose card is lost or stolen, subject to reporting requirements. In fact, Direct Express® cardholders have 90 days to report unauthorized transactions rather than the typical 60 days offered by most financial institutions. Card balances are covered by deposit insurance by the Federal Deposit Insurance Corporation (FDIC) to the extent allowed by law and Direct Express® cardholders are not at risk for an improper garnishment or the related freezing of funds in the card account. More information about the Direct Express® card, including a list of all fees and the terms and conditions of card use, can be found at *www.USDirectExpress.com.*

In light of the choices available to payment recipients, as well as the benefits of electronic payments to recipients and the Government, Treasury believes it is appropriate to make all Federal nontax payments electronically.

2. Provide Limited Waivers From EFT Requirement

a. Limited Waivers for Hardship Based on Mental Impairment and Geographic Barriers

In its NPRM, Treasury requested comments about "examples of exceptional circumstances where specific types of individual EFT waivers could be needed, even with the availability of the Direct Express® card for Federal benefit recipients." *See* 75 FR 34394, at 34395. After review and consideration of all of the comments,

Treasury agrees with those commenters who urged Treasury to reconsider its proposed elimination of individual waivers from the EFT requirement for claims of hardships due to mental disability or geographic barriers. Treasury does not agree, however, that such reconsideration should be extended to the elimination of waivers related to physical disability, language or literacy barriers, or where payment by EFT would impose a financial hardship. None of the commenters provided specific examples of how physical disability or language or literacy barriers would make receiving payments by EFT more difficult than receiving payments by paper check and Treasury does not find any basis for maintaining a waiver for such conditions. In addition, although several commenters urged Treasury to consider that any fees charged for use of the Direct Express® card could create a financial hardship, the Direct Express® card is structured in such a way that it may be used at no cost to the payment recipient, thus minimizing a beneficiary's risk of incurring a financial hardship to receive and use his or her benefits. Treasury recognizes that more education regarding how to use the card for free is needed and is expanding its program to provide such information to Direct Express® cardholders in various ways, including direct mail, informational pictorial brochures, online videos, and more.

One consumer advocate organization urged Treasury to retain a paper check option for those who articulate a "legitimate" reason for receiving payments by paper check, including physical or mental disability that makes it difficult to use a debit card; difficulty accessing funds without incurring fees, costs, or inconvenience; availability of a less expensive and more beneficial alternative using a paper check; dispute with the participating financial provider of the debit card; concerns over privacy or financial security; literacy and technology barriers; and need to accommodate assistance provided by a representative payee or family member. This commenter proposed that Treasury accept individuals' statements about the need for a paper check without inquiry or review. Another consumer advocate organization similarly urged Treasury to reconsider its proposal to eliminate individual waivers with respect to people with mental disabilities, emotional disorders, or other disabilities making the use of the Direct Express® card difficult; people who live in rural areas, or even inner city areas, where there is not ready access to banks and automated teller machines (ATMs); and other hardships that make both a bank account and the Direct Express® card unusable for the payment recipient. This organization also suggested that Treasury not review waiver requests because the costs of policing a waiver process would far outweigh the costs associated with letting recipients who would not qualify for a waiver receive a paper check. Another consumer advocate organization also objected to the elimination of the provision allowing recipients to determine on their own whether they qualify for a waiver to obtain their Federal payments by paper check. Unlike the other two consumer advocate organizations, this organization urged Treasury to offer the broadest waiver possible to allow any individual who wants his or her payments by paper check to receive them that way.

After reviewing the comments, Treasury has reconsidered its proposed elimination of the waivers related to mental disability and geographic barriers. A consumer advocate organization commented on the need to provide a waiver for individuals who have mental or emotional disabilities, for example, someone with an anxiety disorder that makes it difficult to receive benefits electronically, but not by paper check. Another commenter cited his parents with poor memories stating that having their payments deposited electronically would simply add to their confusion and problems in taking care of their own finances. In recognition of individuals within the payment recipient population who may have mental impairments that do not hinder their ability to manage their financial transactions using checks or cash, but for whom EFT would present a significant hardship, Treasury is retaining a waiver from the EFT requirement for an individual payment recipient for whom EFT would impose a hardship because of his or her inability to manage a bank account or prepaid debit card due to a mental impairment. Treasury notes that, in those cases where a beneficiary suffers from a mental disability necessitating the appointment of a representative payee, the representative payee is the "recipient" of a Federal payment under this rule. In those cases, it is the condition of the representative payee and not the beneficiary that is the determining factor as to whether a waiver is appropriate.

Two Federal agencies cited the need to consider the inability of payment recipients who live in remote and less developed areas of the country to access their payments electronically. For example, according to one agency, many recipients of Individual Indian Money payments live in remote and less developed areas such as Alaska and on reservations throughout Indian Country in an environment lacking many amenities including public infrastructure such as roads and convenient access to providers of goods and services. The other agency noted that Regional Advisory Council members appointed under the Alaska National Interest Lands Conservation Act (ANILCA) travel to council meetings held in off-roadway bush villages where it is highly unusual for most village merchants to have the infrastructure to accept charge cards. These villages are cash economies with check cashing capabilities, but no ability to process electronic financial transactions. In its comment, one consumer advocate organization cited the lack of access to banks and ATMs in the majority of Montana, rural parts of Alaska, and some rural parts of Missouri. The fact that an area is rural or remote does not necessarily preclude the use of electronic financial services. As these examples demonstrate, it is the combination of being in an area that is rural or remote plus being in an area lacking the transportation or other infrastructure (for example, access to the Internet and online banking) necessary to access electronic financial services. Therefore, Treasury is including in the final rule a waiver from the EFT requirement for an individual recipient who lives in a remote area lacking the infrastructure to support electronic financial transactions.

Under this final rule, to assert one of these two waivers based on mental impairment or geographic barrier, a Federal payment recipient is required to provide to Treasury a written certification supporting his or her request, in such form as Treasury may prescribe. The individual is required to sign the certification before a notary public, or otherwise file the certification in such form that Treasury may prescribe. Treasury will publish guidance describing the waiver process.

b. Automatic Waivers for Recipients Born Prior to May 1, 1921 Who Are Receiving Federal Payments by Check on March 1, 2013; for Payments Not Eligible for the Direct Express® Card; and for Recipients Whose Direct Express® Card Has Been Suspended or Cancelled

In addition to the limited waivers from the EFT requirement for hardship claims due to mental impairment and geographic barriers, Treasury has added automatic waivers for: (1) A recipient

born prior to May 1, 1921, who is receiving Federal payments by check on March 1, 2013; (2) a payment that is not eligible for deposit to a Direct Express® prepaid card account; and (3) a recipient whose Direct Express® card has been suspended or cancelled.

Many commenters were concerned about the ability of elderly check payment recipients to adapt to electronic money technologies. For example, one consumer advocate organization explained that "[p]eople who are older are more likely to be unaccustomed to or uncomfortable using the technology involved in electronic disbursements." An individual commenter noted: "Many of us older people do not understand and get confused by this paperless society * * *" On the other hand, another commenter believed that paper checks cause problems for older people noting that through her work as a coordinator of a Volunteer Income Tax Assistance program in Missouri, she has "witnessed firsthand the hardships that * * * elderly * * * individuals face when a Treasury Check is lost or misdirected through the mail." Many senior citizens receive their benefit payments electronically, and are very capable of managing their finances electronically.

In recognition of the concerns raised by the commenters about the elderly, Treasury has established an automatic waiver from the EFT requirement for recipients born prior to May 1, 1921, who are receiving Federal payments by check on March 1, 2013. According to the Social Security Administration, almost 80% of Social Security recipients who will turn 80 years old in 2011 receive their payments electronically. By comparison, fewer than 72% of Social Security recipients who will turn 90 years old in 2011 receive their payments electronically. Further, for most of the population of elderly benefit recipients, the EFT requirement is not effective until March 2013, giving Treasury, Federal agencies, community organizations, and others more than two years to educate individuals so they may become comfortable with and adapt to the requirement. Between the publication of the final rule and the effective date for current check recipients, Treasury will work with Federal agencies and various organizations to educate all affected individuals, including the elderly and long-time check recipients, about how to use direct deposit or the Direct Express® debit card.

Treasury has also waived the EFT requirement for any payment that is not eligible for a Direct Express® card account and for those payment recipients whose Direct Express® card has been suspended or cancelled by the card issuer due to improper, fraudulent, or unauthorized use. The Direct Express® card program currently accepts Social Security, SSI, and Veterans compensation and pension benefit payments, as well as Railroad Retirement benefit, Black Lung benefit, and civil service retirement benefit payments. If a recipient receives a payment for which the Direct Express® card is unavailable (for example, an Individual Indian Money payment or a pension benefit payment), then the individual is automatically exempt from the EFT requirement for that payment type. Once the card becomes available for the payment type, then the recipient will be required to switch to an EFT payment option. If the individual also receives other types of Federal payments that are accepted by the Direct Express® card, those payments remain subject to the EFT requirement.

Further, under the terms and conditions of the Direct Express® card program, the card issuer reserves the right to suspend or cancel the Direct Express® card for reasons such as cardholder breach of the account terms and conditions, multiple cardholder claims of unauthorized transactions, a card being used for an unlawful purpose, or other similar reasons. Treasury agrees that the card provider needs to retain the right to suspend or cancel an individual's card account in these types of cases, and recognizes that in the few instances where suspension or cancellation occurs, the payment recipient may have no other way to receive his or her payment except by a paper check.

c. Elimination of Waivers Based on Hardship Due to Physical Disability, Language or Literacy Barriers, or Where Payment by EFT Would Impose a Financial Hardship

Given the availability of the Direct Express® card and Treasury's expansion of its public education campaign describing how to use the Direct Express® card, physical disability, language or literacy barriers, and fees no longer present hardships requiring waivers from the EFT requirement.

i. *Physical Disability.* As noted above, Treasury requested specific examples of the types of hardships that could make it difficult to use EFT as compared to a paper check, but none were cited by the many commenters. While Treasury recognizes that not all physical disability barriers have been eliminated, the Americans With Disabilities Act of 1990, Public Law101–336 (Jul. 26, 1990), and the advent of many services that benefit the physically disabled, such as accessible transportation, public accommodations, and online banking, have generally rendered receiving benefit payments by EFT no more difficult than receiving payments by paper check. In some cases, EFT payments may even be easier for the recipient. With the elimination of this waiver, Treasury recognizes that for those who are physically disabled, the ability to travel in remote and rural areas may be limited, but considers this to be more a hardship due to a geographic barrier, described above, than solely because of a physical disability. In addition, as suggested by two commenters, Treasury is working with the Direct Express® card provider to determine the feasibility of providing cardholders with an additional convenience card that could be loaded via the Internet or by telephone with a cardholder-determined amount of funds for use by a caregiver or relative to make purchases on behalf of the cardholder.

ii. *Language Barriers.* None of the commenters urged Treasury to continue the waiver from the EFT requirements based on hardship due to language barriers. All of the Direct Express® cardholder materials are in English and Spanish, and the Direct Express® card provider offers both English and Spanish support through its automated telephone service and its customer service representatives. Callers may choose to speak with a customer service representative in either language. In addition, the Direct Express® card provider offers real-time free interpreter services in virtually any language a caller requires. For example, in September 2010, the Direct Express® card provider handled customer service calls in 19 different languages in addition to English, including languages such as Mandarin, Urdu, Tagalog, and Tigrinya.

iii. *Literacy Barriers.* None of the commenters specifically urged Treasury to continue its waiver based on hardship due to literacy barriers, although several commenters alluded to the difficulties people have due to a lack of basic literacy skills. For example, one commenter noted that the constituents she works with in a poor, rural area of Georgia are often barely literate and deal with cash because they understand it. Treasury recognizes that lack of basic literacy skills hinders many in managing their financial affairs, and understands the challenges associated with moving some individuals to payment by EFT from payment by paper check. The delayed effective date of the rule for those currently receiving paper checks to March 2013, gives Treasury

additional time to expand its public education efforts related to EFT options. Among other things, through its Go Direct ® campaign, Treasury will work with more than 1,800 partners who know their communities best to help educate check recipients about the benefits of direct deposit, the options for receiving payments electronically, and how to safely and cost-effectively use the Direct Express® card. With the assistance of its partners, Treasury is able to tailor its education efforts to meet the differing needs of local communities.

Treasury especially recognizes the need for and importance of expanded cardholder education for existing and new Direct Express® cardholders. While Treasury recognizes that the current pool of Direct Express® cardholders may not resemble future Direct Express® cardholders in either demographic characteristics or attitudinal variables, according to research conducted in March 2009 (Direct Express—Cardholder Satisfaction and Usage Survey, OMB Control No. 1510–0074), 95 percent of Direct Express® cardholders are satisfied with the card.[2] Eight in ten satisfied cardholders cite convenience, safety or immediate access to money as reasons for their satisfaction. Eighty-six percent of those surveyed said they would recommend the card to a friend or family member who receives Federal benefits. Despite this high satisfaction rate, Treasury believes that many Direct Express® cardholders may be unaware of important features that promote proper card usage and reduce fees, such as the availability of free text message alerts on their cell phones when a deposit is made or when their balance is low, the surcharge free ATM network, the ability to get cash back at point-of-sale (POS) locations for free, or even the ability to make purchases at retail locations for free. Using its research, including recent research conducted with respect to cardholder education materials sent to approximately 7,000 newly enrolled Direct Express® cardholders who receive Veterans compensation and pension benefit payments, Treasury will develop materials, such as informational pictorial brochures, and methods for further educating benefit recipients as necessary, and as suggested by several commenters.

In addition, Treasury continues to work with its Go Direct® partners to promote financial education. For example, through its partnership with the Federal Deposit Insurance Corporation (FDIC), the Go Direct® campaign is working to raise awareness of the value of financial education through the FDIC's award-winning Money Smart financial education program. The Money Smart program is a comprehensive financial education curriculum designed to help individuals outside the financial mainstream enhance their financial skills and create positive banking relationships. Many Go Direct® campaign partners have used the Money Smart curriculum in their financial education efforts, including banks, credit unions, law enforcement and crime prevention organizations, aging and senior organizations, library systems, and community and disability organizations.

iv. *Financial Hardship.* Many commenters suggested that the cost of receiving payments electronically is higher than receiving payments by paper check for many benefit recipients, and expressed concern that Treasury's EFT requirement will create a financial hardship for many of America's most vulnerable population. Treasury's goal is to provide Federal beneficiaries and other payment recipients with a low-cost option for receipt of Federal payments, which goes beyond the requirement in Section 3332 that Treasury make available an account at a "reasonable cost." *See* 31 U.S.C. 3332(i)(2)(a). In addition to low-cost accounts available from financial institutions and other financial service providers around the country, Federal payment recipients have at least one low-cost option—the Direct Express® card—and many recipients potentially have a second option—the Electronic Transfer Account (ETA), an account developed by Treasury in 1999. Although the ETA is not available on a nationwide basis and does not include some of the more useful features that have become available with prepaid debit cards in recent years (thus making the Direct Express® card a more cost-effective and useful option in most cases), the ETA continues to meet the needs of some benefit recipients and will continue to be available.

The Direct Express® card offers a user-friendly low-cost option for Federal benefit payment recipients (*see* Direct Express® card fee tables below). The account fees are structured so that even those cardholders without access to surcharge-free ATMs can use their cards for free because they can access their funds through free POS purchases either in-store or online, can get cash back for free at retail locations, and can get cash for free at any MasterCard® member financial institution. The Direct Express® surcharge-free ATM network has more than 53,000 surcharge-free ATMs, and the Direct Express® card program provider continues to identify opportunities to expand the network further.

While many commenters expressed concern about having to pay fees to the Direct Express® card provider, or pay fees to receive a paper statement, Treasury believes that these fees are generally lower than costs that could be imposed for cashing a Treasury check and managing financial transactions on a cash basis. The Direct Express® fee tables are as follows:

STANDARD FREE SERVICES

Service	Fee
Purchases at U.S. merchant locations	FREE
Cashback with purchase	FREE
Cash from bank tellers	FREE
Customer service calls	FREE
Web account access	FREE
Deposit notification	FREE
Low balance notification	FREE
Card replacement-One free per year	FREE
ATM balance inquiry	FREE
ATM denial of service	FREE

[2] Summaries of all of the surveys conducted by or on behalf of Treasury that are cited in this rulemaking may be found at *http://www.fms.treas.gov/eft.*

STANDARD FREE SERVICES—Continued

Service	Fee
ATM cash withdrawal in the U.S. including the District of Columbia, Guam, Puerto Rico, and U.S. Virgin Islands. Surcharge by ATM owner may apply.	One free withdrawal with each deposit to your Direct Express® Card Account.*

* For each Federal government deposit to your Card Account, Comerica Bank will waive the fee for one ATM cash withdrawal in the U.S. The fee waiver earned for that deposit expires on the last day of the following month in which the deposit was credited to the Card Account.

THE ONLY FEES YOU CAN BE CHARGED

Optional service	Fee
ATM cash withdrawals after free transactions are used in U.S. including the District of Columbia, Guam, Puerto Rico, and U.S. Virgin Islands. Surcharge by ATM owner may apply.	$0.90 each withdrawal (after free transactions are used).
Monthly paper statement mailed to you	$0.75 each month.
Funds transfer to a personal U.S. bank account	$1.50 each time.
Card replacement after one free each year	$4.00 after one (1) free each year.
Overnight delivery of replacement card	$13.50 each time.
ATM cash withdrawal outside of U.S. Surcharge by ATM owner may apply	$3.00 plus 3% of amount withdrawn.
Purchase at Merchant Locations outside of U.S.	3% of purchase amount.

The low fees and nationwide availability of the Direct Express® card more than satisfy the statutory requirement of 31 U.S.C. 3332 for Treasury to make available an account at a financial institution "at a reasonable cost" and with "the same consumer protections with respect to the account as other account holders at the same financial institution." *See* 31 U.S.C. 3332(f), (i)(2).

A recent report comparing fees for general purpose reloadable prepaid cards helps illustrate the low cost of using a Direct Express® card. A consumer advocate organization conducted a case study showing the wide variations in fee structures for four prepaid card products. *See,* "Prepaid Cards: Second-Tier Bank Account Substitutes," Consumers Union (September 2010) (*http://www.defendyourdollars.org/pdf/2010PrepaidWP.pdf*). Using a sample consumer scenario,[3] the report stated that, for the four prepaid card products studied, monthly fees ranged from $15.45 to $43.75 for the first and second months of card use. In contrast, as shown in Figure 1, below, a Direct Express® cardholder under the same scenario would spend no more than $ .90 per month if using surcharge-free ATMs (one free ATM withdrawal per deposit, with a $ .90 per ATM withdrawal charge after that), and no more than $7.89 per month if no surcharge-free ATMs were used, assuming the average $2.33 surcharge fee per withdrawal cited in the 2010 checking study by bankrate.com (*http://www.bankrate.com/finance/checking/banks-taking-a-bigger-bite-with-atm-fees.aspx*).[4] There is no online bill paying service currently offered in the Direct Express® card program, so a cardholder would pay his or her own bills directly to the vendor or retailer, with no fee being charged by the provider. The Direct Express® card provider does not impose charges for POS purchases, balance inquiries, or for receiving a deposit.

FIG. 1—DIRECT EXPRESS® CARD FEES: SAMPLE SCENARIO

Direct Express® Card transactions	Fees (with no ATM surcharge)	Fees (with ATM surcharge of $2.33)
1st ATM withdrawal (free with 1st deposit)	FREE	$2.33
2nd ATM withdrawal (free with 2nd deposit)	FREE	2.33
3rd ATM withdrawal	$ .90	3.23
Three bill payments	FREE	FREE
Eight POS	FREE	FREE
Weekly Balance Inquiry	FREE	FREE
Two Deposits	FREE	FREE
Total	.90	7.89

In addition, the Direct Express® card does not have any monthly fees, fees for activating the card, or fees for customer service calls, which can drive up costs of other prepaid card products. By educating Direct Express® cardholders to learn how to avoid multiple ATM withdrawals, cardholders can quickly learn how to incur no monthly fees whatsoever.

The regulatory impact assessment, below, contains additional scenarios describing the Direct Express® card fees based on card usage.

Costs incurred to use the Direct Express® card can compare favorably to the cost of cashing a check and conducting necessary cash transactions. While some individuals may be able to cash government checks at no cost, there are often fees of up to $20 or more for cashing a check, according to Treasury's research in 2007 (SSA & SSI Check Recipient Survey, OMB Control No. 1510–0074). Check recipients may also incur money order and postage costs to pay bills that are not incurred with the Direct Express® card.

3. Suggested Changes to Direct Express® Card Program. Various Commenters Suggested a Number of Ways That the Direct Express® Card Should Be Changed

a. *ATM Cash Withdrawal Fees.* A few commenters suggested a range of ways to maximize a cardholder's ability to access his or her cash from an ATM for free. Suggestions ranged from providing cardholders with at least one surcharge-free ATM withdrawal to providing free unlimited ATM withdrawals and expanding the current surcharge-free network. Treasury's current Direct Express® card offers sufficient opportunities for a cardholder to access his or her cash without incurring a fee.

[3] The sample consumer scenario in the cited report consisted of a cardholder making the following transactions in a month: Three ATM withdrawals, three bill payments (rent, utilities, phone), eight point-of-sale purchases (groceries and meals once a week), weekly balance inquiry, and two deposits.

[4] The consumer scenarios used in the cited report assumed that the cardholder did not incur any ATM surcharge fees.

The Direct Express® card program offers one free ATM withdrawal for each deposit received. The free withdrawal is valid until the last day of the month following the month of receipt of the deposit. Thus, if a cardholder receives two deposits in January 2011, the cardholder is entitled to two free ATM cash withdrawals that are good until February 28, 2011. In addition, cardholders may obtain cash at retail locations and bank tellers without incurring a fee. The Direct Express® card provider does not impose limits on the number of cash back or teller transactions a cardholder may conduct, although merchants may impose a limit on the amount of cash back a cardholder may receive.

After using available free withdrawals, Direct Express® cardholders who choose to withdraw additional cash from an ATM are charged a fee by the Direct Express® card provider of $ .90 per withdrawal. The card provider does not impose any limits on ATM withdrawals. If the cardholder withdraws cash from an ATM that is not in the Direct Express® network, the ATM owner may charge the cardholder an additional fee, known as a "surcharge," which can range from $1.00 to $3.50 or more. If the cardholder uses one of the more than 53,000 Direct Express® surcharge-free ATMs, the cardholder can avoid a surcharge fee. The Direct Express® card provider continues to look for ways to expand the network, and Treasury will continue to educate current and new cardholders about alternative ways to get cash without paying a fee and how to use their card to pay for goods and services.

b. *Free Monthly Paper Statements.* Several commenters stated a preference for paper statements at no cost to the cardholder. Currently, Direct Express® cardholders may obtain transaction and balance information for free by calling a customer service number or visiting the Direct Express® secure Web site. Upon request, the Direct Express® card provider will send a cardholder a paper transaction history at no cost. In addition, cardholders may sign up for free text message, phone call, or email alerts when they receive a deposit or reach a low balance amount pre-determined by the cardholder. If a cardholder prefers a monthly paper statement, the provider charges a fee of $ .75 per month. Because not every cardholder desires or would use a paper statement, and because transaction and balance information is available via different mechanisms, Treasury has determined that the cost of paper statements should be borne by those who want them. While other bank accounts may offer free monthly paper statements, as one commenter noted, these bank accounts generally also require credit checks and minimum balances, and have other requirements that hinder the ability of recipients to obtain accounts, none of which are required to open a Direct Express® card account. Two commenters suggested that the Direct Express® card program at a minimum offer a free annual paper statement for those who do not elect to receive electronic or monthly paper statements. The Direct Express® card provider currently makes available a cardholder's complete transaction history, upon request and at no cost. Therefore, Treasury believes that it has adequately addressed concerns related to free monthly statements.

c. *Encourage Opt In Election at Enrollment Time of Method for Receiving Transaction Information.* One commenter suggested that cardholders who sign up for a Direct Express® card be given the opportunity at enrollment to elect to receive paper statements, text messages, or electronic mail messages with transactions and balance information. Treasury explored this suggestion, but determined that it is not feasible at this time given that many of the Direct Express® card enrollments are handled by the respective Federal benefit agency when the beneficiary is applying for his or her benefit. Treasury is exploring the use of additional mailings to cardholders to ensure that cardholders are aware of their options for receiving transaction and balance information.

d. *Provide Additional Convenience Card.* Two commenters suggested that the Direct Express® card program provide cardholders with the option of allocating a discrete amount of their funds to a second convenience card. The cardholder could then give this card to a caregiver or relative who could use it to make purchases for the cardholder. In this way, the cardholder would not have to turn over his or her primary card to the caregiver or relative and trust the caregiver or relative not to use all of the funds. Treasury supports this suggestion as a way to mitigate a cardholder's risks and is working with the Direct Express® card provider to determine the feasibility and cost of providing this option.

e. *Provide Access to Checks.* Two commenters suggested that the Direct Express® card program provide cardholders with the ability to write checks. Treasury has explored this suggestion, but is concerned that adding such an option could potentially increase fraud opportunities, add complexity to the card program, and increase costs to the cardholder. Instead, Treasury will educate cardholders on how to avoid the need to use checks by making purchases with the debit card, and if checks are necessary, where to find low-cost money orders. In addition, MasterCard has an initiative aimed at increasing acceptance of its card products by property managers. As part of this initiative, Treasury and MasterCard are working together to emphasize to property managers the importance of accepting the Direct Express® card for rent payments.

f. *Ability to Reload Cards With Non-Federal Funds.* Two commenters suggested that the Direct Express® card program be expanded to allow cardholders to deposit funds other than Federal payments to their card account. Treasury does not plan to implement this suggestion at this time because of the increased cost to the Direct Express® card program, increased opportunity for fraud, and added complexity for cardholders. Treasury has plans to expand the card program to include as many Federal payments as possible.

With respect to the broader need for more safe, low-cost financial account options, Treasury is exploring the feasibility of offering general purpose accounts to low- and moderate-income tax refund recipients and encouraging initiatives for financial products and services that are appropriate and accessible for millions of Americans who are not fully incorporated into the financial mainstream, as authorized by the "Improving Access to Mainstream Financial Institutions Act of 2010," enacted as Title XII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, Jul. 21, 2010). The FDIC also is encouraging the banking industry to offer safe, low-cost transaction and basic savings account products for low- and moderate-income customers with its Model Safe Accounts Pilot (*http://www.fdic.gov/consumers/template/*).

g. *Changes to Terms and Conditions of the Direct Express® Card Program.* Three commenters suggested changing some of the terms and conditions of the Direct Express® card program. One suggestion was to change the title of the Direct Express® card program provider's terms and conditions document to "Notice of Rights and Obligations." Other suggestions were to prohibit terms that waive a cardholder's right to a jury trial or to bring a class action lawsuit; to allow disputes to be governed by the laws of the state in which the cardholder resides, rather than the State of Michigan, which is where the Direct Express® card provider is located; not to require that the recipient contact the

merchant prior to cancelling a preauthorized transfer; to make clearer when the time to dispute a charge begins; make clearer that garnishments are not permitted, except as authorized by law (for example, to collect delinquent taxes or child support); and to improve the protections under Regulation E. Treasury will review the terms and conditions and, at a minimum, will ask the Direct Express® card provider to clarify the language regarding dispute time frames and garnishments. At this time, Treasury does not plan to implement the remaining suggestions, which would result in additional costs to the Direct Express® card program, and perhaps even preclude Treasury from offering a valuable low-cost account option for those beneficiaries who prefer a prepaid debit card over a bank account. For example, allowing lawsuits involving the Direct Express® card program to be based on various choice-of-law provisions would increase costs for the program to an unacceptable level, leaving a large number of Federal benefit recipients without any cost-effective option for enjoying the safety and convenience of direct deposit. Requiring the Direct Express® provider to cancel a preauthorized debit before the cardholder has contacted the merchant could leave cardholders vulnerable to cancellation of needed goods or services because of a lack of understanding about the need to make alternative payment arrangements for necessary services, such as utilities. The Direct Express® card provider follows standard industry practices, except that with respect to the protections afforded under Regulation E, the Direct Express® card provider offers an extended time period within which to dispute a transaction from the industry standard of 60 days to 90 days. Treasury believes it has obtained the best possible terms and conditions for an account that provides the most cost-effective, consumer-friendly terms available. Treasury will, however, continue to work closely with the Direct Express® card provider to identify and suggest improvements to the program. Even though satisfaction with the Direct Express® card program among current cardholders remains very high at 95% (Direct Express®—Cardholder Satisfaction and Usage Survey, March 2009, OMB Control No. 1510–0074), Treasury is committed to taking all feasible and cost-effective steps to improve the program because the agency recognizes that current users may be different than future users in their demographic characteristics or attitudes towards the use of prepaid debit cards. In addition, it should be noted that, at any time, benefit recipients may choose direct deposit to their bank account rather than the Direct Express® card.

h. *Cardholder Education.* Several commenters suggested that Treasury should do more to educate beneficiaries about their payment options, and specifically about the Direct Express® card features, fees, and terms. One commenter suggested that the Direct Express® card program customer service be improved to make it easier to reach an operator. Another commenter suggested that cardholders should be provided with a wallet size information card, noting that "[t]hough the information on the Direct Express® card is generally quite good, it could be improved." As mentioned previously, Treasury will be launching its expanded cardholder education campaign immediately to ensure that information about the Direct Express® card and how to use it are easily accessible to the beneficiary population for whom the card is intended. As part of its education effort, Treasury is in the process of working with the Direct Express® card provider to develop a wallet size information card for cardholders and pictorial brochure with information on how to use the card. In addition, Treasury works continuously with the Direct Express® card provider to maximize and improve customer service. For example, when Treasury and the provider learned of the difficulties cardholders were having in reaching a live customer service representative, the provider modified its telephone system and automated messages to make contact with a live representative easier from a cardholder's perspective. Among other things, Treasury's plans for cardholder education include direct mail and other communications explaining how to use the card to make purchases, pay bills, get cash back, as well as information about how to check balances and transaction history. As appropriate, Treasury will work with its 1,800 Go Direct® partners to further enhance its cardholder education efforts.

4. *Regulation of the Banking Industry and Prepaid Cards.* Several commenters suggested that Treasury take steps to improve consumer protections associated with financial services products. One commenter suggested that Section 3332 requires Treasury to take steps to ensure that *any* account established by an individual to comply with the EFT requirement is available at a "reasonable cost" and stated that Treasury is not complying with the statutory mandate by providing access to one account at a reasonable cost. Treasury disagrees. The statute does not require Treasury to ensure than any account chosen by a Federal payment recipient's must comply with the Section 3332(i) requirements. The provision requires that Treasury regulations ensure that individuals "required * * * to have *an* account" have "access to such *an* account at a reasonable cost" and with "the same consumer protections with respect to the account as other account holders at the same financial institution" (emphasis added). The Direct Express® card account is *an* account that meets the statutory requirements.

Nonetheless, Treasury is committed to taking steps to resolve several concerns raised by commenters. With respect to protecting Federal beneficiaries from unlawful freezing and garnishment of protected benefits, Treasury and the four major benefit paying agencies—Office of Personnel Management, Railroad Retirement Board, Social Security Administration, and Department of Veterans Affairs—will soon publish a joint rule. *See,* Notice of Proposed Rulemaking, Garnishment of Accounts Containing Federal Benefit Payments, 75 FR 20299, Apr. 19, 2010. The rule will help ensure that garnishment-exempt benefit payments in an account are not improperly seized, by requiring financial institutions to exempt from freezing or seizure a defined amount equivalent to benefit payments deposited to an account prior to a financial institution's receipt of a garnishment order. This new rule will protect benefit recipients where benefit payments are directly deposited to an account at a financial institution.

In response to comments related to allowing Federal payments to be delivered to "safe" prepaid card accounts, Treasury is publishing, on this date, an interim rule amending 31 CFR part 210 (Part 210 Interim Rule), which generally requires that a Federal direct deposit payment be delivered to a deposit account at a financial institution in the name of the recipient, subject to certain exceptions. The Part 210 Interim Rule allows Federal payments to be deposited to an account accessed through a prepaid card or similar card that meets the following requirements, as more fully described in the interim rule: The account funds are insured by the Federal Deposit Insurance Corporation or National Credit Union Share Insurance Fund to the extent permitted by law, the account does not have an attached line of credit or loan feature that triggers automatic repayment from the card account, and

the issuer of the card account provides the cardholder with the same protections under Regulation E required to be provided for payroll card accounts (12 CFR 205.18).

Several other concerns raised by commenters relating to the regulation of bank overdraft fees, account advances offered by financial institutions, and setoff of fees owed by account holders are outside the scope of this rule.

5. *Delay Effective Dates.* Two commenters urged Treasury to delay the proposed effective dates for EFT payments under the NPRM. One consumer advocate organization suggested a delay "until there is a greater confidence that people are prepared to switch to electronic disbursements," but did not specify a date for implementation. This commenter urged more time for education noting that some people shifting to electronic payments will need far more education or counseling than others. Another commenter suggested a delay to 2020. As explained in the NPRM, Treasury has accounted for the unique issues raised for converting current check recipients to electronic payments by delaying the implementation date for those individuals to March 1, 2013. Between now and 2013, Treasury plans a robust campaign to educate people about the EFT requirement, EFT options and costs, how to use EFT, and more. Treasury agrees with commenters who recommend a strong education campaign, and as noted above, plans to utilize and expand its existing network of Go Direct® partners in order to provide outreach and sufficient information to all affected beneficiaries. Therefore, Treasury does not believe that there is a need to further extend the effective dates proposed in the NPRM, except that Treasury is delaying the initial effective date from March 1 to May 1, 2011.

6. *Provide Waiver for Attorney Fees for Social Security Cases.* An organization that represents Social Security claimants' representatives and a number of attorneys who represent Social Security claimants recommended that Treasury exempt attorneys' fee payments from the EFT requirements for two main reasons. First, the individual attorneys or representatives receiving the fee payment are not the "owners" of their firm's bank account, and in some cases, are therefore precluded from electronically depositing their fee payment to the firm's account. This is problematic in these cases because the Social Security Administration does not currently make representative fee payments directly to the firm's account, nor does it currently recognize firms as representatives. Secondly, many attorneys state that their banks are unwilling or unable to provide all of the information needed to identify the client on whose account the deposit was made. This second point is also raised by an individual concerned that nursing homes would similarly be unable to identify the resident to whom a direct deposit payment belongs.

The Social Security Administration recently announced that it will include an "addenda record" to display identifying information with all direct deposit fee payments sent to representatives. *See,* Social Security Administration letter at *http://fms.treas.gov/greenbook/ssarep.pdf.* The Social Security Administration encourages receiving financial institutions to pass through to their account holders, as quickly as possible, pertinent information. In this way, attorneys and other representatives of Social Security claimants will be able to identify the purpose of the payments. In addition, the Social Security Administration may, in the future, recognize firms which might help address the difficulties in using EFT for representative fee payments.

In order to mitigate these difficulties, and until these issues are more fully addressed, Treasury recognizes the need to modify one of the waivers that may be exercised by a paying agency, rather than Treasury, in § 208.4(f) regarding non-recurring payments. As the commenters pointed out, some attorneys and representatives may receive multiple payments in a given year for the multiple clients they represent before the Social Security Administration, and thus do not meet the technical definition of a recipient of a non-recurring payment in § 208.4(f) ("Where the agency does not expect to make more than one payment to the same recipient within a one-year period, *i.e.,* the payment is non-recurring"). To address this, Treasury is modifying § 208.4(f) to allow Federal paying agencies to waive the EFT requirement for payments made to the same recipient in a single year when these payments are not made on a regular, recurring basis and remittance data explaining the purpose of the payments is not readily available from the recipient's financial institution receiving the payment by EFT.

Treasury encourages paying agencies to contact Treasury, before invoking this waiver, to discuss various ways that remittance data can be made available to payment recipients, which may negate the need for a waiver. Treasury discourages the use of this waiver by agencies, and expects the waiver to be employed on an exception basis and only until expanded remittance data is more widely available to attorneys and other representatives. In addition, Treasury notes that there are many options for receipt of remittance data for vendors, and therefore does not expect agencies to use this waiver to exempt vendor payments from the EFT requirements.

Treasury is removing the requirement that agencies determine that the cost of making an EFT payment exceeds the cost of making a payment by check, as it may not be possible for an agency to make this determination.

7. *Privacy and Identity Theft Concerns.* Many commenters raised concerns about electronic banking leading to an increased risk of identity theft. Typically, the comments expressed concern about identity theft through online banking. This rule does not mandate any requirement to bank online. Many financial institutions, including the Direct Express® card provider, offer online banking services as a convenience, but account holders are not required to use these services.

None of the comments specifically articulated exactly how this rule would increase a payment recipient's risk of identity theft. Based on Treasury's experience with paper checks and electronic payments, receiving payments by direct deposit decreases rather than increases the risk of identity theft. As noted in the NPRM, in fiscal year 2009, more than 670,000 Social Security and SSI checks were reported lost or stolen. In fiscal year 2010, more than 540,000 checks were reported as lost or stolen. In fiscal year 2009, Treasury investigated more than 70,000 cases of altered or fraudulently endorsed checks, totaling $64 million in estimated value, and in fiscal year 2010, Treasury investigated almost 50,000 cases totaling $93 million in estimated value. People intent on committing fraud can use a stolen Treasury check, along with other stolen or fake identification documents, to open an account in the recipient's name or otherwise impersonate a check payee. A Treasury check that has been endorsed, but not cashed, offers further opportunities for identity theft.

In addition to identity theft concerns, many commenters expressed concern about their privacy and were opposed to having to disclose their banking information to the Federal Government. Federal agencies are subject to the Privacy Act of 1972, 5 U.S.C. 552a, which strictly governs the collection of personal information from individuals, as well as the maintenance and

disclosure of the information. Among other things, Federal agencies are restricted in how they may use personal information, such as bank account information, and must ensure that the information is not disclosed in an unauthorized way. Except in limited circumstances or with proper consent, bank account information provided by individuals to agencies for the purpose of receiving payment by direct deposit may be used and disclosed only for that purpose. For an example of agency regulations implementing the Privacy Act of 1972, see Treasury's regulations at 31 CFR part 1, subpart C.

With respect to customer account information held by a financial institution, including Direct Express® card account information, the Government is precluded from receiving any customer-specific account information from a financial institution, and the financial institution is precluded from providing any customer-specific account information to the Government, without the account holder's consent or without first following a process that provides the account holder with an opportunity to object to any disclosure, generally for law enforcement purposes. *See,* Right to Financial Privacy Act, 12 U.S.C. 3401, *et seq.*

8. *Continue to Offer the ETA.* A couple of commenters urged Treasury to continue to offer the ETA option for those beneficiaries who opt for this account to receive their benefit payments by direct deposit. Treasury continues to offer the ETA as an alternative to the Direct Express® card. It is also an option for unbanked Federal benefit recipient seeking a safe, affordable banking relationship. Currently, the ETA is offered by 392 financial institutions with over 53,000 branch locations. The ETA program has over 121,000 account holders who receive Federal benefit payments. Although the ETA is not available on a nationwide basis and does not include some of the more useful features that have become available with prepaid debit cards in recent years, it continues to meet the needs of some benefit recipients in certain regions of the country. Treasury has no plans to eliminate the ETA option and continues to support the ETA through its call center and Web site. It should be noted, however, that Treasury is directing more of its resources to educating beneficiaries about the Direct Express® card since the card is available nationwide, provides more useful features than the ETA, and may be used more cost-effectively than an ETA. Information about ETAs may be found at *http://www.eta-find.gov.*

9. *Require EFT to Existing Bank Accounts.* An association that represents financial institutions suggested that when a recipient has an established banking relationship, the default election should be to convert the benefit payment to a direct deposit to that established bank account. Through its Go Direct® campaign, Treasury encourages financial institutions to work with their own customers who receive Federal benefit and other payments by paper check on converting to payment by direct deposit. The Go Direct® campaign communicates the many benefits to financial institutions that encourage their customers to convert to direct deposit, which include increasing a financial institution's customer base and customer loyalty, operational and transaction-based cost savings, and reduction of check fraud. *See* www.godirect.org. Absent clear instructions from a payment recipient, Treasury is unable to ascertain with certainty whether a payment recipient has a current bank account to which payments should be directed. Therefore, Treasury allows each recipient to have payments electronically delivered to an account at a financial institution of his or her choice since the recipient is in the best position to determine the most cost-effective and desirable account option for receipt of his or her Federal payments.

IV. Final Rule

As explained above and in the regulatory impact assessment below, Treasury is revising its NPRM proposal to address the comments we received regarding elimination of all individual waivers from the EFT requirement. Under the final rule, the EFT requirement will not apply to (1) payment recipients born prior to May 1, 1921, who are receiving Federal payments by check on March 1, 2013; (2) payments that are not eligible for deposit to a Direct Express® prepaid card account established pursuant to terms and conditions approved by FMS; and (3) payment recipients whose Direct Express® card has been suspended or cancelled. In addition, an individual payment recipient may request a waiver from the EFT requirement if the EFT requirement would impose a hardship because of the inability of a recipient to manage an account at a financial institution or a Direct Express® card account due to a mental impairment or because a recipient lives in a remote geographic location lacking the infrastructure to support electronic financial transactions. Payment recipients requesting a waiver are required to provide to Treasury a written certification supporting their request, in such form as Treasury may prescribe. The certification requires a recipient to identify the basis for his or her request and provide a brief explanation of how the exception applies to his or her situation. The recipient shall sign the certification before a notary public.

V. Section-by-Section Analysis

New § 208.2(c) adds a definition for "Direct Express® card" as meaning the debit prepaid card issued to recipients of Federal benefits by Treasury's financial agent pursuant to requirements established by Treasury. The Direct Express® card features are explained in the NPRM, in this rulemaking, and on the Direct Express® card Web site at *http://www.USDirectExpress.com.*

Redesignated § 208.2(e) (formerly § 208.2(d)) clarifies that the definition of "electronic benefits transfer" includes disbursement through a Direct Express® card account. As has been the case, "electronic benefits transfer" (EBT) continues to include, but is not limited to, disbursement through an ETA℠ and a Federal/State EBT program.

Section 208.4(a) is divided into two paragraphs (a)(1) and (a)(2). It is noted that, in cases where a representative payee has been designated by the benefit paying agency and is receiving payments on behalf of a beneficiary, the representative payee is the "individual" for purposes of § 208.4(a). Redesignated § 208.4(a)(1) is revised to allow waivers where an individual:

(i) Is receiving a Federal payment by check prior to May 1, 2011. In such cases, the individual may continue to receive those payments by check through February 28, 2013;

(ii) Files a claim for a Federal payment prior to May 1, 2011, and requests payment by check at the time he or she files the claim. In such cases, the individual may receive those payments by check through February 28, 2013;

(iii) Was born prior to May 1, 1921, and is receiving Federal payments by check on March 1, 2013;

(iv) Receives payments that are not eligible for deposit to a Direct Express® card account. In such cases, those payments are not required to be made by electronic funds transfer, unless and until such payments become eligible for deposit to a Direct Express® card account;

(v) Is ineligible for a Direct Express® card because of suspension or cancellation of the individual's card by the Financial Agent;

(vi) Has filed a waiver request with Treasury certifying that payment by electronic funds transfer would impose a hardship because of the individual's inability to manage an account at a financial institution or a Direct Express® card account due to a mental impairment, and Treasury has not rejected the request;

(vii) Has filed a waiver request with Treasury certifying that payment by electronic funds transfer would impose a hardship because of the individual's inability to manage an account at a financial institution or a Direct Express® card account due to the individual living in a remote geographic location lacking the infrastructure to support electronic financial transactions, and Treasury has not rejected the request.

New § 208.4(b) requires payment recipients requesting a waiver from the EFT requirement because of a mental impairment or remote geographic location to provide Treasury with a certification, in writing, supporting their request in such form that Treasury may prescribe. The individual shall attest to the certification before a notary public or otherwise file the certification in such form that Treasury may prescribe. A payment recipient requesting these types of waivers will be required to provide identifying information, such as name, address, and Social Security number, as well as a short statement supporting the reason for the waiver request. Unless Treasury rejects the request, the recipient will not be required to comply with the EFT requirement. As noted above, in cases where a representative payee receives payments on behalf of a beneficiary, the representative payee is the individual requesting the claim based on the representative payee's circumstances. Treasury will be publishing additional guidance regarding the waiver process.

The Secretary's waiver authority remains unchanged, and Federal agencies continue to have the flexibility to waive payment by direct deposit or other EFT method in the circumstances described in redesignated paragraphs (a)(2) through (a)(7) of § 208.4 (formerly paragraphs (b) through (g)), namely, for certain payments to payees in a foreign country where the infrastructure does not support EFT, for certain disaster or military situations, for situations in which there may be a security threat or for valid law enforcement reasons, for non-recurring payments, and for unusual and/or urgent situations where the Government would be seriously injured unless payment is made by a method other than EFT.

Treasury is revising redesignated paragraph (a)(6) of § 208.4 (formerly paragraph (f)) which previously allowed Federal paying agencies, rather than Treasury, to waive the EFT requirement for payments that are non-recurring, *i.e.,* no more than one payment to the same recipient within a one-year period. Under the revised rule, the waiver exists for payments made to the same recipient in a single year when these payments are not made on a regular, recurring basis and remittance data explaining the purpose of the payments is not readily available from the recipient's financial institution receiving the payment by electronic funds transfer. As mentioned above, agencies should make limited use of this waiver and should use this waiver only after discussions with Treasury to rule out other ways in which remittance data can be made available.

Section 208.6 is revised to remove the provisions for the general account requirements for Federal payments made electronically to an account at a financial institution. These requirements are contained in 31 CFR 210.5 and do not need to be duplicated in Part 208. Revised § 208.6 states that any individual who receives a Federal benefit, wage, salary, or retirement payment will be eligible for a Direct Express® card account.

Section 208.7 is revised to state that agencies shall put into place procedures that allow recipients to provide the information necessary: (i) For the delivery of their payments by EFT to an account at a financial institution, or (ii) to enroll for a Direct Express® card account. Agencies no longer need to notify individuals about their right to invoke a hardship waiver. FMS will provide guidance and work with agencies to ensure that they have the information they need to effectively explain the rule, available waivers, direct deposit, and features and fees of the Direct Express® card.

Section 208.8 is revised to state that payment recipients are required to provide a Federal agency with the necessary information to receive payments electronically. To receive a payment by direct deposit to an account at a financial institution, a recipient will need to provide his or her account information. To enroll for a Direct Express® card account, a recipient will need to provide sufficient demographic information to allow for an account to be established, including information needed for identity verification purposes.

Section 208.11 is revised to conform to the technical revision and delete the reference to § 208.6.

Appendices A and B containing Model ETA℠ Disclosure Notices are removed because they no longer apply. ETA℠ accounts remain available from financial institutions that continue to offer them. For more information about ETA℠ accounts, visit *http://www.eta-find.gov.*

VI. Procedural Analysis

Regulatory Planning and Review

It has been determined that this regulation is a significant regulatory action as defined in Executive Order 12866 in that this rule would have an annual effect on the economy of $100 million or more, and this rule raises novel policy issues arising out of the legal mandate in 31 U.S.C. 3332. Accordingly, this final rule has been reviewed by the Office of Management and Budget. The Regulatory Impact Assessment prepared by Treasury for this regulation is provided below.

SUMMARY OF ESTIMATED BENEFITS AND COSTS

Benefit	$117 million.
Cost	Not estimated.
Net Benefits	Not estimated.

The analysis used nominal dollars in 2010.

1. *Description of Need for the Regulatory Action*

a. Statutory and Regulatory History

As discussed in the Regulatory Impact Assessment in the NPRM, this rulemaking is necessary to expand compliance with the electronic funds transfer (EFT) provisions of section 3332, title 31 United States Code (Section 3332). In 1996, Congress enacted subsection 31001(x)(1) of the Debt Collection Improvement Act of 1996 (Pub. L. 104–134) (DCIA), which amended Section 3332 to generally require that all nontax Federal payments be made by EFT, unless waived by the Secretary of the Treasury (Secretary). The Secretary must ensure that individuals required to receive Federal payments by EFT have access to an account at a financial institution "at a reasonable cost" and with "the same consumer protections with respect to the account as other account holders at the same financial institution." *See* 31 U.S.C. 3332(f), (i)(2).

To implement Section 3332 as Congress intended, Treasury promulgated 31 CFR part 208 (Part 208). Part 208 sets forth requirements for accounts to which Federal payments may be sent by EFT; provides that any individual who receives a Federal benefit, wage, salary, or retirement payment is eligible to open an Electronic Transfer Account (ETA) at a financial institution that offers such

accounts; and establishes the responsibilities of Federal agencies and recipients under the regulation. Part 208 also sets forth a number of waivers to the general requirement that Federal payments be delivered by EFT. *See* 31 CFR 208.4.

In conjunction with the initial publication of Part 208, Treasury developed the ETA, a low-cost account offered by participating financial institutions for those individuals who wish to receive their Federal payments by direct deposit. The ETA was established with the intention that it would eventually become available nationwide, and thereby comply with the statutory mandate that any person required to receive payment by EFT have access to an account at a financial institution at a reasonable cost and with standard consumer protections. However, the ETA is not available nationwide, and, as a result, does not meet the statutory requirement related to account access.

Any financial institution that wishes to offer the ETA may do so by entering into a financial agency agreement agreeing to offer the ETA in accordance with the terms and conditions established by Treasury. *See* Notice of Electronic Transfer Account Features, 64 FR 38510 (July 16, 1999). A participating financial institution must open an ETA for any individual who requests one, with some limited exceptions, provided that the individual authorizes the direct deposit of his or her Federal benefit, wage, salary or retirement payments. A financial institution may charge an account fee of up to $3.00 per month, and may charge other account-related fees as usually and customarily charged to other retail customers. ETA cardholders must be allowed to withdraw funds at least four times per month without incurring fees. Checks are not offered with ETAs. Account holders access their funds through online debit at ATMs, commonly referred to as "PIN debit," and through POS networks. Offline (signature) debit is not permitted. Treasury pays a participating financial institution a fee of $12.60 for each ETA account established.

The hardship waivers in Part 208 prior to this rulemaking were necessary because the ETA was not (and is not) available to all benefit recipients across the country. In addition, because the ETA does not permit signature debit and does not include bill payment capability as a required feature, the ETA cardholders have limited options in paying for goods and services with an ETA. They cannot use the ETA, for example, to make online and telephone purchases. The limited payment capability of the ETA resulted in a need for hardship exceptions for geographic, financial, and physical disability reasons, since individuals might not have convenient or feasible access to physical POS or ATM locations. Moreover, the ETA allows monthly and other fees which, although limited, could still pose a financial hardship for some benefit recipients. This meant that a waiver for financial hardship was also necessary.

Since its inception in 1999 through September 2010, only 251,941 ETA accounts have been opened, and, as of September 2010, there are only 121,191 active ETA accounts. Anecdotal evidence suggests that, with some exceptions, the ETA is not a cost-effective product for financial institutions. According to a 2002 report by the Government Accountability Office (GAO), although many financial institutions believed that the ETA was a good product for the target market, the financial institutions were reluctant to offer the account because they did not see the product as profitable. *See,* "Electronic Transfers: Use by Federal Payment Recipients Has Increased but Obstacles to Greater Participation Remain," GAO–02–913, page 31 (Sept. 12, 2002) (*www.gao.gov/new.items/d02913.pdf*). From the consumer perspective, reasons for lack of interest include the inability to write checks, limited availability of ETAs, lack of awareness of ETAs, a difficult enrollment process, and a personal preference for doing business without a bank account. *Id.,* at 35–36.

GAO has issued at least two reports on the Federal Government's efforts to increase the use of electronic payments rather than checks. *See,* for example, 2002 GAO report cited above, and "Electronic Payments: Many Programs Electronically Disburse Federal Benefits, and More Outreach Could Increase Use," GAO–08–645 (June 23, 2008) (*http://www.gao.gov/new.items/d08645.pdf*). In these referenced reports, GAO recognizes the advantages of electronic payments, but also recognizes the two major historical obstacles to removing the Part 208 individual waivers. First, there are a high number of check recipients who do not have a bank account or who lack convenient access to an account at a reasonable cost with appropriate consumer protections. GAO–02–913, pages 16–24 (Sept. 12, 2002); GAO–08–645, pages 19–20, 33 (June 23, 2008). Second, consumer concerns about the improper freezing and seizure of Federal benefit funds typically exempt from garnishment has led to resistance to Treasury's efforts to remove the Part 208 individual waivers to EFT requirements. GAO–08–645, pages 20–22.

b. Technology Changes in the Banking Industry

As discussed in the Regulatory Impact Assessment in the NPRM, the technological developments and widespread acceptance of debit and prepaid card products during the last decade have made it feasible and advantageous for Treasury to revise its existing implementing regulation to expand the scope of individuals subject to the EFT requirements. Specifically, the development and implementation of the Direct Express® card, a MasterCard ® prepaid debit card developed by Treasury exclusively for Federal benefit recipients, means that Treasury can now comply with the requirement of Section 3332 to ensure that individuals required to receive Federal payments by EFT have access to an account at a financial institution that is reasonably priced and subject to standard consumer protections.

Reloadable prepaid debit cards, which were a small specialty product in the 1990s, are now widely available and can be used at a vast number of merchant locations across the country, not only to purchase goods and services, but also to obtain cash through cashback transactions at POS locations. With the expansion of the Internet and other technological advances, consumers have the ability to make online purchases with a debit card, as well as the ability to pay for goods and services over the telephone, resulting in the mitigation of some past obstacles to electronic payment acceptance. Even for those without access to the Internet, or who buy goods and use services from vendors who do not accept debit card payments, debit cards can be used to purchase money orders, thereby eliminating the step of having to cash a check or carry large amounts of cash to complete necessary financial transactions.

The "2007 Federal Reserve Payments Study, Noncash Payment Trends in the United States: 2003–2006," sponsored by the Federal Reserve System (released December 10, 2007) (*http://www.frbservices.org/files/communications/pdf/research/2007_payments_study.pdf*), highlights the growing acceptance of debit cards in the United States. According to the study, debit cards now surpass credit cards as the most frequently used payment type. The Federal Reserve noted that the highest rate of growth was in automated clearing house (ACH) payments, which grew about 19 percent

per year, followed closely by debit card payments. The annual use of debit cards increased by about 10 billion payments over the survey period to 25.3 billion payments in 2006, an annual growth rate of transactions of 17.5% from 2003 to 2006. Many financial service providers offer general prepaid branded reloadable cards intended for recipients of wages, incentive or bonus payments, state benefits and child support payments, and other types of high volume or regularly recurring payments. Many states offer or require the use of electronic payment cards for those who receive state benefits, such as temporary assistance to needy families.

Treasury's experience with offering electronic payment card products dates back to 1989, and illustrates how Treasury's products have evolved and how acceptance of these products has grown. In 1989, Treasury offered a debit card product, known as the SecureCard, on a pilot basis in Baltimore, Maryland, at no cost to SSI recipients. The undeveloped nature of the POS system at that time presented the primary challenge in that pilot. To make the card useful, Treasury installed POS equipment at various local merchants, at a substantial cost to the Government. In 1992, Treasury initiated the Direct Payment Card pilot for Social Security and SSI recipients in Texas, which had a better developed POS infrastructure, and subsequently extended the pilot to Social Security recipients in Argentina. From 1992 through 1997, approximately 46,000 recipients enrolled, and the program was well-received by recipients. Building on the success of the Direct Payment Card pilot, in 1996, Treasury joined a Federal-State electronic benefits transfer (EBT) program known as the Benefit Security Card program. The Benefit Security Card was offered to Federal and/or state benefit recipients in eight southeastern states, known as the Southern Alliance of States, which included Alabama, Arkansas, Florida, Georgia, Kentucky, Missouri, North Carolina, and Tennessee. Treasury's Benefit Security Card program allowed benefit recipients to access their Federal and/or state benefits via a single debit card. When Treasury terminated the card program in January 2003, approximately 51,000 Federal benefit recipients were enrolled in the program. Although customers were pleased with the product, Treasury and most states were concerned about cardholder costs, which were scheduled to increase at the time Treasury terminated the program. At the end of 2006, Treasury initiated a small Direct Express® card program to gauge the market for a branded debit card, reloadable only with Federal benefit payments. As part of the pilot, Treasury sent letters to 35,000 Social Security and SSI check recipients in Chicago and southern Illinois, offering them the opportunity to sign up for a Direct Express® card to receive their Federal benefit payments electronically. In addition, Treasury included information about the program in check envelopes mailed to all Illinois Social Security and SSI check recipients. The card features offered for the pilot program were similar to the current Direct Express® card product, although the fees were slightly higher.

2. Provision

Treasury is implementing this rule in two phases. The first phase would require all new benefit recipients to sign up for direct deposit to a bank account of the recipients' choice or to a Direct Express® card account, beginning May 1, 2011. The second phase would begin on March 1, 2013, at which time all recipients of Federal benefit and other nontax payments would receive their payments by direct deposit, either to a bank account or to a Direct Express® card account.

Those receiving their benefit payments by check before May 1, 2011, could continue to do so through February 28, 2013, after which those recipients would convert to direct deposit. For Federal benefit recipients, this means that individuals who file claims for Federal benefits before May 1, 2011, and who request check payments when they file, would be permitted to receive payments by check through February 28, 2013. Individuals who file claims for benefits on or after May 1, 2011, would receive their payments by direct deposit. Individuals receiving their payments by direct deposit prior to May 1, 2011, would continue to do so.

In this final rule, Treasury waives the EFT requirement for recipients born prior to May 1, 1921 who are receiving Federal payments by check on March 1, 2013, for payments that are not eligible for deposit to a Direct Express® card account, and for recipients whose Direct Express® card has been suspended or cancelled. In addition, this rule allows a recipient to request a waiver from the EFT requirement on the basis that EFT would impose a hardship because of the recipient's inability to manage an account at a financial institution or a Direct Express® card account due to a mental impairment, or because the recipient lives in a remote geographic location lacking the infrastructure to support electronic financial transactions. The waiver request is considered effective unless Treasury rejects the request.

3. Baseline

a. Amount of Federal Disbursement

The baseline amount of Federal disbursement described in the NPRM is updated as follows. In fiscal year 2010, Treasury disbursed almost 85% of its nontax payments electronically, or more than 793 million payments. Despite the general requirement that Federal payments be made electronically, and Treasury's efforts to persuade check recipients to convert to direct deposit, Treasury nevertheless continues to print and mail many millions of checks each year, at a substantially higher cost to the Government than if those payments were delivered by EFT. For example, of the approximately 143 million checks disbursed for nontax payments, in fiscal year 2010, more than 130 million of them were Federal benefit checks mailed to almost 11 million benefit recipients, causing avoidable payment-related problems for many check recipients, and resulting in extra costs to taxpayers of more than $117 million that would not have been incurred had those payments been made by EFT. Social Security (retirement, disability, and survivors benefits) and SSI payments represent more than 92 percent, or approximately 120 million, of those benefit check payments. The remaining 10 million benefit check payments are made to recipients of civil service retirement, railroad retirement, Black Lung, and Veterans benefits. Although the direct deposit payments rate has increased since 1996, when it was 58%, the rate has climbed only slowly since fiscal year 2005 when it first reached 80%.

b. Affected Population

As noted above, in fiscal year 2010, Treasury disbursed 130 million checks to almost 11 million benefit recipients. Treasury estimates that approximately 4 million of those recipients do not have bank accounts.

Treasury recognizes the demographic differences between payment recipients who are more willing to accept direct deposit and those who are not. Treasury also recognizes that there are a variety of reasons why check recipients do not switch to direct deposit. Because the majority of its check payments are made to Social Security and SSI recipients, Treasury's research focuses on this population. During implementation of its rule, Treasury will continue its research efforts to ensure that the needs of all check recipients are adequately addressed and take appropriate action.

While recognizing that the results of the study is not generalizable to the U.S. population, Treasury's study, "Understanding the Dependence on Paper Checks—A Study of Federal Benefit Check Recipients and the Barriers to Boosting Direct Deposit" (2004), sheds some insight on individuals who choose to receive Federal benefits through paper checks (OMB Control No. 1510–0074). The average age of a Social Security check recipient was 66 years old. Sixty-one percent of the Social Security check recipients were female; 39% were male. Thirty-five percent of the Social Security check recipients had not completed high school, while 26% had some college education or beyond. Sixty percent of Social Security recipients were retired; 27% did not have bank accounts; 12% received some other form of government assistance; and, 27% had a disability.

Comparatively, the average age of a SSI check recipient was 50. Seventy percent of the SSI check recipients were female; 30% were male. Fifty-one percent of the SSI recipients had not completed high school, while 15% had some college education or beyond. Only 21% of SSI recipients were retired; 68% did not have a bank account; 42% received some other form of government assistance, and 42% had a disability.

According to Treasury research in 2007 (SSA & SSI Check Recipient Survey, OMB Control No. 1510–0074), the check recipient population demographics had not changed significantly. The 2007 survey found that 28% of Social Security check recipients did not have a bank account, but that 9% more SSI recipients had bank accounts than in 2004 (in 2007, 59% of SSI recipients did not have a bank account).

The above-referenced Treasury research shows that younger benefit recipients convert to direct deposit at a faster rate than older benefit recipients. Younger benefit recipients who have had their payments for less than a year are signing up for direct deposit at rates that far exceed their proportions in the population. Close to 50% of those Social Security and SSI check recipients who converted to direct deposit had been receiving their benefits for less than one year. Conversely, only 16% of Social Security check recipients and 15% of SSI recipients who had been receiving their payments nine (9) years or longer signed up for direct deposit.

Treasury and the Social Security Administration found that, in fiscal year 2010, 79.1% of new Social Security enrollees signed up for direct deposit either to an existing bank account or to a Direct Express® card account. Since September 2008, the Social Security Administration has been offering new Social Security and SSI recipients the option of signing up for a Direct Express® card, in addition to direct deposit at a financial institution, at the time they enroll for benefits. Social Security is also allowing individuals to sign up at local offices and by telephone. The Direct Express® card has been a major contributor in the decline of Social Security and SSI check payments over the last two years, but has had an especially significant impact on the SSI check payment volume. The average monthly payment amount for an SSI check recipient is $545, whereas the average monthly payment amount for a Social Security check recipient is $808 for beneficiaries who receive their payment on the third of the month, and $915 for all other Social Security check recipients. There has been a year-over-year decrease in SSI checks of 6.91% in March 2010, compared to March 2009, which is significantly greater than the 3.81% decline in March 2009, compared to March 2008. The number of all nontax checks decreased from 148 million in fiscal year 2009 to 143 million in fiscal year 2010.

4. Assessment of Potential Costs and Benefits

a. Potential Costs

There are potential short-term costs associated with the rulemaking. First, there are intangible emotional costs for individuals who are fearful or resistant to direct deposit. In its 2004 research, Treasury learned that there are some key differences among Social Security check recipients, SSI check recipients, and those that receive their benefit payments by direct deposit. Although these differences do not necessarily explain why certain individuals are more resistant than others to receiving payments by direct deposit, the data helps Treasury properly target its public education campaign. For example, because the data described below shows that Social Security check recipients are more likely than SSI check recipients to have a bank account, Treasury can direct its resources to informing Social Security check recipients about the benefits of directly depositing payments to an existing bank account. For SSI recipients who are less likely to have a bank account, Treasury can focus its Direct Express® card information to that population.

Compared to SSI check recipients, Social Security check recipients are older (average age 66), more likely to have a bank account, more likely to be male and retired, less likely to have a disability, less likely to receive some other form of government assistance, less likely to depend on their benefit as their sole source of income, and more likely to be Caucasian. SSI recipients are likely to be younger (average age 50), less likely to have a bank account, more likely to have a representative payee acting on their behalf, more likely to be African-American, more likely to be female, more likely to live in a city, more likely to receive some other form of benefit payment, and more likely to depend on others for assistance with daily chores and errands. Direct deposit recipients are more technologically savvy than either Social Security or SSI check recipients. They are more likely to own a cell phone or to use a personal computer and the Internet. Compared with check recipients, direct deposit beneficiaries responding to the survey were more likely to have confidence in banks, to believe that computers are secure, and to feel that ATMs are safe.

Despite these demographic differences, Treasury has found that the reasons for resistance to direct deposit among check recipients have remained fairly constant over the years. Many people express a desire to see the physical payment in check form. Others feel a greater sense of control when handling checks, and many, especially those receiving SSI, believe that receiving checks helps them to better manage their money and maintain their standard of living. Barriers that need to be overcome can be grouped into four general categories: informational (those who do not understand how direct deposit works); emotional (those who just prefer to receive checks); inertia (those who are receptive to electronic payments, but need to be motivated to sign up); and mechanical (those who do not have bank accounts, and in some cases, do not want bank accounts).

Treasury expects most recipients to pay less for EFT payments than for check payments. While some individuals may be able to cash government checks at no cost, there are often fees of up to $20 or more for cashing a check, according to Treasury's research in 2007 (SSA & SSI Check Recipient Survey, OMB Control No. 1510–0074). The Direct Express® card program is structured so that there are several ways for cardholders to access their funds and use their card without paying any fees. The Direct Express® card account fees compare favorably to those charged by financial service providers offering general purpose reloadable cards, which often charge fees for sign-up, monthly maintenance, ATM withdrawals, balance inquiries,

and customer service calls. Cardholders may use their card to make purchases and get cash back at a POS location without paying a fee; obtain cash from any MasterCard® member bank teller window without paying a fee; and make one free ATM cash withdrawal for each benefit payment deposited to the card account (the free ATM cash withdrawal is available until the end of the month following the month of deposit). If the cardholder makes a withdrawal using an ATM within the Direct Express® surcharge-free ATM network, the cardholder will not pay a surcharge fee to an ATM owner. In addition, there are many other features that cardholders can access without paying a fee, including unlimited customer service calls (with or without live operators); optional automated low balance alerts or deposit notifications; and online or telephone transaction history and other account information. There is no fee to sign up for the card, close the account, or to obtain one replacement card per year. Importantly, there are no overdrafts, minimum balance requirements, or credit requirements to sign up for the card. The few fees that are charged for the card include $.90 for ATM transactions after free ATM transactions are used, $.75 per month for optional paper statements, fees for using the card outside the United States, and replacement cards beyond the free replacement card. By way of illustration, sample Direct Express® cardholder scenarios follow:

FIG. 2—DIRECT EXPRESS® CARD FEES: SAMPLE SCENARIO 1

Direct Express® Card transactions	Fees (with no ATM surcharge)	Fees (with ATM surcharge of $2.33) [5]
1st ATM withdrawal (free with 1st deposit)	FREE	$2.33
Three bill payments	FREE	FREE
Eight POS transactions	FREE	FREE
Weekly Balance Inquiry	FREE	FREE
One Deposit	FREE	FREE
Total Monthly Fee	FREE	2.33

FIG. 3—DIRECT EXPRESS® CARD FEES: SAMPLE SCENARIO 2

Direct Express® Card transactions	Fees (with no ATM surcharge)	Fees (with ATM surcharge of $2.33)
1st ATM withdrawal (free with 1st deposit)	FREE	$2.33
2nd ATM withdrawal	$.90	3.23
Eight POS transactions	FREE	FREE
Weekly Balance Inquiry	FREE	FREE
One Deposit	FREE	FREE
Total Monthly Fee	.90	5.56

FIG. 4—DIRECT EXPRESS® CARD FEES: SAMPLE SCENARIO 3

Direct Express® Card transactions	Fees (with no ATM surcharge)	Fees (with ATM surcharge of $2.33)
1st ATM withdrawal (free with 1st deposit)	FREE	$2.33
Bank Teller Cash Withdrawal	FREE	FREE
Eight POS transactions	FREE	FREE
Weekly Balance Inquiry	FREE	FREE
One Deposit	FREE	FREE
Total Monthly Fee	FREE	2.33

FIG. 5—DIRECT EXPRESS® CARD FEES: SAMPLE SCENARIO 4

Direct Express® Card transactions	Fees (with no ATM surcharge)	Fees (with ATM surcharge $2.33)
1st ATM withdrawal (free with 1st deposit)	FREE	$2.33.
Purchase Money Order for $700 at US Post Office (USPS) to pay rent	$1.50 (to USPS)	1.50 (to USPS).
Eight POS transactions	FREE	FREE.
Weekly Balance Inquiry	FREE	FREE.

[5] The bankrate.com 2010 checking study cited an average $2.33 surcharge fee per withdrawal (*http://www.bankrate.com/finance/checking/banks-taking-a-bigger-bite-with-atm-fees.aspx*).

FIG. 5—DIRECT EXPRESS® CARD FEES: SAMPLE SCENARIO 4—Continued

Direct Express® Card transactions	Fees (with no ATM surcharge)	Fees (with ATM surcharge $2.33)
One Deposit	FREE	FREE.
Total Monthly Fee	$1.50	$3.83.

FIG. 6—DIRECT EXPRESS® CARD FEES: SAMPLE SCENARIO 5

Direct Express® Card transactions	Fees (with no ATM surcharge)	Fees (with ATM surcharge of $2.33)
1st ATM withdrawal (free with 1st deposit)	FREE	$2.33
5 additional ATM withdrawals	$4.50	16.15
One POS transaction	FREE	FREE
Weekly Balance Inquiry	FREE	FREE
One Deposit	FREE	FREE
Total Monthly Fee	4.50	18.48

Even in Scenario 5, which is not the recommended way to use the Direct Express® card, a cardholder incurs less expense than what some beneficiaries pay to cash their Treasury checks. Treasury expects that, with its expanded cardholder education, fees incurred under Scenarios 1 through 4 would be more typical.

Treasury expects to continue to incur expenditures for the public education related to the implementation of the new rule and to temporarily expand its telephone and online direct deposit enrollment center to accommodate those converting from check payments to direct deposit to comply with the new rule, whether the conversion is to an account at a financial institution or to a Direct Express® card account. However, such expenditures will taper off after the new rule is fully implemented, since direct deposit enrollment in the future will occur at the time of benefit enrollment. Federal benefit agencies may incur costs to temporarily expand customer service centers to accommodate recipients' questions and enrollments until the new rules are fully implemented.

Treasury expects increased costs for its call center and Web site used to enroll check recipients into direct deposit, although these costs are expected to drop off after 2013, when the rule would be fully implemented. The education costs, estimated at $10 million over the next three years, are costs that Treasury would have incurred even without the rule, and for potentially longer than the next three to five years. Similarly, Treasury expects benefit paying agencies to incur some initial costs for customer service training for customer service representatives responsible for educating new enrollees and current check recipients about the new rules, but these costs are expected to be more than offset by the cost savings expected once customer service centers no longer have to respond to individual inquiries related to check problems. The one-time costs to increase customer service capacity at the Treasury enrollment center (both telephone and online) could total as high as $20 million from the effective date of the final rule through 2013. These costs include Treasury's costs for processing waiver requests. After 2013, Treasury expects these costs to drop off significantly.

The Go Direct® campaign, sponsored by Treasury and the Federal Reserve Banks, highlights the need for this educational program. Despite the success of the campaign with more than five million direct deposit enrollments achieved since 2005 as a result of the campaign's activities, an estimated 11 million Federal benefit recipients still receive checks each month. Treasury research shows that the likelihood of current check recipients switching to direct deposit remained generally unchanged from 2004 to 2007, with 55% of banked Social Security check recipients surveyed in 2007 being very unlikely to change to direct deposit, down from 59% in 2004. The percentage of banked Social Security check recipients likely to switch to direct deposit went from 27% in 2004 to 28% in 2007. Comparatively, 40% of banked SSI check recipients were likely to switch to direct deposit in 2007, up only one percentage point since 2004. While Treasury research shows that direct deposit education has a positive impact on the likelihood of a check recipient to switch to direct deposit, the effort is time consuming, administratively burdensome, costly, and resource-intensive. During the period July 2009 through June 2010, Treasury spent $4.5 million on its Go Direct® campaign, and expects to spend another $4 million during the period July 2010 through June 2011. Prior years' costs have ranged from $5 million to $10 million for Treasury to establish and sustain its presence in target markets to promote and encourage check recipients to convert to direct deposit.

Finally, and less directly, financial institutions may experience some costs associated with converting their check recipient customers to direct deposit, but Treasury does not expect this to be a significant burden since financial institutions already enroll a significant number of direct deposit recipients through Treasury's Go Direct® campaign.

b. Potential Benefits

The potential benefits of the rule to the Government and taxpayers are significant. As noted above, in fiscal year 2010, Treasury mailed more than 130 million Federal benefit checks to approximately 11 million benefit recipients, resulting in extra costs to taxpayers of more than $117 million that would not have been incurred had those payments been made by EFT. Without the rule change and given the current trends, the number of checks

that Treasury prints and mails each year is expected to increase significantly over the coming years, primarily as a result of the aging of the baby boomer generation. Beginning in 2008, the first wave of 78 million baby boomers became eligible for Social Security benefits. Even as the more technologically-savvy baby boomers enter the rolls, while improving, the direct deposit rate for fiscal year 2010 climbed no higher than 79.1% for new Social Security enrollees. With the increase in retiring baby boomers, Treasury expects to issue approximately 60 million new payments each year to approximately 5 million newly enrolled recipients (based on Social Security Administration actuarial data). Of those 60 million payments, an estimated 9 million would be made by check based on the current overall direct deposit/check ratio (85 percent/15 percent) for Social Security payments. By 2020, the Social Security Administration projects there will be 18.6 million more Social Security beneficiaries than in fiscal year 2009, which would result in more than 223 million additional payments each year. At the current direct deposit/check ratio, this would mean 33.5 million additional checks each year beginning in 2020, at a cost of $31 million each year, leading to a total annual cost of more than $156 million more than if those payments were made by direct deposit.

These projected cost savings do not take into account future increased costs in postage, paper, and salaries; the cost of issuing benefit checks other than Social Security and SSI; or the costs agencies incur in handling inquiries and authorizing replacement checks. For example, the Social Security Administration expects administrative savings resulting from a drop in non-receipt and lost check actions. The Social Security Administration also expects to save money by eliminating the "Payment Delivery Alert System," which is a joint effort among the Social Security Administration, Treasury, and the U.S. Postal Service to locate and deliver delayed Social Security and SSI checks.

Those who receive their payments by direct deposit do not have to worry about a lost or stolen check, or carrying around large amounts of cash that can be easily lost or stolen. Each year, approximately half a million individuals call Treasury to request claims packages related to problems with check payments. For example, in fiscal year 2009, more than 670,000 Social Security and SSI checks were reported lost or stolen, and in fiscal year 2010, more than 540,000 checks were reported lost or stolen. In fiscal year 2009, Treasury investigated more than 70,000 cases of altered or fraudulently endorsed checks, totaling $64 million, and in fiscal year 2010, Treasury investigated almost 50,000 cases, totaling $93 million. When checks are misrouted, lost in the mail, stolen, or fraudulently signed, Treasury must send replacement checks to the recipient. This can result in a delay in payment, especially if fraud or counterfeiting is involved, thereby creating a hardship for benefit recipients who rely on these payments for basic necessities such as food, rent, or medication. In contrast, individuals receiving Federal payments electronically rarely have any delays or problems with their payments. Nine out of ten problems with Treasury-disbursed payments are related to paper checks even though checks constitute only 19 percent of all Treasury-disbursed payments made by the Government.

These projected savings also do not account for the costs that would no longer be incurred by banks and credit unions for cashing checks and reimbursing the Government when there are alterations, forgeries, or unauthorized indorsements of Federal benefit checks. In fiscal year 2009, it cost the banking industry $69.3 million to reimburse the Treasury for checks that had been fraudulently altered or counterfeited, or contained a forged or unauthorized indorsement. In fiscal year 2010, these costs increased to $88 million.

5. Alternative Approaches Considered

Treasury considered three alternative approaches to achieving the benefits of direct deposit other than the approach described in this rulemaking notice.

First, Treasury could have eliminated the individual EFT waivers sooner for everyone, *i.e.,* eliminate the waivers for all benefit recipients on the same effective date, but Treasury was concerned about the impact of such a rule on payment recipients if the amount of time to educate the public about the rule's requirements and benefits was inadequate. It is important for Treasury and benefit agencies to be prepared to respond to recipients' inquiries about the new rules, which requires sufficient time to train agency customer service representatives, educate those affected by the new rules, and to implement any process changes that may be required. Treasury will work closely with the agencies to ensure that implementation requirements are understood and can be addressed in the time frame in the rule.

Second, Treasury also considered phasing in the elimination of the individual EFT waivers over a longer period of time. Treasury is concerned that such a delay results in additional costs to individuals who will be delayed in realizing the benefits of direct deposit. Treasury intends to begin its public education campaign immediately upon the promulgation of this final rule. Treasury will monitor the progress of its campaign, and adjust the campaign as necessary to ensure maximum effectiveness. In addition, a delayed implementation results in additional costs to the Government and taxpayers. For every year that Treasury delays full implementation of the EFT rule, the Government spends at least $117 million more for check payments than it would otherwise spend if recipients were receiving EFT payments.

Finally, Treasury considered eliminating all EFT waivers, and whether to institute a formal application process for individuals seeking to invoke a waiver to the EFT requirement. Treasury is concerned that such an approach would require the unnecessary development of a new bureaucratic infrastructure to process the applications, and would impose administrative burdens on both Government agencies and benefit recipients. After reviewing comments received in response to the NPRM, Treasury retained waivers for recipients born prior to May 1, 1921 who are receiving Federal payments by check on March 1, 2013, for payments that are not eligible for deposit to a Direct Express® card account, and for recipients whose Direct Express® card has been suspended or cancelled. In addition, this rule allows a payment recipient to request a waiver from the EFT requirement on the basis that EFT would impose a hardship because of the recipient's inability to manage an account at a financial institution or a Direct Express® card account due to a mental impairment, or because the recipient lives in a remote geographic area lacking the infrastructure to support electronic financial transactions. Recipients requesting waivers are required to submit a certification with a short statement explaining why they need a waiver. The certification will be signed by the individual requesting the waiver before a notary public, or in such form that Treasury may prescribe. The waiver request is considered effective unless Treasury rejects the request.

The availability of the Direct Express® card negates the need for other individual waivers. Agencies retain the ability to waive EFT requirements for

classes of payments for various reasons. Finally, in an unusual or exceptional circumstance, the Secretary has the authority to waive the EFT requirement, but Treasury does not anticipate invoking this authority except in rare situations.

6. Other Issues

a. Financial Agent

Building on the "lessons learned" in previous programs and the Direct Express® card program pilot, Treasury issued an announcement in 2007 seeking a financial institution qualified to act as a Treasury-designated financial agent to provide debit card services for Federal benefit recipients nationwide, through the Direct Express® card program. Treasury has unique legal authority to designate a financial institution as its financial agent to disburse Federal benefit payments electronically, which includes the establishment of an account meeting certain requirements, maintenance of an account, the receipt of Federal payments electronically, and the provision of access to funds in the account on the terms specified by Treasury. *See* 12 U.S.C. 90; 31 CFR 208.2. Fifteen financial institutions responded, and after careful review of the applications, Treasury selected Comerica Bank as its agent based on various criteria, including the proposed cardholder fees. Treasury considered, but rejected, selecting multiple financial agents (although it has the option to do so in the future) primarily to ensure that the selected financial agent would be able to maintain a sufficient volume of active accounts in order to cost-effectively sustain a program with the lowest possible cardholder fees. The financial agent selection process used by Treasury enabled Treasury to obtain debit card services with the most value for benefit recipients, including, among other things, better consumer protections than those offered by most prepaid card products, a surcharge-free ATM network of more than 53,000 surcharge-free ATMs, free low balance alerts and deposit notification, unlimited free customer service calls, and the ability to use the debit card product to access Federal benefit payments without incurring a fee. Treasury provides oversight to confirm that its financial agent operates the Direct Express® card program to provide maximum value at a reasonable cost to cardholders. The card program is now available to recipients of Social Security, SSI, Veterans compensation and pension, civil service retirement, and railroad retirement benefit payments. This allows Federal payment recipients to receive multiple types of Federal payments to a single Direct Express® card account.

b. Garnishment

Treasury has also addressed the concerns about the improper freezing and seizure of benefit funds exempt from garnishment. Treasury and the four major benefit paying agencies—Office of Personnel Management, Railroad Retirement Board, Social Security Administration, and Department of Veterans Affairs—published a notice of proposed rulemaking and will soon publish a joint rule. The rule will help ensure that garnishment-exempt benefit payments in an account are not improperly seized, and will protect benefit recipients where benefit payments are directly deposited to an account at a financial institution.

Regulatory Flexibility Act Analysis

It is hereby certified that the rule will not have a significant economic impact on a substantial number of small entities. The rule applies to individuals who receive Federal payments, and does not directly impact small entities. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is not required.

Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that the agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires the agency to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. We have determined that the rule will not result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, we have not prepared a budgetary impact statement or specifically addressed any regulatory alternatives.

List of Subjects in 31 CFR Part 208

Accounting, Automated Clearing House, Banks, Banking, Electronic funds transfer, Financial institutions, Government payments.

■ For the reasons set out in the preamble, 31 CFR part 208 is amended to read as follows:

PART 208—MANAGEMENT OF FEDERAL AGENCY DISBURSEMENTS

■ 1. The authority citation for part 208 continues to read as follows:

Authority: 5 U.S.C. 301; 12 U.S.C. 90, 265, 266, 1767, 1789a; 31 U.S.C. 321, 3122, 3301, 3302, 3303, 3321, 3325, 3327, 3328, 3332, 3335, 3336, 6503; Pub. L. 104–208, 110 Stat. 3009.

■ 2. In § 208.2, redesignate paragraphs (c) through (o) as paragraphs (d) through (p), respectively, add new paragraph (c), and revise redesignated paragraph (e) to read as follows:

§ 208.2 Definitions.

* * * * *

(c) *Direct Express® card* means the prepaid debit card issued to recipients of Federal benefits by a Financial Agent pursuant to requirements established by Treasury.

* * * * *

(e) *Electronic benefits transfer (EBT)* means the provision of Federal benefit, wage, salary, and retirement payments electronically, through disbursement by a financial institution acting as a Financial Agent. For purposes of this part, EBT includes, but is not limited to, disbursement through an ETA℠, a Federal/State EBT program, or a Direct Express® card account.

* * * * *

■ 3. Amend § 208.4 as follows:
■ a. Remove the introductory text;
■ b. Revise paragraph (a);
■ c. Add paragraph (a)(1);
■ d. Redesignate paragraphs (b) through (g) as paragraphs (a)(2) through (a)(7).
■ e. In redesignated paragraph (a)(4), further redesignate paragraphs (1) and (2) as paragraphs (a)(4)(i) and (ii);
■ f. Revise redesignated paragraph (a)(6); and
■ g. Add new paragraph (b).

The revisions and additions read as follows:

§ 208.4 Waivers.

(a) Payment by electronic funds transfer is not required in the following cases:

(1) Where an individual:

(i) Is receiving a Federal payment by check prior to May 1, 2011. In such cases, the individual may continue to receive those payments by check through February 28, 2013;

(ii) Files a claim for a Federal payment prior to May 1, 2011, and requests payment by check at the time he or she files the claim. In such cases, the individual may receive those

payments by check through February 28, 2013;

(iii) Was born prior to May 1, 1921, and is receiving payment by check on March 1, 2013;

(iv) Receives a type of payment that is not eligible for deposit to a Direct Express® card account. In such cases, those payments are not required to be made by electronic funds transfer, unless and until such payments become eligible for deposit to a Direct Express® card account;

(v) Is ineligible for a Direct Express® card because of suspension or cancellation of the individual's card by the Financial Agent;

(vi) Has filed a waiver request with Treasury certifying that payment by electronic funds transfer would impose a hardship because of the individual's inability to manage an account at a financial institution or a Direct Express® card account due to a mental impairment, and Treasury has not rejected the request; or

(vii) Has filed a waiver request with Treasury certifying that payment by electronic funds transfer would impose a hardship because of the individual's inability to manage an account at a financial institution or a Direct Express® card account due to the individual living in a remote geographic location lacking the infrastructure to support electronic financial transactions, and Treasury has not rejected the request.

* * * * *

(6) Where the agency does not expect to make payments to the same recipient within a one-year period on a regular, recurring basis and remittance data explaining the purpose of the payment is not readily available from the recipient's financial institution receiving the payment by electronic funds transfer; and

* * * * *

(b) An individual who requests a waiver under paragraphs (a)(1)(vi) and (vii) of this section shall provide, in writing, to Treasury a certification supporting that request, in such form that Treasury may prescribe. The individual shall attest to the certification before a notary public, or otherwise file the certification in such form that Treasury may prescribe.

■ 4. Revise § 208.6 to read as follows:

§ 208.6 Availability of the Direct Express® Card.

An individual who receives a Federal benefit, wage, salary, or retirement payment shall be eligible to open a Direct Express® card account. The offering of a Direct Express® card account shall constitute the provision of EBT services within the meaning of Public Law 104–208.

■ 5. Revise § 208.7 to read as follows:

§ 208.7 Agency responsibilities.

An agency shall put into place procedures that allow recipients to provide the information necessary for the delivery of payments to the recipient by electronic funds transfer to an account at the recipient's financial institution or a Direct Express® card account.

■ 6. Revise § 208.8 to read as follows:

§ 208.8 Recipient responsibilities.

Each recipient who is required to receive payment by electronic funds transfer shall provide the information necessary to effect payment by electronic funds transfer.

■ 7. Revise the third sentence in § 208.11 to read as follows:

§ 208.11 Accounts for disaster victims.

* * * Treasury may deliver payments to these accounts notwithstanding any other payment instructions from the recipient and without regard to the requirements of §§ 208.4 and 208.7 of this part and § 210.5 of this chapter.

* * *

■ 8. Remove Appendix A and Appendix B to Part 208.

Dated: December 16, 2010.

Richard L. Gregg,

Fiscal Assistant Secretary.

[FR Doc. 2010–32117 Filed 12–21–10; 8:45 am]

BILLING CODE 4810–35–P

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 210

RIN 1510–AB24

Federal Government Participation in the Automated Clearing House

AGENCY: Financial Management Service, Fiscal Service, Treasury.

ACTION: Interim final rule.

SUMMARY: The Department of the Treasury, Financial Management Service (FMS) is amending its regulation governing the use of the Automated Clearing House (ACH) system by Federal agencies to permit the delivery of Federal payments to prepaid debit cards that meet certain criteria. To be eligible to receive Federal payments, a card must provide the cardholder with pass-through deposit or share insurance and the card account must not have an attached line of credit or loan feature that triggers automatic repayment from the card account. In addition, the issuer of the card account must provide the cardholder with all of the consumer protections that apply to a payroll card under the Federal Reserve Board's Regulation E.

DATES: This interim final rule is effective January 21, 2011. Comments must be received on or before February 22, 2011.

ADDRESSES: You can download this interim final rule at the following Web site: *http://www.fms.treas.gov/ach.* You may also inspect and copy this interim final rule at: Treasury Department Library, Freedom of Information Act (FOIA) Collection, Room 1428, Main Treasury Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220. Before visiting, you must call (202) 622–0990 for an appointment.

In accordance with the U.S. government's eRulemaking Initiative, FMS publishes rulemaking information on *http://www.regulations.gov.* Regulations.gov offers the public the ability to comment on, search, and view publicly available rulemaking materials, including comments received on rules.

Comments on this rule, identified by docket FISCAL–FMS–2010–0003, should only be submitted using the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions on the Web site for submitting comments.
- *Mail:* Walt Henderson, Financial Management Service, 401 14th Street, SW., Room 337, Washington, DC 20227.

The fax and e-mail methods of submitting comments on rules to FMS have been decommissioned.

Instructions: All submissions received must include the agency name ("Financial Management Service") and docket number FISCAL–FMS–2010–0003 for this rulemaking. In general, comments received will be published on Regulations.gov without change, including any business or personal information provided. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not disclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

FOR FURTHER INFORMATION CONTACT: Walt Henderson, Director of the EFT Strategy Division, at (202) 874–6619 or *walt.henderson@fms.treas.gov;* or Natalie H. Diana, Senior Counsel, at (202) 874–6680 or *natalie.diana@fms.treas.gov.*

SUPPLEMENTARY INFORMATION: On May 14, 2010, we published in the **Federal Register**, at 75 FR 27239, a Notice of Proposed Rulemaking (NPRM) requesting comment on a number of proposed amendments to 31 CFR part 210 (part 210). One of the proposed amendments was to allow Federal payments to be delivered to prepaid debit card or similar card accounts meeting certain consumer protection requirements. The NPRM also proposed to allow Federal payments to be delivered to certain kinds of accounts established by nursing facilities or religious orders. In addition, the NPRM addressed a number of other issues, including requirements adopted by NACHA—The Electronic Payments Association in 2009 to identify international payment transactions using a new Standard Entry Class and proposed changes to the process for reclaiming post-death benefit payments from financial institutions.

In this Interim Final Rule, we are finalizing the proposal in the NPRM to allow Federal payments to be delivered to prepaid card accounts meeting certain consumer protection requirements, with a number of changes reflecting the comments that we received. Although we previously requested and received comment on the prepaid card proposal, we are issuing this rule as an interim final rule in order to provide the public with an additional opportunity to comment. This interim final rule does not address any of the other proposed amendments to part 210 that were published in the NPRM. The final rule relating to those proposed amendments will be issued separately.

I. Background and Summary of Prepaid Card Proposal

Title 31 CFR 210.5(a) generally requires that a Federal direct deposit payment be delivered to a deposit account at a financial institution. For all payments other than vendor payments, the account at the financial institution must be in the name of the recipient, unless one of the exceptions listed in the regulation applies. As explained in the NPRM, our long-standing interpretation of the words "in the name of the recipient" has been that the payment recipient's name must appear in the account title. *See, e.g.,* 64 FR 17480, referring to discussion at 63 FR 51490, 51499. The purpose of this requirement is to ensure that the payment reaches the intended recipient through delivery to a deposit account that the recipient owns and to which he or she has unfettered access, so that the payment is not diverted to a creditor or another third party before it reaches the recipient and comes under the recipient's control.

The "in the name of the recipient" requirement has the effect of prohibiting payments to pooled accounts in which the recipient's ownership interest is reflected in subacccount records. Because prepaid card programs are generally set up using this kind of structure, the delivery of non-vendor Federal payments to these types of cards currently is prohibited. We indicated in the NPRM that we believed that the "in the name of the recipient" requirement may be impeding the use of prepaid card programs that may be beneficial to the unbanked and underbanked populations. We therefore requested comment on a proposal to create an exception to the "in the name of the recipient" requirement in order to allow the delivery of Federal payments to accounts accessed by prepaid and stored value cards, provided that the card bears the cardholder's name and meets the following requirements:

- The account accessed by the card is held at an insured depository institution and meets the requirements for pass-through insurance under 12 CFR part 330 such that the cardholder's balance is FDIC insured to the extent permitted by law; and
- The card account constitutes an "account" as defined in 12 CFR 205.2(b) such that the consumer protections of Regulation E (12 CFR part 205), the rule prescribed by the Board of Governors of the Federal Reserve System (Board) to implement the Electronic Fund Transfer Act, apply to the cardholder.

We requested comment on the implications of allowing delivery of Federal benefit and other non-vendor payments to accounts that meet the requirements listed above. We further noted that we are mindful of concerns that account arrangements may be structured to facilitate automatic third party debits to a direct deposit account (known in some States as payday lending) and similar arrangements that are inappropriate for Federal benefit recipients, and we particularly solicited comment on whether the consumer protections required in the proposed exception are adequate to prevent potential abuses.

II. Summary of Comments

We received 12 comments in response to the NPRM. The commenters represented a variety of perspectives. Comments were submitted by financial institutions, consumer advocacy groups, industry associations, the Senate Committee on Finance and the House Committee on Ways and Means. Most commenters commented on our proposal to allow Federal payments to be deposited to prepaid card accounts.

Several commenters, including financial institutions and a nonprofit organization focusing on financial services for underserved consumers, supported the proposed prepaid card exception to the "in the name of the recipient" requirement. Those supporting the exception noted that prepaid products can benefit Federal payment recipients by expanding their options to receive Federal payments. They pointed out that underbanked Federal benefit recipients currently may use a variety of high cost financial service providers to cash their benefit checks and pay their bills. These commenters also noted that underbanked individuals may tend to hold significant amounts of cash, which may pose a security risk. According to these commenters, expanding Federal benefit recipients' ability to use prepaid cards could alleviate many of these concerns.

Most commenters supported our proposed requirement that the prepaid cardholder's balance be FDIC-insured via the FDIC's requirements for pass-through insurance. Comments regarding the proposed requirement that card accounts constitute "accounts" subject to Regulation E were mixed. Several commenters urged us to clarify the proposed requirement that the consumer protections of Regulation E apply to the cardholder. Some commenters noted that currently the only type of prepaid cards to which Regulation E applies are payroll cards. Since Regulation E does not currently apply to general use prepaid cards, some commenters were uncertain as to whether only payroll cards would be eligible for the proposed exception. Therefore, commenters requested that the final rule clarify whether a prepaid card that would fit within the exception proposed by Treasury must: (a) Actually be subject to Regulation E (which, under current law, would eliminate many or all general use prepaid products from eligibility under the proposed exception); or (b) provide protections similar or identical to those contained in Regulation E.

Other commenters suggested that Regulation E should be extended to cover all prepaid cards. We note that FMS does not have the authority to amend Regulation E to cover prepaid cards. That authority is assigned to the Board.[1] One commenter, referring to

[1] *See* 15 U.S.C. 1693b(a). This authority will be transferred to the Bureau of Consumer Financial Protection (CFPB) pursuant to Public Law 111–203, § 1084.

Regulation E, recommended that "Treasury ensure that these protections are in place prior to allowing benefits to be deposited onto any cards." It is unclear whether the commenter intended to suggest that we delay finalizing the prepaid card proposal until the Board amends Regulation E to address general use prepaid cards.

Some financial institutions commented that requiring issuers to voluntarily provide cardholders with the protections of Regulation E would increase costs to cardholders and adversely impact innovation in the prepaid card industry. Several financial institutions suggested that FMS should require compliance with only some of Regulation E's protections, such as those providing protections for unauthorized transactions and those governing error resolution processes. These commenters recommended that certain Regulation E requirements, such as the periodic statement requirement, not be imposed.

In contrast, some other commenters expressed the view that FDIC insurance and Regulation E protections are not sufficient to adequately protect cardholders. These commenters expressed concern that Federal benefits might be deposited onto prepaid and stored value products that carry high fees or other features, such as lines of credit, that may affect the amount of the Federal benefit ultimately available to the Federal benefit recipient. One consumer advocacy organization requested that FMS impose a number of additional requirements on prepaid cards in order for them to be eligible for the exception to the "in the name of the recipient" rule. Additional requirements that commenters proposed include: Prohibiting the deposit of Federal benefits onto prepaid cards or stored value cards that contain credit features; regulating the fees associated with a prepaid card or stored value card; imposing fee disclosure requirements; requiring prepaid card providers to inform benefit recipients of the Direct Express® prepaid card [2] or of any other lower-cost options; and ensuring that card providers cannot collect fees or repayment of any advances by exercising any right of set-off against Federal benefit payments.

On the other hand, another consumer advocacy organization supported the prepaid card proposal without any changes, except that they urged us to craft language that ensures that cardholders' access to responsibly-designed credit is not restricted. This organization recognized the concern that the accounts may be structured to facilitate payday lending or other similar arrangements that can result in unaffordable debt levels for Federal beneficiaries. However, they expressed concern that a vaguely worded restriction on credit features associated with card accounts could prevent Federal benefit recipients from accessing forms of credit that are responsibly structured.

Finally, some commenters expressed concern that we have not pursued enforcement action against entities that may be currently violating the "in the name of the recipient" requirements by allowing payments onto prepaid cards or other accounts. One commenter urged that, in order to allow for enforcement, the rule expressly provide that no institution (bank or nonbank) may accept direct deposit of Federal payments to accounts that do not meet the rule's requirements.

III. Interim Final Rule

We are revising the proposed prepaid card exception to address the comments we received. We are requiring that the funds accessible through the card be insured for the benefit of the cardholder in light of the fact that commenters uniformly supported such an insurance requirement, but we are broadening that provision to allow for eligibility of insurance by National Credit Union Share Insurance Fund (NCUSIF). We are aware that NCUSIF pass-through insurance is available to beneficial owners of share accounts in certain circumstances, and we request comment on whether credit unions have established, or might establish in the future, prepaid card accounts that provide pass-through insurance for members or non-members.

Because Regulation E currently does not cover any prepaid cards other than payroll cards, we are making the prepaid card exception available for prepaid cards if the issuer voluntarily provides all of the protections that apply to payroll cards under Regulation E, as may be amended from time to time. In addition, we are adding a requirement that the prepaid card not have an attached line of credit or loan feature that triggers automatic repayment from the card account. While we are not determining a fee structure or a range of acceptable fees, it is our expectation that the fees for such cards be transparent to the recipient, adequately disclosed, and reasonable by industry standards. We note in this regard that Regulation E requires that fees be disclosed in a clear and readily understandable manner.

In developing the interim final rule, we have attempted to balance the need to maintain appropriate consumer protections—consistent with the general requirement of section 210.5(a)—with concerns expressed by different commenters. As originally proposed, the exception would not have allowed the delivery of Federal payments to any general use prepaid card accounts, because prepaid card accounts (other than payroll card accounts) are not subject to Regulation E. Moreover, several commenters indicated that the industry is unlikely to develop prepaid cards that provide cardholders with all of the protections applicable to bank deposit accounts. Finalizing the requirement that eligible cards be covered by all of the protections that apply to an account under Regulation E would therefore have rendered the exception pointless. Instead, we are requiring that the protections that apply to payroll card accounts under Regulation E be provided by the card issuer. For cards that do not constitute payroll cards as defined in Regulation E, this means that the issuer must voluntarily provide the protections that apply to payroll cards. This requirement ensures that cardholders will receive important consumer protections, while allowing prepaid card issuers to provide account history and balance information in lieu of sending periodic statements.

Several commenters pointed specifically to Regulation E's statement requirements as a barrier to the provision of prepaid cards at a reasonable cost. Regulation E provides an alternative means of compliance for the statement requirements for payroll cards. Generally, statements need not be sent if the issuer makes the consumer's account balance available by phone and also makes available an electronic history of the consumer's account transaction activity covering 60 days, as well as a written transaction history covering 60 days upon the consumer's request. *See* 12 CFR 205.18(b). Consequently, the unauthorized transaction and error resolution reporting deadlines for payroll cards are triggered by the earlier of the sending of a written history reflecting the transaction to the cardholder or the date the cardholder accesses the electronic

[2] The Direct Express® prepaid card is a card established pursuant to terms and conditions approved by FMS. Direct Express® is a registered service mark of the Financial Management Service, U.S. Department of the Treasury. The Direct Express® Debit MasterCard® card is issued by Comerica Bank, pursuant to a license by MasterCard International Incorporated. MasterCard® and the MasterCard® Brand Mark are registered trademarks of MasterCard International Incorporated. *See,* 75 FR 34394, 34397–34398 (Jun. 17, 2010) for a description of the Direct Express® card.

account history reflecting the transaction. *See* 12 CFR 205.18(c)(3), (4).

We considered developing a separate framework of requirements based on Regulation E to apply to prepaid cards to which Federal payments are directly deposited, but believe it would be detrimental to introduce a separate and unique framework of consumer protections for a relatively limited class of transactions involving prepaid cards. The payroll card requirements of Regulation E are well established and Treasury believes that, in general, the card industry already is familiar with appropriate measures necessary to meet those requirements. In this regard, Treasury believes that a number of prepaid cards already provide most, though not necessarily all, of the payroll card protections to cardholders. It is our expectation that some issuers of existing prepaid cards will choose to modify the terms and conditions of the card accounts to include all of the payroll card protections to cardholders, so that their cards will be eligible to receive Federal payments. We also anticipate that as new prepaid card programs are developed, issuers seeking to make the cards available to Federal payment recipients will structure their cards to incorporate Regulation E's payroll card protections. We request comment on the extent to which prepaid card issuers will choose to do so. We also request comment on the kinds of changes that card issuers will undertake to provide the consumer protection specified in this interim final rule and the costs associated with adopting these changes.

We have also attempted to balance the competing comments made by consumer organizations relating to credit features associated with prepaid cards. In order to prevent Federal payments from being delivered to prepaid cards that have payday lending or "account advance" features, we are prohibiting prepaid cards from having an attached line of credit if the credit agreement allows for automatic repayment of a loan from a card account triggered by the delivery of the Federal payment into the account. Our intention is that this restriction will prevent arrangements in which a bank or creditor "advances" funds to a cardholder's account, and then repays itself for the advance and any related fees by taking some or all of the cardholder's next deposit. Accounts covered by Regulation E, including payroll cards, are subject to restrictions on these types of arrangements through Regulation E's "compulsory use" provision, which provides: "No financial institution or other person may condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic fund transfers, except for credit extended under an overdraft credit plan or specified to maintain a specified minimum balance in the consumer's account." 12 CFR 205.10(e). Because prepaid cards other than payroll cards are not currently covered by this provision, we are restricting credit features associated with cards as a condition for the receipt of Federal payments onto a card.

This restriction does not, however, bar the provision of credit to consumers who receive Federal payments via an eligible prepaid card product. Nor does this restriction absolutely bar a recipient-cardholder from repaying a loan with an eligible prepaid card product to which Federal payments have been made. We request comment on whether we have struck the appropriate balance, and on whether the wording of the prohibition is sufficiently clear.

To address comments made concerning the need to enforce the "in the name of the recipient" requirement, we have added a provision to the exception to make it clear that no person or entity may issue a prepaid card that accepts Federal payments in violation of the rule's requirements, and that any financial institution that holds an account for or on behalf of a prepaid card issuer to which Federal payments are received is responsible for ensuring that the requirements of the exception are met. Treasury believes that, under this provision, a violation of a requirement of the exception currently would be enforceable by the appropriate Federal or State regulator (or both) to the extent that the regulator has jurisdiction over the person or entity, and in accordance with applicable law. If we become aware that Federal payments are being deposited to prepaid cards that do not meet these requirements, we will review the situation and take appropriate action. We may, for example, contact both the issuer and the financial institution holding the issuer's account, review the terms and conditions of the card account, and refer any violations of our requirements to the appropriate regulatory bodies, including the primary regulator of the financial institution maintaining the card account for an issuer. Treasury requests comment on whether the wording of this provision is sufficiently clear.

Treasury also seeks comment on whether the consumer protections provided by this interim final rule allow for more novel uses of these cards by consumers including, but not limited to, those (1) who currently own bank accounts but prefer receiving payments by check due to privacy reasons; and (2) consumers who are unbanked or underbanked who receive Federal payments by check.

IV. Section-by-Section Analysis

Section 210.5(b)(5)(i) permits a Federal payment to be deposited to an account accessed by a prepaid card that does not meet the "in the name of the recipient" requirement if certain conditions are met. To be eligible to receive Federal payments, a prepaid card must meet four conditions. The first condition, at § 210.5(b)(5)(i)(A), is that the account be held at an insured financial institution. The second condition, at § 210.5(b)(5)(i)(B), requires that the account be set up to meet the requirements for pass through deposit or share insurance under 12 CFR part 330 or 12 CFR part 745 such that the funds accessible through the card are insured for the benefit of the Federal payment recipient. The third condition, at § 210.5(b)(5)(i)(C), is that the account is not attached to a line of credit or loan agreement under which repayment from the card account is triggered by delivery of the Federal payment. The fourth condition, at § 210.5(b)(5)(i)(D), requires the issuer of the card to comply with all of the requirements, and to provide the Federal payment recipient with the same consumer protections, that apply to a payroll card under regulations implementing the Electronic Fund Transfer Act (EFTA), 15 U.S.C. 1693a(1). The payroll card provisions of those regulations currently are located at 12 CFR 205.18 and are administered by the Board of Governors of the Federal Reserve System. This authority is scheduled to be transferred to the CFPB on the "designated transfer date," which is set as July 21, 2011.[3]

With respect to the fourth condition, § 210.5(b)(5)(i)(D) provides that the issuer must comply with the rules implementing the EFTA "as amended." Treasury notes that, as of the designated transfer date, the CFPB will be authorized to prescribe rules, as well as issue interpretations and guidance, implementing the provisions of the EFTA (other than section 920 of the EFTA).[4] In addition, the requirements under the EFTA are enforceable by the Federal banking agencies, the Federal Trade Commission, and other Federal agencies, including the CFPB, subject to several provisions of the Consumer

[3] 75 FR 57,252 (Sept. 20, 2010).

[4] *See* Public Law 111–203, § 1075 (amending the EFTA to allow the Board to prescribe rules relating to interchange transaction fees for electronic debit transactions).

Financial Protection Act of 2010.[5] Treasury expects that, as the requirements under the EFTA that apply to a payroll card account may be amended or interpreted from time to time, the CFPB and the agencies charged with enforcing the EFTA—not Treasury—also will be in the position to administer the requirements under this § 210.5(b)(5)(i)(D).

Section 210.5(b)(5)(ii) prohibits a person or entity from issuing a card that receives Federal payments in violation of these requirements. Moreover, any financial institution violates this regulation if the institution maintains an account for or on behalf of an issuer of a prepaid card that receives Federal payments if that issuer violates this subsection. As discussed above, we will refer violations of the regulation to the appropriate regulatory bodies.

Section 210.5(b)(5)(iii) provides that the term "payroll card account" has the same meaning as that term is defined for purposes of the rules implementing the EFTA. The term "prepaid card" means a card, code, or other means of access to funds of a recipient. The term "issuer" means a person or entity that issues a prepaid card.

V. Procedural Requirements

Request for Comment on Plain Language

Executive Order 12866 requires each agency in the Executive branch to write regulations that are simple and easy to understand. We invite comment on how to make the interim final rule clearer. For example, you may wish to discuss: (1) Whether we have organized the material to suit your needs; (2) whether the requirements of the rule are clear; or (3) whether there is something else we could do to make this rule easier to understand.

Regulatory Planning and Review

The Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs (OIRA) designates the interim final rule as a "significant regulatory action" as defined in Executive Order 12866. While Treasury has not conducted a regulatory impact analysis that comports with the requirements of OMB Circular A–4, Treasury is providing some preliminary information about the current industry practices, and potential costs and benefits of this rule. Treasury believes that many issuers of the prepaid cards are already providing some consumer protection. We seek comment on the degree to which consumer protection is already provided by prepaid debit card issuers; the changes the issuers would undertake to provide the level of consumer protection specified in this rulemaking; and the costs associated with providing these additional protections.

In addition, Treasury believes that once prepaid cards provide the specified consumer protections, these cards will be used in novel ways. An example of this is receiving tax refunds on these prepaid cards. Given that there were approximately 45 million tax refund checks issued in FY 2010, assuming $1 per check processing fee on the part of the Federal government, and assuming that all Federal tax refunds are processed through prepaid cards, the reduction in costs to the Federal government for processing these checks could be approximately $45 million. Therefore, Treasury seeks information from the public regarding other ways in which these prepaid cards will be used to receive Federal payments across different types of consumers.

Depending upon the comments received on the interim final rule, Treasury may produce a Regulatory Impact Analysis that comports with the requirements of Circular A–4 in its final rule.

Regulatory Flexibility Act Analysis

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply. Even if the RFA did apply, we have considered the potential impact of this rule on small entities and hereby certify that the interim final rule will not have a significant economic impact on a substantial number of small entities. We believe the rule will affect only a limited number of small entities and that any economic impact will be minimal. Currently, Federal non-vendor payments are not permitted to be delivered to general use prepaid cards. The interim final rule will allow prepaid card issuers to develop and offer to Federal benefit recipients prepaid cards that meet the rule's requirements. Some prepaid card issuers, regardless of size, may choose to meet the rule's requirements, in which case they may be able to expand their customer base to include Federal benefit recipients. Any economic impact for these issuers is not expected to be significant. Accordingly, a regulatory flexibility analysis under the RFA is not required. We invite comments regarding any less burdensome alternatives to this rule.

Unfunded Mandates Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532 (Unfunded Mandates Act), requires that the agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires the agency to identify and consider a reasonable number of regulatory alternatives before promulgating the rule. We have determined that the interim final rule will not result in expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, we have not prepared a budgetary impact statement or specifically addressed any regulatory alternatives.

Authority To Issue Interim Final Rule

The Administrative Procedure Act (5 U.S.C. 551 *et seq.*) (APA) generally requires public notice before promulgation of regulations or a showing of good cause that prior notice and opportunity to comment are unnecessary, impracticable, or contrary to the public interest. *See* 5 U.S.C. 553(b). In accordance with section 553(b), FMS published a notice of proposed rulemaking requesting comment on the prepaid card exception on May 14, 2010 (75 FR 27239) and FMS has considered the comments received in developing this interim final rule. FMS is issuing this rule for effect, but also wishes to provide the public another opportunity to comment on it.

List of Subjects in 31 CFR Part 210

Automated clearing house, Electronic funds transfer, Financial institutions, Fraud.

■ For the reasons set forth in the preamble, 31 CFR part 210 is amended as follows:

PART 210—FEDERAL GOVERNMENT PARTICIPATION IN THE AUTOMATED CLEARING HOUSE

■ 1. The authority citation for part 210 continues to read as follows:

Authority: 5 U.S.C. 5525; 12 U.S.C. 391; 31 U.S.C. 321, 3301, 3302, 3321, 3332, 3335, and 3720.

■ 2. In § 210.5, redesignate paragraph (b)(5) as (b)(6) and add a new paragraph (b)(5) to read as follows:

[5] *See, e.g.,* Public Law 111–203, §§ 1025–1026 (governing the enforcement authorities of the CFPB and a prudential regulator with respect to a depository institution and, depending on the size of that institution, its affiliates).

§ 210.5 Account requirements for Federal payments.

* * * * *

(b) * * *

(5)(i) Where a Federal payment is to be deposited to an account accessed by the recipient through a prepaid card that meets the following requirements:

(A) The account is held at an insured financial institution;

(B) The account is set up to meet the requirements for pass-through deposit or share insurance such that the funds accessible through the card are insured for the benefit of the recipient by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund in accordance with applicable law (12 CFR part 330 or 12 CFR part 745);

(C) The account is not attached to a line of credit or loan agreement under which repayment from the account is triggered upon delivery of the Federal payments; and

(D) The issuer of the card complies with all of the requirements, and provides the holder of the card with all of the consumer protections, that apply to a payroll card account under the rules implementing the Electronic Fund Transfer Act, as amended.

(ii) No person or entity may issue a prepaid card that receives Federal payments in violation of this subsection, and no financial institution may maintain an account for or on behalf of an issuer of a prepaid card that receives Federal payments if the issuer violates this paragraph.

(iii) For the purposes of this paragraph (b)(5), the term—

(A) "Payroll card account" shall have the same meaning as that term is defined in the rules implementing the Electronic Fund Transfer Act;

(B) "Prepaid card" means a card, code, or other means of access to funds of a recipient; and

(C) "Issuer" means a person or entity that issues a prepaid card.

* * * * *

Dated: December 16, 2010.

Richard L. Gregg,

Fiscal Assistant Secretary.

[FR Doc. 2010–32114 Filed 12–21–10; 8:45 am]

BILLING CODE 4810–35–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R02–OAR–2010–0310, FRL–9214–4]

Approval and Promulgation of Implementation Plans; New Jersey; 8-Hour Ozone Control Measures

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a request by New Jersey to revise the State Implementation Plan (SIP) for ozone involving the control of volatile organic compounds (VOCs). The SIP revision consists of two new rules, Subchapter 26, "Prevention of Air Pollution From Adhesives, Sealants, Adhesive Primers and Sealant Primers," and Subchapter 34, "TBAC Emissions Reporting," (TBAC means tertiary butyl acetate or t-butyl acetate) and revisions to Subchapter 23, "Prevention of Air Pollution From Architectural Coatings," Subchapter 24, "Prevention of Air Pollution From Consumer Products," and Subchapter 25, "Control and Prohibition of Air Pollution by Vehicular Fuels," of the New Jersey Administrative Code. The intended effect of this action is to approve control strategies that will result in VOC emission reductions that will help achieve attainment of the national ambient air quality standard for ozone.

DATES: *Effective Date:* This rule is effective on *January 21, 2011.*

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R02–OAR–2010–0310. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region II Office, Air Programs Branch, 290 Broadway, 25th Floor, New York, New York 10007–1866. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is 212–637–4249.

FOR FURTHER INFORMATION CONTACT: Paul Truchan, Air Programs Branch, Environmental Protection Agency, 290 Broadway, 25th Floor, New York, New York 10007–1866, (212) 637–4249.

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I. What action is EPA taking?

On April 9, 2009, New Jersey submitted a proposed revision to the State Implementation Plan (SIP) that includes amendments to New Jersey Administrative Code, Title 7: Chapter 27 (NJAC 7:27)

—Subchapter 24, "Prevention of Air Pollution From Consumer Products,"
—Subchapter 26, "Prevention of Air Pollution From Adhesives, Sealants, Adhesive Primers and Sealant Primers,"
—Subchapter 34, "TBAC Emissions Reporting," and
—Amending the definition of volatile organic compound (VOC) throughout NJAC 7:27.

The revisions to Subchapter 24 expand the number of consumer product categories that are regulated, and revised and improved the portable fuel container requirements. Subchapter 26 is a new rule that regulates adhesives, sealants, adhesive primers and sealant primers that are sold in larger containers and used primarily in commercial/industrial applications, but includes residential applications of these products, such as carpet and flooring installations and roofing installations. Subchapter 34 is a new rule that establishes reporting requirements for tertiary butyl acetate or t-butyl acetate (TBAC) emissions. The definition of VOC was revised throughout the New Jersey rules to exclude TBAC from VOC emissions limitations or VOC content requirements, but requires that TBAC be considered a VOC for purposes of recordkeeping, emissions reporting, photochemical dispersion modeling and inventory requirements. These rules complete the commitment New Jersey made as part of its RACT analysis and 1997 8-hour national ambient air quality standard (NAAQS) ozone attainment demonstration that EPA conditionally approved.

For additional information, see the proposed rulemaking published on July 22, 2010 (75 FR 42672) or the Technical Support Document which is available on line at *http://www.regulations.gov* and entering the docket number EPA–R02–OAR–2010–0310.

II. What comments did EPA receive in response to its proposal?

EPA received comments from two individuals on the July 22, 2010 proposal. Comments supported the efforts that New Jersey and the EPA were making in improving the air quality and implementing new control strategies. One comment went further, recommending the need for measures that are necessary for good health and safe living.

The rules that EPA is approving fulfill New Jersey's commitment, made as part of the reasonably available control technology (RACT) analysis, and were used in the 8-hour ozone attainment demonstration to show that the SIP would attain the 8-hour ozone standard. These rule revisions and new rules became operative in the State on December 29, 2008 and have already started to produce VOC emission reductions.

Monitored air quality in New Jersey supports the progress New Jersey has made in reducing emissions and preliminary air quality data shows that the New York-Northern New Jersey-Long Island, NY-NJ-CT nonattainment area is in attainment of the 8-hour ozone standard. For the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE nonattainment area, quality assured air data for 2009 shows attainment, making the area eligible for a one year extension of the ozone attainment date. When EPA completes the reconsideration of the 2008 8-hour ozone standard, New Jersey like other States will need to reevaluate their SIP to determine if additional measures are necessary to meet the new standard.

EPA thanks the commenters for supporting this rulemaking. In this rulemaking EPA is only acting on the April 9, 2009 SIP revision request, which added the above rules to the SIP and was submitted to fulfill the commitments New Jersey made as part of the 1997 8-hour ozone attainment plan. When EPA completes the reconsideration of the 2008 8-hour ozone standard and depending on the monitored ozone air quality at that time, New Jersey may need to reevaluate its SIP to determine whether additional control measures are necessary to attain the reconsidered NAAQS for ozone. At this time New Jersey meets the Clean Air Act requirements for the ozone RACT SIP.

III. What are EPA's conclusions?

EPA has evaluated New Jersey's submittal for consistency with the Act, EPA regulations, and EPA policy. The new control measures will strengthen the SIP by providing additional VOC emission reductions that the State committed to achieve. Accordingly, EPA is approving the following rules as part of the SIP: Subchapter 23, "Prevention of Air Pollution From Architectural Coatings," Subchapter 24, "Prevention of Air Pollution From Consumer Products," Subchapter 25, "Control and Prohibition of Air Pollution by Vehicular Fuels," Subchapter 26, "Prevention of Air Pollution From Adhesives, Sealants, Adhesive Primers and Sealant Primers," and Subchapter 34, "TBAC Emissions Reporting," of NJAC 7:27. These rules became operative on December 29, 2008. While the changes made to the VOC definition in the other rules included in this SIP revision are also acceptable, EPA will act on those rules in separate **Federal Register** actions at a later date. In addition, EPA finds that Subchapter 26 fully addresses the Control Techniques Guideline document for Miscellaneous Industrial Adhesives dated September 2008.

EPA is also fully approving New Jersey's RACT analysis as New Jersey has fulfilled its commitment to adopt the identified RACT rules, the last of which are being approved in this action. EPA will replace the conditionally approved RACT analysis in the SIP with a full approval (40 CFR 52.1582). These revisions meet the requirements of the Act and EPA's regulations, and are consistent with EPA's guidance and policy. EPA is taking this action pursuant to section 110 and part D of the Act and EPA's regulations.

Administrative Correction

On August 3, 2010, 75 FR 45483, EPA took final action approving a New Jersey SIP revision, which incorporated Subchapter 19, "Control and Prohibition of Air Pollution from Oxides of Nitrogen" along with two Administrative Corrections to Subchapter 19. 40 CFR 52.1570 and 52.1605 listed only the dates of the two administrative corrections, June 15, 2009 and July 6, 2009, but did not include the initial State effective date, April 20, 2009. This correction will be made to 40 CFR 52.1570 and 40 CFR 52.1605 by this action.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General

of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 22, 2011. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: September 30, 2010.

George Pavlou,

Acting Regional Administrator, Region 2.

■ Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart FF—New Jersey

■ 2. Section 52.1570 is amended by revising (c)(88)(i) and adding paragraph (c)(89) to read as follows:

§ 52.1570 Identification of plan.

* * * * *

(c) * * *

(88) * * *

(i) Incorporation by reference:

(A) New Jersey Administrative Code, Title 7, Chapter 27 (NJAC 7:27): Subchapter 4 "Control and Prohibition of Particles from Combustion of Fuel" with an effective date of April 20, 2009; Subchapter 10 "Sulfur in Solid Fuels" with an effective date of April 20, 2009; Subchapter 16 "Control and Prohibition of Air Pollution by Volatile Organic Compounds" with an effective date of April 20, 2009; Subchapter 19 "Control and Prohibition of Air Pollution from Oxides of Nitrogen" with an effective date of April 20, 2009 (including two Administrative Corrections published in the New Jersey Register on June 15, 2009 and July 6, 2009); and Subchapter 21 "Emission Statements" with an effective date of April 20, 2009.

* * * * *

(89) A revision submitted on April 9, 2009, by the New Jersey Department of Environmental Protection (NJDEP) that establishes new and revised control measures for achieving additional reductions of VOC emissions that will help achieve attainment of the national ambient air quality standard for ozone.

(i) Incorporation by reference:

(A) New rules contained in New Jersey Administrative Code, Title 7, Chapter 27 (NJAC 7:27) with effective date of December 1, 2008 and Operative date of December 29, 2008:

(*1*) Subchapter 26, "Prevention of Air Pollution From Adhesives, Sealants, Adhesive Primers and Sealant Primers," and

(*2*) Subchapter 34, "TBAC Emissions Reporting."

(B) Amendments to NJAC 7:27 with effective date of December 1, 2008 and Operative date of December 29, 2008:

(*1*) Subchapter 23, "Prevention of Air Pollution From Architectural Coatings," 23.2 Definitions;

(*2*) Subchapter 24, "Prevention of Air Pollution From Consumer Products," 24.1 Definitions, 24.2 Applicability, 24.4 Chemically formulated consumer products: standards, 24.5 Chemically formulated consumer products: registration and labeling, 24.6 Chemically formulated consumer products: recordkeeping and reporting, 24.7 Chemically formulated consumer products: testing, 24.8 Portable fuel containers and spill-proof spouts: certification requirements, 24.9 Portable fuel containers and spill proof spouts: labeling, 24.10 Portable fuel containers and spill proof spouts: recordkeeping and reporting, 24.12 Penalties and other requirements imposed for failure to comply; and

(*3*) Subchapter 25, "Control and Prohibition of Air Pollution by Vehicular Fuels," 25.1 Definitions.

(C) Repeal to NJAC 7:27 with effective date of December 1, 2008 and Operative date of December 29, 2008: Subchapter 24, "Prevention of Air Pollution From Consumer Products," section 24.11 Portable fuel containers and spill-proof spouts: testing, repealed without replacement and reserved.

(ii) Additional information.

(A) Letter dated April 9, 2009 from Acting Commissioner Mark N. Mauriello, NJDEP, to George Pavlou Acting Regional Administrator, EPA Region 2, submitting the SIP revision containing Subchapters 23, 24, 25, 26, and 34.

■ 3. Section 52.1582 is amended by revising paragraph (m)(6) to read as follows:

§ 52.1582 Control strategy and regulations: Ozone.

* * * * *

(m) * * *

(6) The Statewide reasonably available control technology (RACT) analysis for the 8-hour ozone standard included in the August 1, 2007 State Implementation Plan revision is approved based on EPA's approval of the April 9, 2010 and April 21, 2010 SIP revisions.

■ 4. Section 52.1605 is amended by revising the table entries, under Title 7, Chapter 27: for Subchapters 19, 23, 24, 25, and adding new entries for Subchapters 26 and 34, in numerical order to read as follows:

§ 52.1605 EPA-approved New Jersey regulations.

State regulation	State effective date	EPA approved date	Comments
*	*	*	*	*	*	*
Title 7, Chapter 27.			

State regulation	State effective date	EPA approved date	Comments
* *	* *	*	* *
Subchapter 19, "Control and Prohibition of Air Pollution from Oxides of Nitrogen."	April 20, 2009, as corrected on June 15, 2009 and July 6, 2009.	August 3, 2010, 75 FR 45483.	Subchapter 19 is approved into the SIP except for the following provisions: (1) Phased compliance plan through repowering in § 19.21 that allows for implementation beyond May 1, 1999; and (2) phased compliance plan through the use of innovative control technology in § 19.23 that allows for implementation beyond May 1, 1999.
* *	* *	*	* *
Subchapter 23, "Prevention of Air Pollution From Architectural Coatings."	December 29, 2008 ...	December 22, 2010, [insert **Federal Register** page citation].	
Subchapter 24, "Prevention of Air Pollution From Consumer Products."	December 29, 2008 ...	December 22, 2010, [insert **Federal Register** page citation].	
Subchapter 25, "Control and Prohibition of Air Pollution by Vehicular Fuels."	December 29, 2008 ...	December 22, 2010, [insert **Federal Register** page citation].	
Subchapter 26, "Prevention of Air Pollution From Adhesives, Sealants, Adhesive Primers and Sealant Primers."	December 29, 2008 ...	December 22, 2010, [insert **Federal Register** page citation].	
* *	* *	*	* *
Subchapter 34, "TBAC Emissions Reporting."	December 29, 2008 ...	December 22, 2010, [insert Federal Register page citation].	
* *	* *	*	* *

[FR Doc. 2010–32034 Filed 12–21–10; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2010–0981; FRL–8857–5]

Extension of Tolerances for Emergency Exemptions (Multiple Chemicals)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation extends time-limited tolerances for the pesticides listed in Unit II. of the **SUPPLEMENTARY INFORMATION**. These actions are in response to EPA's granting of emergency exemptions under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of these pesticides. Section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act (FFDCA) requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA.

DATES: This regulation is effective December 22, 2010. Objections and requests for hearings must be received on or before February 22, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (*see also* Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2010–0981. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: See the table in this unit for the name of a specific contact person. The following information applies to all contact persons: Emergency Response Team, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

Pesticide/CFR citation	Contact person
Avermectin 180.449	Marcel Howard, *howard.marcel@epa.gov,* (703) 305–6784.
Bifenazate 180.572, Fenoxaprop-ethyl 180.430, Fipronil 180.517, Propiconazole 180.434, Sulfentrazone 180.498	Andrea Conrath, *conrath.andrea@epa.gov,* (703) 308–6356.
Boscalid 180.589, Fenpyroximate 180.566, Pyraclostrobin 180.582	Stacey Groce, *groce.stacey@epa.gov,* (703) 305–2505.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2010–0981 in the subject line on the first page of your submission. All requests must be in writing, and must be received by the Hearing Clerk on or before February 22, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2010–0981, by one of the following methods:

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

II. Background and Statutory Findings

EPA published a final rule in the **Federal Register** for each pesticide listed. The initial issuance of these final rules announced that EPA, on its own initiative, under section 408 of FFDCA, 21 U.S.C. 346a, was establishing time-limited tolerances.

EPA established the tolerances because FFDCA section 408(l)(6) requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under FIFRA section 18. Such tolerances can be established without providing notice or time for public comment.

EPA received requests to extend the use of these chemicals for this year's growing season. After having reviewed these submissions, EPA concurs that emergency conditions exist. EPA assessed the potential risks presented by residues for each pesticide. In doing so, EPA considered the safety standard in FFDCA section 408(b)(2), and decided that the necessary tolerance under FFDCA section 408(l)(6) would be consistent with the safety standard and with FIRA section 18.

The data and other relevant material have been evaluated and discussed in the final rule originally published to support these uses. Based on that data and information considered, the Agency reaffirms that extension of these time-limited tolerances will continue to meet the requirements of FFDCA section 408(l)(6). Therefore, the time-limited tolerances are extended until the date listed. EPA will publish a document in the **Federal Register** to remove the revoked tolerances from the Code of Federal Regulations (CFR). Although these tolerances will expire and are revoked on the date listed, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on the commodity after that date will not be unlawful, provided the residue is present as a result of an application or use of a pesticide at a time and in a manner that was lawful under FIFRA, the tolerance was in place at the time of the application, and the residue does not exceed the level that was authorized by the tolerance. EPA will take action to revoke these tolerances earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe. Tolerances for the use of the following pesticide chemicals on specific commodities are being extended:

1. *Avermectin.* EPA has authorized under FIFRA section 18 the use of avermectin on lima bean for control of spider mites in California. This regulation extends a time-limited tolerance for residues of the insecticide avermectin B_1 and its delta-8,9-isomer in or on bean, lima, seed at 0.005 parts per million (ppm) for an additional 3-year period. This tolerance will expire and is revoked on December 31, 2013. A time-limited tolerance was originally published in the **Federal Register** of November 12, 2008 (73 FR 66775) (FRL–8387–8).

2. *Bifenazate.* EPA has authorized under FIFRA section 18 the use of bifenazate on Timothy grass for control of Banks grass mite in Nevada. This regulation extends time-limited tolerances for combined residues of the miticide bifenazate [1-methylethyl 2-(4-methoxy [1,1′-biphenyl]-3-yl) hydrazinecarboxylate and its metabolite, diazinecarboxylic acid, (2-(4-methoxy-[1,1′-biphenyl] -3-yl, 1-methylethyl ester] (expressed as bifenazate) in or on Timothy forage at 50 ppm and Timothy hay at 150 ppm for an additional 3-year period. These tolerances will expire and are revoked on December 31, 2013. Time-limited tolerances were extended in the **Federal Register** of December 19, 2007 (72 FR 71802) (FRL–8339–2).

3. *Boscalid.* EPA has authorized under FIFRA section 18 the use of boscalid on Belgian endive for control of the fungal pathogen, *Scelerotinia sclerotiorum* in California. This regulation extends a time-limited tolerance for residues of the fungicide boscalid (3

pyridinecarboxamide, 2-chloro-N-(4′-chloro[1,1′ -biphenyl]-2-yl)) in or on Belgian endive at 16 ppm for an additional 3-year period. This tolerance will expire and is revoked on December 31, 2013. A time-limited tolerance was extended in the **Federal Register** of May 28, 2010 (75 FR 29907) (FRL–8826–4).

4. *Fenpyroximate.* EPA has authorized under FIFRA section 18 the use of fenpyroximate for control of varroa mites in beehives in Nebraska. This regulation extends a time-limited tolerance for combined residues of the insecticide fenpyroximate [(E)-1,1-dimethylethyl 4-[[[[(1,3-dimethyl-5-phenoxy-1H-pyrazol-4-yl) methylene] amino]oxy]methyl]benzoate] in or on honey at 0.10 ppm for an additional 3-year period. This tolerance will expire and is revoked on December 31, 2013. A time-limited tolerance was originally published in the **Federal Register** of May 9, 2007 (72 FR 26317) (FRL–8127–3).

5. *Fenoxaprop-ethyl.* EPA has authorized under FIFRA section 18 the use of fenoxaprop-ethyl in or on grass grown for seed for control of noxious weed species in Oregon. This regulation extends time-limited tolerances for combined residues of the herbicide fenoxaprop-ethyl [[(±)-ethyl 2-[4-[(6-chlor-2-benzoxazoly)oxy] phenoxy]propanoic acid and 6-chloro-2,3-dihydrobenzoxazol-2-one)] in or on grass forage and grass hay at 0.05 ppm for an additional 3-year period. These tolerances will expire and are revoked on December 31, 2013. Time-limited tolerances were originally published in the **Federal Register** of June 13, 2008 (73 FR 33714) (FRL–8366–6).

6. *Fipronil.* EPA has authorized under FIFRA section 18 the use of fipronil on turnip and rutabaga for control of cabbage maggot in Oregon. This regulation extends time-limited tolerances for combined residues of the insecticide fipronil [5-amino-1-(2,6-dichloro-4-(trifluoromethyl) phenyl)-4-((1,R,S)- trifluoromethyl)sulfinyl)-1-H-pyrazole-3-carbonitrile and its 2 metabolites MB45950 (5-amino-1-(2,6-dichloro-4-(trifluoromethyl)phenyl)-4-[(trifluoromethyl)thio]-1H-pyrazole-3-carbonitrile) and MB46136 (5-amino-1-(2,6-dichloro-4-(trifluoromethyl)phenyl)-4-[(trifluoromethyl)sulfonyl]-1H-pyrazole-3-carbonitrile) and its photodegradate MB46513 (5-amino-1-(2,6-dichloro-4-(trifluoromethyl)phenyl]-4-[(1R,S)-(trifluoromethyl)]-1H-pyrazole-3-carbonitrile)] in or on turnip at 1.0 ppm and rutabaga at 1.0 ppm for an additional 3-year period. These tolerances will expire and are revoked on December 31, 2013. These time-limited tolerances were originally published in the **Federal Register** of August 22, 2007 (72 FR 46906) (FRL–8142–6).

7. *Propiconazole.* EPA has authorized under FIFRA section 18 the use of propiconazole in or on nectarine and peach, postharvest for control of sour rot in California. This regulation extends time-limited tolerances for combined residues of the fungicide propiconazole [1-[[2-(2,4-dichlorophenyl)-4-propyl-1,3-dioxolan-2-yl]methyl]-1H-1,2,4-triazole and its metabolites determined as 2,4-dichlorobenzoic acid] in or on nectarine at 2.0 ppm and peach at 2.0 ppm for an additional 3-year period. These tolerances will expire and are revoked on December 31, 2013. These time-limited tolerances were originally published in the **Federal Register** of April 25, 2007 (72 FR 20436) (FRL–8121–2).

8. *Pyraclostrobin.* EPA has authorized under FIFRA section 18 the use of pyraclostrobin in or on Belgian endive for control of the fungal pathogen, *Scelerotinia sclerotiorum* in California. This regulation extends a time-limited tolerance for residues of the fungicide pyraclostrobin [(carbamic acid), 2[[[1(4 chlorophenyl) 1Hpyrazol3yl]oxy]methyl]phenyl methoxymethyl ester, and its desmethoxy metabolite, methylN[[[1(4chlorophenyl) pyrazol 3yl]oxy]otolyl] carbamate)] expressed as parent compound, in or on endive, Belgian at 11 ppm for an additional 3-year period. This tolerance will expire and is revoked on December 31, 2010. A time limited tolerance was extended in the **Federal Register** of January 6, 2010 (75 FR 770) (FRL–8801–9).

9. *Sulfentrazone.* EPA has authorized under FIFRA section 18 the use of sulfentrazone on flax for control of kochia and ALS-resistant kochia in North Dakota and South Dakota. This regulation extends a time-limited tolerance for combined residues of sulfentrazone [N-[2,4-dichloro-5-[4-(difluoromethyl)-4,5-dihydro-3-methyl-5-oxo-1H-1,2,4-triazol-1-yl]phenyl]methanesulfonamide, and its metabolites 3-hydroxymethyl sulfentrazone (HMS) and 3-desmethyl sulfentrazone (DMS)] in or on flax seed at 0.20 ppm for an additional 3-year period. This tolerance will expire and is revoked on December 31, 2013. A time-limited tolerance was extended in the **Federal Register** of December 19, 2007 (72 FR 71802) (FRL–8339–2).

10. *Sulfentrazone.* EPA has authorized under FIFRA section 18 the use of sulfentrazone on strawberries for control of broadleaf weeds in Washington, Oregon, Wisconsin and Michigan. This regulation extends a time-limited tolerance for combined residues of sulfentrazone [N-[2,4-dichloro-5-[4-difluoromethyl)-4,5-dihydro-3-methyl-5-oxo-1H-1,2,4-triazol-1-yl]phenyl] methanesulfonamide, and its metabolites 3-hydroxymethyl sulfentrazone (HMS) and 3-desmethyl sulfentrazone (DMS)] in or on strawberries at 0.60 ppm for an additional 3-year period. This tolerance will expire and is revoked on December 31, 2013. A time-limited tolerance was extended in the **Federal Register** of December 19, 2007 (72 FR 71802) (FRL–8339–2).

III. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/ World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

The Codex has not established a MRL for avermectin, bifenazate, boscalid, fenoxaprop-ethyl, fenpyroximate, fipronil, propiconazole, pyraclostrobin, and sulfentrazone.

IV. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any

information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994). Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

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

V. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: December 10, 2010.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

§ 180.430 [Amended]

■ 2. In § 180.430, in the table to paragraph (b), amend the entries for "Grass, forage" and "Grass, hay" by revising the expiration dates "12/31/10" to read "12/31/13."

§ 180.434 [Amended]

■ 3. In § 180.434, in the table to paragraph (b), amend the entries for "Nectarine" and "Peach" by revising the expiration dates "12/31/10" to read "12/31/13."

§ 180.449 [Amended]

■ 4. In § 180.449, in the table to paragraph (b), amend the entry for "Bean, lima, seed" by revising the expiration date "12/31/10" to read "12/31/13."

§ 180.498 [Amended]

■ 5. In § 180.498, in the table to paragraph (b), amend the entries for "Flax, seed" and "Strawberry" by revising the expiration dates "12/31/10" to read "12/31/13."

§ 180.517 [Amended]

■ 6. In § 180.517, in the table to paragraph (b), amend the entries for "Rutabaga" and "Turnip" by revising the expiration dates "12/31/10" to read "12/31/13."

§ 180.566 [Amended]

■ 7. In § 180.566, in the table to paragraph (b), amend the entry for "Honey" by revising the expiration date "12/31/10" to read "12/31/13."

§ 180.572 [Amended]

■ 8. In § 180.572, in the table to paragraph (b), amend the entries for "Timothy, forage," and "Timothy, hay" by revising the expiration dates "12/31/10" to read "12/31/13."

§ 180.582 [Amended]

■ 9. In § 180.582, in the table to paragraph (b), amend the entry for "Endive, Belgian" by revising the expiration date "12/31/10" to read "12/31/13."

§ 180.589 [Amended]

■ 10. In § 180.589, in the table to paragraph (b), amend the entry for "Endive, Belgian" by revising the expiration date "12/31/10" to read "12/31/13."

[FR Doc. 2010–32148 Filed 12–21–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0775; FRL–8855–7]

Flutolanil; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of flutolanil in or on Brassica leafy vegetable group 5 and turnip greens. The Interregional Research Project Number 4 requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective December 22, 2010. Objections and requests for hearings must be received on or before February 22, 2011, and must be filed in accordance with the instructions provided in 40 CFR part 178 (*see* also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0775. All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov,* or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–

4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Andrew Ertman, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9367; e-mail address: *ertman.andrew@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.gpoaccess.gov/ecfr.* You may access Harmonized Guidelines referenced in this document at *http://www.epa.gov/ocspp/pubs/frs/home/guideline.htm.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0775 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before February 22, 2011. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2009–0775, by one of the following methods:

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

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of January 6, 2010 (75 FR 864) (FRL–8801–5), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9E7612) by the Interregional Research Project No. 4 (IR–4), 500 College Road East, Suite 201W, Princeton, NJ 08540. The petition requested that 40 CFR 180.484 be amended by establishing tolerances for residues of the fungicide flutolanil, *N*-(3-(1-methylethoxy)phenyl)-2-(trifluoromethyl)benzamide and its metabolites converted to 2-(trifluoromethyl) benzoic acid and calculated as flutolanil, in or on ginseng at 3.5 parts per million (ppm); vegetable, *Brassica,* leafy, group 5 at 0.11 ppm; and turnip, greens at 0.11 ppm. That notice referenced a summary of the petition prepared by Gowan Company, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

IR–4 later withdrew their request to establish a tolerance on ginseng. Also, EPA has revised the tolerance levels proposed by IR–4. The reasons for these changes are explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

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

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for flutolanil including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with flutolanil follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. The toxicology studies conducted on flutolanil demonstrate few or no biologically significant toxic effects. Liver effects in

rats included increases in absolute and relative liver weight in the absence of clinical chemistry and/or histopathology findings. In dogs, there was an elevation in alkaline phosphatase and cholesterol levels together with dose-related increases in absolute and relative liver weights, slightly enlarged livers, and an increase in severity of glycogen deposition. The increased liver weights are considered to be an adaptive response to flutolanil treatment and not an adverse effect. Based on the lack of evidence of carcinogenicity and the lack of evidence of mutagenicity, flutolanil is classified as "not likely to be carcinogenic to humans."

Flutolanil is not neurotoxic, and it is not a developmental or reproductive toxicant. No maternal, reproductive, or developmental toxicity was observed at the limit dose. There was no evidence for increased susceptibility of rat or rabbit fetuses to *in utero* exposure or rat pups to pre- and post-natal exposure to flutolanil. No toxic effects were observed in studies in which flutolanil was administered by the dermal route of exposure at the limit dose.

Specific information on the studies received and the nature of the adverse effects caused by flutolanil as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in docket ID number EPA–HQ–OPP–2009–0775 in the document titled "Flutolanil: Human Health Risk Assessment for Flutolanil on *Brassica* Leafy Vegetables (Crop Group 5) and Turnip Greens" on pages 27–30.

B. Toxicological Points of Departure/Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/safety factors are used in conjunction with the POD to calculate a safe exposure level—generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD)—and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm.*

A summary of the toxicological endpoints for flutolanil used for human risk assessment is discussed in Unit III.B., of the final rule published in the **Federal Register** of June 11, 2008 (73 FR 33013) (FRL–8365–6).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to flutolanil, EPA considered exposure under the petitioned-for tolerances as well as all existing flutolanil tolerances in 40 CFR 180.484. EPA assessed dietary exposures from flutolanil in food as follows:

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

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

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the U.S. Department of Agriculture (USDA) 1994–1996 and 1998 Continuing Survey of Food Intake by Individuals (CSFII). As to residue levels in food, the chronic dietary analysis included tolerance level residues, 100% crop treated estimates and default processing factors.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that flutolanil does not pose a cancer risk to humans. Therefore, a dietary exposure assessment for the purpose of assessing cancer risk is unnecessary.

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for flutolanil. Tolerance level residues and/or 100% CT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for flutolanil in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of flutolanil. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Pesticide Root Zone Model and Exposure Analysis Modeling System (PRZM–EXAMs) and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of flutolanil for chronic exposures are estimated to be 8.5 parts per billion (ppb) for surface water and 0.7 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For chronic dietary risk assessment, the water concentration of value 8.5 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Flutolanil is currently registered for the following uses that could result in residential exposures: Turf grass and ornamental plants. Although there is a potential for residential (non-occupational) exposure, a quantitative exposure assessment was not conducted since no toxicological endpoint attributable to acute, short-term or intermediate-term exposure have been identified and the current use pattern does not indicate chronic or long-term exposure (6 or more months of continuous exposure) potential. Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

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

EPA has not found flutolanil to share a common mechanism of toxicity with any other substances, and flutolanil does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has

assumed that flutolanil does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

1. *In general.* Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity.* There was no evidence of increased susceptibility of rat or rabbit fetuses to *in utero* exposure or rat pups to prenatal and postnatal exposure to flutolanil. Flutolanil is not a developmental or reproductive toxicant. No maternal, reproductive, or developmental toxicity was observed at the limit dose.

3. *Conclusion.* EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for flutolanil is complete except for acute and subchronic neurotoxicity and immunotoxicity studies. Recent changes to 40 CFR part 158 make acute and subchronic neurotoxicity testing (OPPTS Test Guideline 870.6200), and immunotoxicity testing (OPPTS Test Guideline 870.7800) required for pesticide registration. However, the available data for flutolanil do not suggest that the compound produces hematological or thymus/spleen organ effects indicative of immunotoxicity. Further, there is no evidence of neurotoxicity in any study in the toxicity database for flutolanil. Therefore, EPA does not believe that conducting neurotoxicity and immunotoxicity studies will result in a lower POD than currently used for overall risk assessment. Consequently, an additional database uncertainty factor (UF) does not need to be applied.

ii. There is no indication that flutolanil is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. There is no evidence that flutolanil exposure results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100% CT and tolerance-level residues. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to flutolanil in drinking water. Residential exposure does not pose a concern for flutolanil because (1) chronic residential exposure is not expected; and (2) although short-term or intermediate-term residential exposure may occur, no relevant adverse effects were identified for dermal or incidental oral or inhalation exposure related to residential use. These assessments will not underestimate the exposure and risks posed by flutolanil.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, flutolanil is not expected to pose an acute risk.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to flutolanil from food and water will utilize 1.5% of the cPAD for children 1 to 2 years old, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of flutolanil is not expected.

3. *Short- and intermediate-term risk.* Short- and intermediate-term aggregate exposure takes into account short- and intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Because no short- and/or intermediate-term adverse effects were identified, flutolanil is not expected to pose a short- or intermediate-term risk.

4. *Aggregate cancer risk for U.S. population.* Based on the lack of evidence of carcinogenicity in two adequate rodent carcinogenicity studies, flutolanil is not expected to pose a cancer risk to humans.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

An adequate enforcement methodology, (Method AU/95R/04), a common moiety Gas Chromatography/Mass Spectrometry (GC/MS) method which determines residues of flutolanil and metabolites as 2-trifluoromethyl benzoic acid (2–TFBA) is available for enforcement.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov.*

B. International Residue Limits

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international maximum residue limits (MRLs) established by the Codex Alimentarius Commission (Codex), as required by FFDCA section 408(b)(4). The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level. No Canadian, Mexican or Codex MRLs have been established for Brassica leafy vegetables and/or turnip greens.

C. Revisions to Petitioned-For Tolerances

The proposed tolerance level of 0.11 ppm for both Brassica leafy vegetable group 5 and turnip greens has been revised to 0.1 ppm. The level of 0.1 ppm is based on the sum of the demonstrated levels of quantitation of flutolanil and metabolite M4, each 0.05 ppm. The proposed tolerance of 0.11 ppm is based on one mustard green trial (of 10 trials) where flutolanil was quantitated at 0.05 to 0.06 ppm, and M4 was approximately 0.03 ppm. Because total residues were < 0.1 ppm, EPA is setting the tolerance level at 0.1 ppm.

V. Conclusion

Therefore, tolerances are established for residues of flutolanil, *N*-(3-(1-methylethoxy)phenyl)-2-(trifluoromethyl)benzamide, including its metabolites and degradates, in or on vegetable, *brassica,* leafy group 5 at 0.1 ppm, and turnip greens at 0.1 ppm.

VI. Statutory and Executive Order Reviews

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

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

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: December 10, 2010.

Daniel J. Rosenblatt,

Director, Registration Division, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. Section 180.484 is amended by alphabetically adding the following commodities to the table in paragraph (a) to read as follows:

§ 180.484 Flutolanil; tolerances for residues.

(a) *General.* * * *

Commodity	Parts per million
* * * * *	
Turnip, greens	0.1
Vegetable, brassica, leafy, group 5	0.1

[FR Doc. 2010–32147 Filed 12–21–10; 8:45 am]

BILLING CODE 6560–50–P

GENERAL SERVICES ADMINISTRATION

41 CFR Parts 300–3, 301–10, 301–12, 301–30, 301–70, Chapter 301, Parts 302–1, 302–2, 302–3, 302–7, 302–11, and 303–70

[FTR Amendment 2010–07; FTR Case 2010–307; Docket 2010–0020, Sequence 1]

RIN 3090–AJ09

Federal Travel Regulation; Removal of Privately Owned Vehicle Rates; Privately Owned Automobile Mileage Reimbursement When Government Owned Automobiles Are Authorized; Miscellaneous Amendments; Correction

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Final rule; correction.

SUMMARY: GSA is correcting a final rule that appeared in the **Federal Register** on November 29, 2010. The applicability date for the final rule was incorrectly designated December 29, 2010. This final rule correction document corrects the applicability date to January 1, 2011.

DATES: The effective date for the final rule published on November 29, 2010 at 75 FR 72965 remains November 29, 2010. The *applicability date* is corrected to January 1, 2011.

FOR FURTHER INFORMATION CONTACT: The Regulatory Secretariat (MVCB), 1275 First Street, NE., Washington, DC, 20417, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content,

contact Mr. Cy Greenidge, Program Analyst, Office of Governmentwide Policy, at (202) 219–2349. Please cite FTR Amendment 2010–07; FTR case 2010–307.

Dated: December 16, 2010.

James Vogelsinger,

Acting Deputy Associate Administrator, Office of Governmentwide Policy.

[FR Doc. 2010–32128 Filed 12–21–10; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA–2010–0003; Internal Agency Docket No. FEMA–8161]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

DATES: *Effective Dates:* The effective date of each community's scheduled suspension is the third date ("Susp.") listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further information, contact David Stearrett, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–2953.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the NFIP, 42 U.S.C. 4001 *et seq.;* unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, FEMA has identified the Special Flood Hazard Areas (SFHAs) in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year, on FEMA's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

■ Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

§ 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Region IV				
Kentucky:				
Bourbon County, Unincorporated Areas	210271	July 31, 1975, Emerg; July 16, 1981, Reg; January 6, 2011, Susp.	Jan. 6, 2011	Jan. 6, 2011.
Cynthiana, City of, Harrison County	210107	February 26, 1975, Emerg; October 15, 1981, Reg; January 6, 2011, Susp.	.....do	Do.
Harrison County, Unincorporated Areas	210329	May 31, 1985, Emerg; May 31, 1985, Reg; January 6, 2011, Susp.	.....do	Do.
Millersburg, City of, Bourbon County	210014	October 27, 1977, Emerg; September 27, 1985, Reg; January 6, 2011, Susp.	.....do	Do.
Paris, City of, Bourbon County	210015	July 23, 1974, Emerg; June 15, 1981, Reg; January 6, 2011, Susp.	.....do	Do.
South Carolina:				
Campobello, Town of, Spartanburg County.	450216	July 7, 1975, Emerg; November 24, 1978, Reg; January 6, 2011, Susp.	.....do	Do.
Duncan, Town of, Spartanburg County	450177	April 29, 1975, Emerg; May 27, 1977, Reg; January 6, 2011, Susp.	.....do	Do.
Inman, City of, Spartanburg County	450217	May 14, 1976, Emerg; November 24, 1978, Reg; January 6, 2011, Susp.	.....do	Do.
Landrum, Town of, Spartanburg County	450215	November 24, 1975, Emerg; July 16, 1981, Reg; January 6, 2011, Susp.	.....do	Do.
Lyman, Town of Spartanburg County ...	450219	May 15, 1975, Emerg; May 27, 1977, Reg; January 6, 2011, Susp.	.....do	Do.
Pacolet, Town of, Spartanburg County	450180	October 3, 1975, Emerg; November 24, 1978, Reg; January 6, 2011, Susp.	.....do	Do.
Spartanburg, City of, Spartanburg County.	450181	January 14, 1974, Emerg; June 1, 1978, Reg; January 6, 2011, Susp.	.....do	Do.
Spartanburg County, Unincorporated Areas.	450176	March 5, 1975, Emerg; August 1, 1984, Reg; January 6, 2011, Susp.	.....do	Do.
Woodruff, City of, Spartanburg County	450214	December 12, 1975, Emerg; November 24, 1978, Reg; January 6, 2011, Susp.	.....do	Do.
Region V				
Indiana:				
Indian Village, Town of, St. Joseph County.	180225	June 11, 1981, Emerg; June 11, 1981, Reg; January 6, 2011, Susp.	.....do	Do.
Mishawaka, City of, St. Joseph County	180227	February 24, 1975, Emerg; August 17, 1981, Reg; January 6, 2011, Susp.	.....do	Do.
North Liberty, Town of, St. Joseph County.	180228	February 24, 1975, Emerg; August 19, 1985, Reg; January 6, 2011, Susp.	.....do	Do.
Osceola, Town of, St. Joseph County ..	180229	N/A, Emerg; December 14, 1992, Reg; January 6, 2011, Susp.	.....do	Do.
Roseland, Town of, St. Joseph County	185179	May 5, 1972, Emerg; May 4, 1973, Reg; January 6, 2011, Susp.	.....do	Do.
South Bend, City of, St. Joseph County	180231	August 16, 1974, Emerg; February 1, 1978, Reg; January 6, 2011, Susp.	.....do	Do.
St. Joseph County, Unincorporated Areas.	180224	October 22, 1971, Emerg; August 15, 1978, Reg; January 6, 2011, Susp.	.....do	Do.
Walkerton, Town of, St. Joseph County	180232	July 15, 1975, Emerg; April 15, 1981, Reg; January 6, 2011, Susp.	.....do	Do.
Ohio:				
Belle Valley, Village of, Noble County ..	390429	September 22, 1975, Emerg; November 2, 1990, Reg; January 6, 2011, Susp.	.....do	Do.
Caldwell, Village of, Noble County	390430	August 1, 1975, Emerg; September 4, 1987, Reg; January 6, 2011, Susp.	.....do	Do.
Dexter City, Village of, Noble County ...	390431	August 19, 1975, Emerg; August 19, 1987, Reg; January 6, 2011, Susp.	.....do	Do.
Noble County, Unincorporated Areas ...	390428	May 19, 1976, Emerg; January 1, 1988, Reg; January 6, 2011, Susp.	.....do	Do.
Sarahsville, Village of, Noble County	390706	February 9, 2006, Emerg; January 6, 2011, Reg; January 6, 2011, Susp.	.....do	Do
Region VI				
Arkansas:				
Drew County, Unincorporated Areas	050430	October 14, 1998, Emerg; July 1, 2009, Reg; January 6, 2011, Susp.	.....Do.	Do.
Monticello, City of, Drew County	050074	April 3, 1975, Emerg; April 1, 1982, Reg; January 6, 2011, Susp.	.....do	Do.
Tillar, City of, Desha and Drew Counties.	050075	April 3, 1975, Emerg; February 1, 1988, Reg; January 6, 2011, Susp.	.....do	Do.
Wilmar, City of, Drew County	050076	July 17, 1975, Emerg; October 12, 1982, Reg; January 6, 2011, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Winchester, City of, Drew County	050077	April 15, 2004, Emerg; August 1, 2009, Reg; January 6, 2011, Susp.	.....do	Do.
New Mexico:				
Bayard, City of, Grant County	350019	October 28, 1975, Emerg; July 1, 1988, Reg; January 6, 2011, Susp.	.....do	Do.
Grant County, Unincorporated Areas	350121	July 2, 1991, Emerg; April 1, 1992, Reg; January 6, 2011, Susp.	.....do	Do.
Santa Clara, Village of, Grant County ...	350020	June 5, 1975, Emerg; July 1, 1987, Reg; January 6, 2011, Susp.	.....do	Do.
Silver City, Town of, Grant County	350022	July 22, 1975, Emerg; May 17, 1988, Reg; January 6, 2011, Susp.	.....do	Do.
Oklahoma:				
Beggs, City of, Okmulgee County	400345	October 8, 1976, Emerg; September 19, 1978, Reg; January 6, 2011, Susp.	.....do	Do.
Butler, Town of, Custer County	400266	February 15, 1983, Emerg; May 15, 1985, Reg; January 6, 2011, Susp.	.....do	Do.
Clinton, City of, Custer and Washita Counties.	400054	November 25, 1974, Emerg; July 2, 1980, Reg; January 6, 2011, Susp.	.....do	Do.
Custer County, Unincorporated Areas ..	400486	July 20, 1994, Emerg; N/A, Reg; January 6, 2011, Susp.	.....do	Do.
Dewar, Town of, Okmulgee County	400143	November 21, 1975, Emerg; June 5, 1985, Reg; January 6, 2011, Susp.	.....do	Do.
Henryetta, City of, Okmulgee County ...	400144	August 19, 1975, Emerg; March 4, 1980, Reg; January 6, 2011, Susp.	.....do	Do.
Hoffman, Town of, Okmulgee County ...	400285	September 30, 1976, Emerg; August 5, 1985, Reg; January 6, 2011, Susp.	.....do	Do.
Morris, City of, Okmulgee County	400407	February 24, 1977, Emerg; June 29, 1982, Reg; January 6, 2011, Susp.	.....do	Do.
Okmulgee, City of, Okmulgee County ...	400145	April 29, 1975, Emerg; February 4, 1981, Reg; January 6, 2011, Susp.	.....do	Do.
Okmulgee County, Unincorporated Areas.	400492	April 1, 1985, Emerg; September 27, 1991, Reg; January 6, 2011, Susp.	.....do	Do.
Weatherford, City of, Custer County	400056	February 7, 1975, Emerg; December 18, 1979, Reg; January 6, 2011, Susp.	.....do	Do.
Texas:				
Alto, Town of, Cherokee County	480740	January 24, 1977, Emerg; August 19, 1985, Reg; January 6, 2011, Susp.	.....do	Do.
Bosque County, Unincorporated Areas	480051	May 4, 1976, Emerg; August 1, 1987, Reg; January 6, 2011, Susp.	.....do	Do.
Burleson County, Unincorporated Areas	481169	July 6, 1987, Emerg; January 18, 1989, Reg; January 6, 2011, Susp.	.....do	Do.
Caldwell, City of, Burleson County	480089	March 31, 1975, Emerg; September 30, 1988, Reg; January 6, 2011, Susp.	.....do	Do.
Cherokee County, Unincorporated Areas.	480739	June 16, 1989, Emerg; December 1, 1989, Reg; January 6, 2011, Susp.	.....do	Do.
Clifton, City of, Bosque County	480052	May 1, 1975, Emerg; April 1, 1987, Reg; January 6, 2011, Susp.	.....do	Do.
Cranfills Gap, City of, Bosque County ..	481512	May 20, 1991, Emerg; January 1, 1992, Reg; January 6, 2011, Susp.	.....do	Do.
DeWitt County, Unincorporated Areas ..	481171	October 1, 1981, Emerg; May 1, 1987, Reg; January 6, 2011, Susp.	.....do	Do.
Iredell, Town of, Bosque County	481072	April 7, 1992, Emerg; November 1, 1992, Reg; January 6, 2011, Susp.	.....do	Do.
Jacksonville, City of, Cherokee County	480123	September 3, 1974, Emerg; February 18, 1981, Reg; January 6, 2011, Susp.	.....do	Do.
Meridian, City of, Bosque County	480053	June 4, 1975, Emerg; August 1, 1987, Reg; January 6, 2011, Susp.	.....do	Do.
New Summerfield, City of, Cherokee County.	481153	January 21, 2010, Emerg; January 6, 2011, Reg; January 6, 2011, Susp.	.....do	Do.
Rusk, City of, Cherokee County	480124	June 20, 1975, Emerg; June 1, 1988, Reg; January 6, 2011, Susp.	.....do	Do.
Snook, City of, Burleson County	480090	N/A, Emerg; September 15, 2001, Reg; January 6, 2011, Susp.	.....do	Do.
Somerville, City of, Burleson County	480091	July 21, 1975, Emerg; June 4, 1990, Reg; January 6, 2011, Susp.	.....do	Do.
Troup, City of, Cherokee and Smith Counties.	480570	August 15, 1975, Emerg; January 23, 1979, Reg; January 6, 2011, Susp.	.....do	Do.
Valley Mills, City of, Bosque and McLennan Counties.	480054	July 31, 1975, Emerg; November 15, 1979, Reg; January 6, 2011, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Wells, City of, Cherokee County	480741	February 4, 1991, Emerg; June 1, 1991, Reg; January 6, 2011, Susp.	.....do	Do.
Yorktown, City of, DeWitt County	480197	January 16, 1974, Emerg; March 1, 1987, Reg; January 6, 2011, Susp.	.....do	Do.
Region VII				
Iowa:				
Anita, City of, Cass County	190048	April 11, 1975, Emerg; June 17, 1986, Reg; January 6, 2011, Susp.	.....do	Do.
Atlantic, City of, Cass County	190049	July 8, 1975, Emerg; August 5, 1986, Reg; January 6, 2011, Susp.	.....do	Do.
Cass County, Unincorporated Areas	190852	August 25, 1975, Emerg; September 1, 1986, Reg; January 6, 2011, Susp.	.....do	Do.
Lewis, City of, Cass County	190347	October 26, 1976, Emerg; August 26, 1977, Reg; January 6, 2011, Susp.	.....do	Do.
Marne, City of, Cass County	190348	September 11, 2008, Emerg; January 6, 2011, Reg; January 6, 2011, Susp.	.....do	Do.
Massena, City of, Cass County	190349	January 15, 2008, Emerg; January 6, 2011, Reg; January 6, 2011, Susp.	.....do	Do.
Missouri:				
Calhoun, City of, Henry County	290622	November 7, 1975, Emerg; August 19, 1985, Reg; January 6, 2011, Susp.	.....do	Do.
Cedar County, Unincorporated Areas	290791	N/A, Emerg; April 11, 2006, Reg; January 6, 2011, Susp.	.....do	Do.
Clinton, City of, Henry County	290155	June 25, 1975, Emerg; July 4, 1988, Reg; January 6, 2011, Susp.	.....do	Do.
Henry County, Unincorporated Areas	290804	January 29, 2007, Emerg; January 6, 2011, Reg; January 6, 2011, Susp.	.....do	Do.
Stockton, City of, Cedar County	290667	N/A, Emerg; September 25, 2003, Reg; January 6, 2011, Susp.	.....do	Do.
Windsor, City of, Henry County	290156	March 30, 1976, Emerg; September 18, 1985, Reg; January 6, 2011, Susp.	.....do	Do.
Region IX				
California: Gridley, City of, Butte County	060019	N/A, Emerg; April 25, 1997, Reg; January 6, 2011, Susp.	.....do	Do.

*do = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: December 7, 2010.

Sandra K. Knight,

Deputy Federal Insurance and Mitigation Administrator, Mitigation.

[FR Doc. 2010–32106 Filed 12–21–10; 8:45 am]

BILLING CODE 9110–12–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[ET Docket No. 10–152; FCC 10–194]

Satellite Television Extension and Localism Act of 2010 and Satellite Home Viewer Extension and Reauthorization Act of 2004

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document the Commission, adopts a point-to-point predictive model for determining the ability of individual locations to receive an over-the-air digital television broadcast signal at the intensity level needed for service through the use of an antenna as required by the Satellite Television Extension and Localism Act of 2010 (STELA). The STELA reauthorizes the Satellite Home Viewer Extension and Reauthorization Act of 2004 (SHVERA) by extending the statutory copyright license for satellite carriage of distant broadcast signals, as well as provisions in the Communications Act, and by amending certain provisions in the Communications Act and the Copyright Act.

DATES: Effective January 21, 2011.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Alan Stillwell, Office of Engineering and Technology, (202) 418–2925, *e-mail: Alan.Stillwell@fcc.gov,* TTY (202) 418–2989.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, ET Docket No. 10–152, FCC 10–194, adopted November 22, 2010 and released November 23, 2010. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room, CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov.*

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Summary of Report and Order

1. The Satellite Television Extension and Localism Act of 2010 (STELA) reauthorizes the Satellite Home Viewer Extension and Reauthorization Act of

2004 (SHVERA) by extending the statutory copyright license for satellite carriage of distant broadcast signals, as well as provisions in the Communications Act, and amending certain provisions in the Communications Act and the Copyright Act. To implement the new statutory regime, the STELA, *inter alia,* requires the Commission to "develop and prescribe by rule a point-to-point predictive model for reliably and presumptively determining the ability of individual locations, through the use of an antenna, to receive signals in accordance with the signal intensity standard in § 73.622(e)(1) of [its rules], or a successor regulation, including to account for the continuing operation of translator stations and low power television stations." In this action, the Commission has adopted a point-to-point predictive model for determining the ability of individual locations to receive an over-the-air digital television broadcast signal at the intensity level needed for service through the use of an antenna as required by the STELA. The new digital ILLR model will be used as a means for reliably and presumptively determining whether individual households are eligible to receive the signals of distant network-affiliated digital television stations, including TV translator and low power television stations, from their satellite carrier. The predictive model the Commission adopts, which is based on the current model for predicting the intensity of analog television signals at individual locations, will allow such determinations to be made in a timely and cost effective manner for all parties involved, including network TV stations, satellite carriers and satellite subscribers. The Commission is also providing a plan for the model's continued refinement by use of additional data as it may become available. Under that plan, refinements based on additional data may be proposed by referencing the docket of this proceeding, which will be held open indefinitely for this purpose. Consistent with this intention to refine the model as new information becomes available, the Commission has also initiated a *Further Notice of Proposed Rulemaking* published elsewhere in this issue, in this proceeding to request comment on possible modifications to the methodology in the digital ILLR model to improve its predictive accuracy as suggested by one of the parties responding to the *Notice of Proposed Rulemaking* (NPRM), 75 FR 46885, August 4, 2010, in this proceeding.

2. As directed by Congress in the STELA, the Commission is adopting a new digital ILLR model for predicting the ability of individual locations to receive, through use of an antenna, an over-the-air digital television broadcast signal in accordance with the intensity standards specified in § 73.622(e)(1) of our rules. This new model will be established in the Commission's rules as the point-to-point model for presumptively determining the ability of individual locations to receive with an antenna the digital signals of full service television stations, low power television stations (including digital Class A stations) and TV translator stations. Consistent with the specifications in the STELA, the Commission is basing this new model on the SHVIA ILLR model that it adopted in CS Docket No. 98–201, Report and Order, 64 FR 7113, February 12, 1999, as revised previously, for use in predicting the signal strengths of analog television signals. The new digital ILLR model incorporates parameters and features appropriate for prediction of the signal strengths of digital television signals. The Commission also adopts a procedure for continued refinement of this model through use of additional data and information as it may become available. As part of that effort, the Commission requested comment on possible revisions to the digital ILLR model in the Further Notice of Proposed Rulemaking, published elsewhere in this issue, adopted November 22, 2010 in this proceeding.

3. In developing the new model, the Commission considered, in addition to the modifications necessary to enable the model to predict digital television signal strengths, three ways in which the STELA revises the definition of "unserved household": (1) The definition now references an "antenna" without specifying the kind of antenna or where it is located; (2) the definition specifically recognizes both a "primary stream" and a "multicast stream" affiliated with a network; and (3) the definition now limits network stations whose signals are to be considered to those network affiliates in the same DMA as the subscriber. The new STELA digital ILLR model and its specifications are described in OET's new "OET Bulletin No. 73" in Appendix A of the Report and Order.

A. The ILLR Model for Digital Television Signals

4. The Commission is adopting the methodology and parameters for describing the basic radiofrequency environment of the SHVIA ILLR model as proposed in the *NPRM* for the digital ILLR model. As indicated by the Broadcasters and CDE, the methodology in the ILLR model as modified over time has been time-tested and proven successful. The Commission expects that the new digital ILLR model will provide the same reliable and accurate predictions of signal availability as the analog SHVIA ILLR model. Like its predecessor, the new model incorporates features to account for the radio propagation environment through which television signals pass and the receiving systems used by consumers. These features are described in the "planning factors" that describe a set of assumptions for digital and analog television reception systems. Since digital and analog television signals are transmitted in the same frequency bands, the planning factors affecting basic propagation of signals using the two different modulation methods and the background noise level are the same. The Commission is not modifying in the digital ILLR model any of the parameters of the SHVIA ILLR model that describe basic propagation and the background noise levels. The planning factors that are different for digital and analog signals include antenna location (outdoor vs. indoor) and performance, time and location variability, and land use and land cover. The Commission's decisions on each of these features in the digital ILLR model are discussed. The Commission also observes that the planning factor differences for antenna location and performance and for time and location variability are incorporated into the threshold signal level for reception for digital television service, which the STELA directs to be set at the noise-limited levels specified in § 73.622(e)(1).

5. The Commission is not including adjustments to account for interference and multipath in the digital ILLR model. As the Commission observed in its 2005 Report to Congress, a receiver's ability to provide service in the presence of interfering signals is not relevant to the field strength needed to provide service. While the presence of other signals on the same or adjacent channels does have the potential for disrupting service, the effects of other signals are a separate matter from the basic functioning of a receiver in an interference-free environment that forms the basis for the Commission's field strength standards. With regard to multipath, in the 2005 Report to Congress, the Commission finds that while the sensitivity of television receivers may degrade to a small degree when they process multipath signals, the difficult multipath conditions under which

degradation of as much as 2 dB could occur are not expected to be the norm. Moreover, the incidence of multipath varies significantly over very short distances and the level of multipath and its character is generally not a predictable factor. Further, the Commission sees no indication in the STELA that Congress intended that it add interference or multipath consideration to the signal strength standard. The Commission also observes that at locations where interference or multipath are present, consumers can often take steps such as repositioning or re-orienting their antenna to resolve the impact and achieve reception. Accordingly, the Commission finds no basis or need for including adjustments to the digital ILLR model for interference or multipath.

6. The Commission is not adopting the revisions to the estimating methodology proposed by Mr. Shumate as it has not had an opportunity to fully explore the changes he suggests. Therefore, the Commission is not addressing his proposals for improving the ILLR methodology in the Further Notice of Proposed Rulemaking herein. Nonetheless, the Commission believes there may be merit in the improvements he describes for the methodology for predicting digital television signal strengths at individual locations and perhaps more generally, and that they warrant further investigation as possible modifications to the digital ILLR model. The Commission will explore these improvements through a Further Notice of Proposed Rulemaking that is included in the instant action. It also is not acting on Adaptrum's suggestion that we allow optional use of the digital ILLR model for prediction of signal strengths for purposes of identifying unused spectrum in the TV bands where unlicensed devices could operate as it is beyond the scope of this proceeding.

7. *Antenna Location and Performance.* In the NPRM, the Commission proposed to use the current standard for an outdoor antenna as specified in the DTV planning factors in OET Bulletin No. 69 for predicting digital television signal strengths at individual locations, citing the information and conclusions regarding outdoor and indoor antennas in the 2005 Report to Congress. As set forth in the OET Bulletin No. 73, the prediction model would use an antenna at 6 meters (20 feet) for one-story structures and 9 meters (30 feet) for structures taller than one story. Consistent with Congress' modification of the specification of the receiving antenna to simply say an "antenna," and its concern that using the outdoor antenna model may result in instances where a consumer who either cannot use an outdoor antenna or cannot receive service using an outdoor antenna and is not able to receive a station's service with an indoor antenna will be found ineligible for satellite delivery of a distant network signal, the Commission again requested comments, suggestions and new information that would provide a solution for satellite television subscribers in such circumstances. In this regard, it indicated that it was particularly interested in new ideas and information that have been developed in the time since the 2005 Report to Congress.

8. The Commission concludes that the current standard for an outdoor antenna as specified in the digital television planning factors in OET Bulletin No. 69 and on which the digital television signal strength standards in § 73.622(e)(1) are based, at the alternative heights proposed in the NPRM, should be used as the basis for predicting digital television signal strengths at individual locations in the digital ILLR model. As discussed in the NPRM, Congress's use of the term "antenna" in the STELA grants the Commission greater flexibility to take into account different types of antennas than was previously available, without requiring the Commission to incorporate any particular type of antenna into the model. The Commission is not persuaded by the Broadcasters' arguments that the omission of the word "outdoor" from the antenna description in the STELA has no significance and that the Commission is required to assume use of an outdoor antenna in predicting digital television signal strengths. While they are correct that the STELA directs the Commission to rely on the ILLR model recommended with respect to digital signals in the 2005 Report to Congress, which assumes use of an outdoor antenna, the Commission believes that STELA's use of the term "rely" provides us latitude in the manner in which the ILLR model is implemented. Their argument that the Commission must specify an outdoor antenna because the minimum signal strengths specified by the STELA are premised on use of an outdoor antenna (through the digital television planning factors), is similarly not persuasive in that, as DIRECTV/DISH observe, other specifications of parameters that include an indoor antenna are possible while still adhering to those signal strengths as the standard.

9. The Commission also is not persuaded by DIRECTV/DISH's arguments that Congress' deletion of the qualifiers specifying a "conventional, stationary, outdoor rooftop receiving antenna" from the definition of an "unserved household" from the STELA means that a household is now unserved if it cannot receive a signal of sufficient strength by means of a simple indoor antenna. Again, it believes that this change simply affords the Commission latitude to consider all types of antennas in implementing the digital ILLR model. Even assuming that DIRECTV/DISH are correct that more consumers are now using indoor antennas, their argument that Congress was responding to greater use of indoor antennas by consumers misses the fact that consumers are only using indoor antennas where such antennas provide service. As observed in the 2005 Report to Congress, the Commission has always assumed that households will use the type of antenna that they need to achieve service; if an indoor antenna is insufficient for a particular household, it generally will rely on a rooftop antenna. Nothing in the STELA reflects a Congressional intent for the Commission to abandon that assumption. Thus, the Commission disagrees that households that are not able to receive service with an indoor antenna should be considered unserved simply because they do not use an outdoor antenna. The Commission has considered the full range of antenna options in developing the digital TV ILLR prediction model.

10. Turning to the specification of antennas in the prediction model, the Commission finds that an approach that specifies an outdoor antenna at 6 meters above ground for one-story structures and 9 meters above ground for taller structures (household roof-top levels) with gain as specified in the digital television planning factors is most consistent with the directives for the digital TV signal strength prediction model set forth in the STELA. The Commission reached this conclusion for the following reasons. First, given that the STELA specifies use of the digital television signal strength standard in § 73.622(e)(1) of the rules as the threshold metric against which predictions are to be compared to make determinations of "served" and "unserved," it is important and necessary that the signal strengths predicted by the model can be meaningfully compared to that standard. To provide for such comparisons, the signals whose strengths are predicted by the model must have the same qualities as the signal specified in the standard. This can occur only if the assumptions underlying the signal strength needed for reception as described by the

standard are the same as the assumptions underlying the signal predicted by the model and their relationship is well defined, so that the two represent the same conditions of reception. The § 73.622(e)(1) digital television signal strength standard is derived from the assumptions in the digital television planning factors as described in OET Bulletin No. 69 and those assumptions include an outdoor antenna as described above. This signal strength standard is important under the Commission's rules because it serves to define the service boundary or "service contour" of a digital television station and the threshold at which a station's service is considered to be available in areas within that service contour. Congress specified this same signal strength standard for defining "served" and "unserved" locations for purposes of determining households' eligibility for satellite delivery of distant network signals in the STELA. For these reasons, the Commission agrees with the Broadcasters that it is appropriate to incorporate into the digital ILLR model the assumptions in the planning factors in OET Bulletin No. 69, including the specified outdoor antenna, to obtain predictions of signal strength for comparison to the standard specified in the STELA.

11. The Commission also rejects DIRECTV/DISH's proposed adjustments to the signal strength standard to account for differences in the expected signal level and in the gain of indoor and outdoor antennas. It finds that application of these adjustments would significantly alter the digital television service description as defined in the § 73.622(e)(1) signal strength standard by reducing the likelihood that a given location would be predicted to receive service. Under the plan they propose, between 36.7 dB and 46.7 dB (depending on whether the location is in an urban area), or more, would be subtracted from the prediction calculated by the ILLR model for locations that do not have an outdoor antenna. They do not offer any additional modifications to the model or its assumptions to compensate for this proposed change in the signal strength standard; nor are we aware of any modifications that would provide such compensation. In application, DIRECTV/DISH's proposal would raise the signal strength needed for reception of UHF signals from 41 dBμV/m to between 77.7 dbμV/m and 87.7 dBμV/m for households without outdoor antennas. Such a change could, as the broadcasters observe, drastically increase the number of households eligible for satellite delivery of distant network signals by allowing viewers to claim use of an indoor antenna when such viewers generally could in fact receive service using an outdoor antenna. Notwithstanding the difficulties in developing a model that would provide accurate and reliable indoor predictions, the Commission is concerned that many satellite subscribers who could use an outdoor antenna would have an incentive to take the "easy path" and simply report that they cannot use an outdoor antenna and thereby be evaluated under the indoor antenna standard, when in fact they could readily receive a station's service with outdoor antenna. For example, subscribers located within a station's service area but at distances from its transmitter where indoor reception is not possible could simply assert that they cannot use an outdoor antenna and thus be eligible to receive a distant network signal. This would remove large numbers of viewers from local stations potential audience. In view of Congress' selection of the § 73.622(e)(2) signal strength standard as the threshold for distant signal eligibility in the STELA, the Commission does not believe that Congress envisioned or contemplated such an increase in the numbers of satellite subscribers eligible for delivery of distant network signals.

12. In addition, as the Commission discussed in the 2005 Report to Congress and the NPRM, there are significant difficulties in achieving accurate and reliable estimates of digital television signal strengths in indoor environments, which make it very difficult if not impossible to obtain accurate and reliable predictions of digital television signal strengths indoors. The Commission is concerned that simplification of indoor antenna reception to a single set of circumstances as suggested by DIRECTV/DISH and Mr. Kurby would ignore the significant differences that exist in indoor reception scenarios, particularly with respect to attenuation of signals due to the materials with which a building is constructed, which vary substantially in the degree to which they absorb or reflect signals, and the antenna's location within the structure, which affects the number and pathways of structural features (walls or ground in the case of basements) that signals must penetrate to reach the antenna. In this regard, the Commission also observes that in the DTV transition, it advised consumers of the wide variability in the performance of antennas generally and indoor antennas in particular in materials provided to the public for the DTV transition. For example, the Commission noted that consumers having problems with indoor antennas needed to check the performance information for the antenna, move the antenna for best reception, place it near a window, as high as possible, away from electronic equipment and change the direction the antenna is facing. Further, the Commission advised that a roof-top antenna may be needed.

13. These differences in indoor reception scenarios are very difficult to account for properly in a model's input values and can also be challenging for a user of a model to assess so as to specify appropriate input values for any particular location. These factors together greatly reduce the reliability and accuracy of any indoor signal strength predictions that might be provided by a model. While the Commission understands that there are also variations in signal strength across outdoor receive locations due to terrain and the presence of man-made terrain features, including aspects of the structure on which an antenna is mounted, that variability is generally much less than the variability of signal strengths indoors which are affected by building materials and location within the building as well as the same terrain and man-made features that affect signals received outdoors. The Commission also expects that there would be an incentive for households in areas where service is not available with an indoor antenna to simply submit that they have an indoor antenna in order to be eligible for distant signal delivery when in fact they could receive that signal with an outdoor antenna under the standard specified in the STELA. This type of behavior would, to the extent it occurred, undermine broadcasters' coverage and complicate our administration of an indoor antenna standard. The Commission also is not persuaded that any of the options for modifying their proposed adjustments that DIRECTV/DISH have submitted in recent ex parte presentations would remedy the problems discussed. None of those suggestions would provide reliable and accurate estimates of indoor signal strengths; nor do they offer modifications that would compensate for the change their plan would make to digital signal strength standard set forth in the STELA. Accordingly, the Commission will use the current standard for an outdoor antenna as specified in the digital television planning factors in OET Bulletin No. 69 in the digital ILLR model.

14. Notwithstanding this decision, the Commission remains aware and

concerned that using the outdoor reception model may result in instances where a consumer who either cannot use an outdoor antenna or cannot receive service using an outdoor antenna and is not able to receive a station's service with an indoor antenna will be found ineligible for satellite delivery of a distant network signal. This concern is mitigated by new local-into-local offerings by satellite carriers, which the Commission believes will significantly reduce the number of instances where satellite subscribers would need to consider requesting delivery of distant network signals. Dish Network now provides local network stations (local-into-local service) in all 210 DMAs. In addition, DIRECTV now provides local-into-local service in all but 60 relatively small markets. The Commission recognizes that DIRECTV/DISH will still have to qualify some distant signals even after they provide local-into-local service in all 210 DMAs. However, the locations that they will not reach with local-into-local service are likely to be in areas with relatively small populations that are at the edge of some DMAs that are served by satellite service "spot beams" that provide localized service to the major portion of a DMA, including its center of population. Those populations are served by their carrier's larger regional coverage signals that do not have the local signals carried on the spot beams. Moreover, the areas not reached by the spot beams will generally be in less densely populated areas where there are generally fewer residences that are not able to use an outdoor antenna. In concluding that the outdoor antenna standard remains appropriate, the Commission has also considered that most subscribers who will request distant signals from their satellite carriers are likely to be in rural areas where use of outdoor antennas is more common and practical than in urban areas. Dish now serves all 210 DMAs and only a small number of Dish subscribers are beyond the spot beams serving those DMAs and therefore potentially eligible for distant signals. Although DIRECTV does not offer local stations in 60 DMAs, these are small market areas and mostly in rural areas where outdoor antennas are likely to be more prevalent.

15. The Commission also observes that under section 339(a)(2)(E) of the Communications Act, satellite TV subscribers who are denied delivery of a distant network signal based on the signal strength predictive model or a measurement may request a waiver, through the subscriber's satellite carrier, from the station that asserts that such retransmission is prohibited. While the Commission does not know the extent to which stations have granted such waivers, the waiver process is available. It hopes that stations receiving such waiver requests will consider whether the subscriber is in an urban area or residing in a multiple dwelling unit, and therefore confined to reliance on an indoor antenna, and that the stations will act accordingly to grant the waiver request on a case-by-case basis in such circumstances. Finally, the Commission will remain open to consideration of new ideas, approaches and methods for identifying households that cannot use or receive service with an outdoor antenna that are predicted to be served by our digital ILLR predictive model. The Commission is holding this proceeding open for continued refinement of the digital TV ILLR Model, so parties may submit proposals for such new ideas, approaches and methods.

16. *Time and Location Variability Factors.* The field strength of radio signals, including television signals, at a given distance from a transmitter vary by location and with time due to factors affecting their propagation. The time and location (situational) variability factors are commonly represented using the notation "F(L,T)," where a signal of a specified strength level will be available at L percent of locations T percent of the time. The variations over time are also known as "fading." In the NPRM, the Commission proposed to use 50% as the location variability factor and 90% as the time variability factor in the digital ILLR model, in accordance with the DTV planning factors. The SHVIA ILLR model applicable to analog stations uses 50% as the location variability and 50% as the time variability factor.

17. The Commission continues to believe that the F(50,90) specifications for time and location variability set forth in the digital television planning factors are the appropriate values for those factors in the digital ILLR model. While the Commission understands DIRECTV/DISH's position that viewers desire service to be available nearly all the time and that digital television service does not degrade gradually, the fact is that the propagation paths of terrestrial broadcast television signals are much different than those of sky-based satellite signals and this affects the practically achievable degree of broadcast signal availability. As observed in the NPRM, terrestrial signals follow paths that are close to the surface and are attenuated by the natural and man-made surface features they encounter along those paths. The attenuation caused by those features results in propagation conditions whereby signal strength varies statistically by location and time. The power and/or antenna height needed to improve broadcast television signal availability increase in a non-linear manner such that it is unrealistic to require such availability to approach 100%. These propagation conditions are much different than those faced by satellite signals, which travel over paths that are generally affected only by weather and other atmospheric conditions.

18. The F(50,90) values for digital television service availability were established based on an industry-Government consensus that relied on the traditional TV service model that worked well for analog TV service and that, as argued by the broadcasters, is also appropriate for digital TV service. Changing the time variability factor value to 99% reliability as requested by the satellite providers would greatly shrink the predicted local DTV service areas and would not reflect the capability of the vast majority of viewers to receive signals. Moreover, as pointed out by the Broadcasters and in MSW's Engineering Statement, the assumed 10% reduction in signal availability over time occurs at the outermost limit of a station's service area and is not the typical statistical figure for reliable reception across a station's entire service area. As the distance to a station's transmitter decreases, time availability of the signal above the noise-limited threshold value also increases. The Commission also observes that households at the edge of a station's service area can often improve their reception (and thereby reduce or eliminate periods when the station's signal is not available) by mounting their antennas higher, using higher gain antennas, or using low-noise pre-amplifiers at their antennas. In addition, it is more likely that a station's signal strength at a household that is located near the edge of its service area will be predicted to be below the threshold needed for reception and therefore eligible for delivery of a distant signal by its satellite provider. Accordingly, the Commission finds no basis for modifying the time variability factor for broadcast television signals for purposes of determining a household's eligibility for delivery of distant network signals and therefore will specify the time and availability factors in the digital ILLR model as F(50,90).

19. *Land Use and Land Cover Factors.* The land use and land cover (LULC) data provides information on building

structures and other man-made terrestrial features and on land cover features such as forests and open land that can affect radio propagation. Inclusion of this data in the prediction methodology of the SHVIA ILLR TV computer model significantly enhanced the accuracy and reliability of its signal strength predictions. The method for considering these land cover factors is to assign certain signal loss values, in addition to those already factored in the model for terrain variation, as a function of the LULC category of the reception point. More specifically, the field strength predicted by the basic Longley-Rice model is reduced by the clutter loss value associated with the respective LULC category. Reception point environments at individual locations are classified in terms of the codes used in the LULC database of the United States Geological Survey (USGS). In the *NPRM,* the Commission proposed to apply the LULC categories and clutter loss values for describing land use and land cover features in the digital TV ILLR model in the same manner as currently incorporated into the SHVIA ILLR model. These values were specified in the *SHVIA First Report and Order.*

20. The Commission concludes that the LULC categories and clutter loss values for describing land use and land cover features in the digital TV ILLR model should be applied in the digital ILLR in the same manner as currently applied in the SHVIA ILLR model. While the Commission understands the seeming inconsistency of using no LULC corrections for VHF signals, it has found previously that the clutter loss values used in the current SHVIA ILLR model, including zero values for VHF signals, strike the correct balance. Analysis of the data on the model's performance shows that using the values used in the SHVIA ILLR model produce approximately an equal number of over-predictions as under-predictions. Thus, the Commission has found a range of clutter values, including zero, that correspond to different land cover types are valid. It sees no merit in DIRECTV/DISH's argument that the studies used by the Commission in determining that the LULC adjustment for VHF signals should be zero were conducted in some of the flattest states in the country. Rather, the Commission finds that the 5 markets examined have varied terrain characteristics that are sufficient to represent the terrain in television markets across the nation. Also, at this time, the Commission is not aware of any LULC database that would provide more refined or granular information on land use and land clutter than that provided by the USGS LULC database. In this regard, DIRECTV/DISH's suggestion to use Google Earth is not practical as that service provides does not provide data on terrain and surface clutter variation. The Commission also will not alter the LULC correction factors to add additional attenuation to account for lower antenna heights as the model will continue to use the same 30 foot (9 meters) and 20 foot (6 meters) antenna heights used in the SHVIA ILLR model. The Commission also finds that it would not be practical to introduce clutter height and density factors into the clutter calculations of the ILLR software at this time as suggested by Mr. Shumate. Also, there is no height and density information available for the current LULC data. Accordingly, the Commission will apply the land use and land cover categories and USGS cluttler loss values for describing land use and land cover features in the digital TV ILLR model in the same manner as these elements are currently incorporated into the SHVIA ILLR model.

21. *Multicast program streams.* In the *NPRM,* the Commission stated that it believes that the proposed digital signal strength prediction model would account for multicast as well as primary streams that are transmitted by a station and affiliated with one or more networks. Therefore, it proposed to provide no special adjustment in the model to predict the availability of network signals that are transmitted on multicast streams, rather than on a station's primary program stream. In their comments, the Broadcasters agree with the Commission's position in the *NPRM* that all multicast streams can be treated equally for purposes of both prediction and measurement of signal strength. They note that all of the streams arrive on the same signal and at the same strength and that the different programming on multicast channels simply consists of different packets within a station's transport stream.

22. The Commission finds that there is no need for adjusting predictions from the digital ILLR model to reflect the added reference to network affiliated multicast streams in the STELA. The prediction of signal strength for a digital television broadcast signal applies regardless of the content, including the presence of multicast program streams. If a household is predicted to receive a station, then all of that station's program streams would be received equally. Accordingly, the Commission will not provide any special adjustment or procedure in the model for network signals carried on multicast program streams.

B. Other Issues

23. *Previous findings of eligibility.* In the *NPRM,* the Commission proposed to uphold any previous findings of eligibility for delivery of distant signals based on the predictive model in the event that it were to update that model and a prediction from the updated model were to indicate that a previously unserved location could receive service from a local network station. In its comments, CDE observes that because of changes many television stations are still making to their digital operations, the potential situation arises for those stations that a lack-of-service determination under STELA may be rendered moot at a later date by an upgrade in their television facilities and improved off-the-air service. It asks that the Commission clarify how the predictive model is to be administered for those viewers who opted at one juncture to choose satellite service due to lack of off-the-air service but later are predicted to receive off-the-air service as a result of an upgrade to a stations facilities.

24. The Commission continues to believe that it is appropriate to "grandfather" the eligibility of households in cases where a location was predicted to be unserved by a local network station using an adopted version of the digital ILLR model and the household at that location is receiving a signal of that network from a distant station by its satellite provider. This provision will avoid disruption of the existing services to which households have been accustomed to receiving if the Commission updates the digital ILLR model or a station modifies its transmission facilities. This grandfathering will apply only in cases where the household already is receiving a distant signal from its satellite provider prior to a change in the digital ILLR prediction model or in the coverage of the local station.

25. *Analog Low Power TV and TV Translator Stations.* Although all full-service television stations converted fully to digital operation on June 12, 2009, TV translator and low power/Class A TV stations were not required to make that conversion and many of those stations continue to broadcast in analog format. In the *NPRM* the Commission, recognizing the provisions of Section 205 of the STELA and that many TV translators and low power TV stations continue to transmit analog signals, tentatively concluded that it would continue to apply the existing analog SHVIA ILLR model specified in

OET Bulletin No. 72 for predicting signal strengths in distant network eligibility cases involving TV translator and low-power/Class A television stations that use the analog TV standard to broadcast their own programming or to retransmit the content of local digital network stations. In their comments, the Broadcasters support the Commission's proposal to continue to use the analog SHVIA ILLR model for LPTV, Class A, and translator stations that are still broadcasting using the analog transmission standard. They state that, to the extent such stations continue broadcasting in analog, it makes sense to continue to use the Commission's existing tools for predicting analog signal reception, including OET Bulletin 72. They state that those tools have worked well for years and there is no reason not to continue to employ them with this category of stations.

26. Consistent with Section 205 of the STELA, the Commission will continue to apply the methods in OET Bulletin No. 72 for predicting the signal strengths of TV translator and low power/Class A stations that operate using the analog TV standard. It sees no reason or basis for changing from the use of the SHVIA ILLR model for obtaining predictions of signal strength for determining eligibility for satellite delivery of distant network signals for those stations.

27. *Procedure for Continued Refinement of the Digital TV ILLR Model.* The STELA requires that the Commission establish procedures for continued refinement in the application of the digital TV ILLR model through use of additional data as it becomes available. In the *NPRM,* the Commission proposed to comply with this requirement by establishing a procedure under which it would consider possible changes to OET Bulletin No. 73 (which describes the model and is referenced in the rules) to implement improvements to the model. The commenting parties did not address our proposals for the procedures for continued refinement of the application of the digital TV ILLR model.

28. The Commission continues to believe the most efficient, effective, fair, transparent and timely approach for revising the digital TV ILLR model if new information becomes available is to hold open the docket in this proceeding and then conduct further rule making as proposed in the *NPRM.* This plan is consistent with the Commission's past action concerning the SHVIA model. Given that the digital ILLR model is being incorporated into its rules, the Commission believes that this plan also is consistent with the requirements of section 553 of the Administrative Procedures Act. Parties with new data, analysis or other information relating to improving the predictive model will be able to submit requests to modify the model in the instant docket. The Commission has instructed OET to evaluate such requests and, as appropriate, prepare a Notice of Proposed Rulemaking for consideration by the Commission. The Commission also could initiate rulemaking action on its own motion.

29. *Stations to Consider for Distant Signals.* Under the SHVIA and the SHVERA, the predicted signal strengths of all the stations affiliated with the same network were considered, regardless of those stations' DMAs. That is, if a satellite subscriber desired to receive the distant signal of the "XYZ" network, then the predicted results from any stations affiliated with the XYZ network would be analyzed for that subscriber's location. If one or more of those affiliated stations were predicted to deliver a signal of the requisite intensity, the subscriber would be predicted "served" by that network and not eligible for a distant signal from that network unless each of the stations predicted to serve the subscriber granted a waiver. Section 102 of the STELA changes this regime by specifying that only "local" stations are to be considered, *i.e.,* stations that are located in the same DMA as the satellite subscriber. In the *NPRM,* the Commission proposed to address this statutory modification by changing the way the digital ILLR model's results are to be used, rather than through a change in the digital TV ILLR model itself that would limit the signals examined to those located in the same DMA as the subscriber. That is, instead of having the computer software for the model limit consideration of network stations to any such stations in the subscriber's DMA that the model predicts to be available, the Commission proposed to amend its rules to specify that satellite carriers are required to consider only the signals of network stations located in the subscriber's DMA in determining whether a subscriber is eligible for delivery of distant network signals. The commenting parties did not address this issue.

30. The Commission is adopting its proposal to address the statutory change to limit the network stations to be considered in satellite signal delivery eligibility cases to those stations that are located in the same DMA as the satellite subscriber by amending its rules to specify that eligibility determinations are to consider only the signals of network stations located in the subscriber's DMA. The Commission notes that this statutory change will also reduce the burden associated with distant network signal eligibility waiver requests by reducing the number of stations from which a waiver would need to be requested. In addition, this change will reduce the burden of on-site measurement of signal strengths where such tests are performed for the purpose of determining a satellite subscriber's eligibility to receive distant signals.

Procedural Matters

Final Regulatory Flexibility Analysis

31. As required by the Regulatory Flexibility Act of 1980, as amended (RFA) [1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking* (*NPRM*) to this proceeding.[2] The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis ("FRFA") conforms to the RFA.[3]

A. *Need for and Objectives of the Report and Order.* In this Report and Order, we are adopting a point-to-point predictive model for determining the ability of individual locations to receive an over-the-air digital television broadcast signal at the intensity level needed for service through the use of an antenna as required by the STELA.[4] The new digital ILLR model will be used as a means for reliably and presumptively determining whether individual households are eligible to receive the signals of distant network-affiliated digital television stations, including TV translator and low power television stations, from their satellite carrier. The

[1] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601 *et. seq.,* has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Public Law 104–121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (CWAAA).

[2] *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004,* 20 FCC Rcd 2983, Appendix C (2005) (NPRM).

[3] *See* 5 U.S.C. 604.

[4] In its implementation provisions, the STELA also requires that the Commission issue an order completing its rulemaking to establish a procedure for on-site measurement of digital television signals in ET Docket No. 06–94. 47 U.S.C. 339(c)(3)(B). In the *Notice of Proposed Rulemaking (NPRM) and Further Notice of Rulemaking (FNPRM)* preceding the instant Report and Order, the Commission requested additional comment in the ET Docket No. 06–94 signal measurement proceeding. We are today, in a separate action in that docket, issuing a *Report and Order* to establish the required procedure for on-site measurement of digital television signals. *See Report and Order* in ET Docket No. 06–94, FCC 10–195, adopted November 22, 2010.

predictive model we are adopting, which is based on the current model for predicting the intensity of analog television signals at individual locations, will allow such determinations to be made in a timely and cost effective manner for all parties involved, including network TV stations, satellite carriers and satellite subscribers. We are also providing a plan for the model's continued refinement by use of additional data as it may become available. Under that plan, refinements based on additional data may be proposed by referencing the docket of this proceeding, which will be held open indefinitely for this purpose. Consistent with this intention to refine the model as new information becomes available, we are also initiating a Further Notice of Proposed Rulemaking herein to request comment on possible modifications to the methodology in the digital Individual Location Longley-Rice (ILLR) model to improve its predictive accuracy as suggested by one of the parties responding to the NPRM in this proceeding.

B. *Summary of Significant Issues Raised by Public Comments in Response to the IRFA:* There were no comments filed that specifically addressed the rules and policies propose in the IRFA.

C. *Description and Estimates of the Number of Small Entities to Which the Rules will apply:* The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.[5] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[6] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[7] A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[8]

Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.[9] A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[10] Nationwide, as of 2002, there were approximately 1.6 million small organizations.[11] The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[12] Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States.[13] We estimate that, of this total, 84,377 entities were "small governmental jurisdictions."[14] Thus, we estimate that most governmental jurisdictions are small.

Cable Television Distribution Services. The "Cable and Other Program Distribution" census category includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry." The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services the Commission must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: All such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

Direct Broadcast Satellite (DBS) Service. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Wired Telecommunications Carriers. However, as discussed above, the Commission relies on the previous size standard, Cable and Other Subscription Programming, which provides that a small entity is one with $13.5 million or less in annual receipts. Currently, only two operators—DirecTV and EchoStar Communications Corporation (EchoStar)—hold licenses to provide DBS service, which requires a great investment of capital for operation. Both currently offer subscription services and report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, the Commission believes it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, the Commission acknowledges the possibility that there are entrants in this field that may not yet have generated $13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

Television Broadcasting. The rules and policies apply to television broadcast licensees and potential licensees of television service. The SBA defines a television broadcast station as

[5] 5 U.S.C. 603(b)(3), 604(a)(3).

[6] *Id.,* 601(6).

[7] 5 U.S.C. 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the **Federal Register**."

[8] 15 U.S.C. 632.

[9] *See* SBA, Office of Advocacy, "Frequently Asked Questions," http://web.sba.gov/faqs/faqindex.cfm?areaID=24 (revised Sept. 2009).

[10] 5 U.S.C. 601(4).

[11] Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

[12] 5 U.S.C. 601(5).

[13] U.S. Census Bureau, Statistical Abstract of the United States: 2006, Section 8, page 272, Table 415.

[14] We assume that the villages, school districts, and special districts are small, and total 48,558. *See* U.S. Census Bureau, Statistical Abstract of the United States: 2006, section 8, page 273, Table 417. For 2002, Census Bureau data indicate that the total number of county, municipal, and township governments nationwide was 38,967, of which 35,819 were small. *Id.*

a small business if such station has no more than $14 million in annual receipts.[15] Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[16] The Commission has estimated the number of licensed commercial television stations to be 1,392.[17] According to Commission staff review of the BIA/Kelsey, MAPro Television Database (BIA) as of April 7, 2010, about 1,015 of an estimated 1,380 commercial television stations[18] (or about 74 percent) have revenues of $14 million or less and thus qualify as small entities under the SBA definition. The Commission has estimated the number of licensed non-commercial educational (NCE) television stations to be 390.[19] We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations[20] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

In addition, an element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimates of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

Class A TV, LPTV, and TV translator stations. The rules and policies adopted in this Report and Order include licensees of Class A TV stations, low power television (LPTV) stations, and TV translator stations, as well as potential licensees in these television services. The same SBA definition that applies to television broadcast licensees would apply to these stations. The SBA defines a television broadcast station as a small business if such station has no more than $14 million in annual receipts.[21] Currently, there are approximately 537 licensed Class A stations, 2,386 licensed LPTV stations, and 4,359 licensed TV translators.[22] Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition. We note, however, that under the SBA's definition, revenue of affiliates that are not LPTV stations should be aggregated with the LPTV station revenues in determining whether a concern is small. Our estimate may thus overstate the number of small entities since the revenue figure on which it is based does not include or aggregate revenues from non-LPTV affiliated companies. We do not have data on revenues of TV translator or TV booster stations, but virtually all of these entities are also likely to have revenues of less than $14 million and thus may be categorized as small, except to the extent that revenues of affiliated non-translator or booster entities should be considered.

D. *Description of Projected Reporting, Recordkeeping and Other Compliance Requirement for Small Entities.* We are adopting the methodology and parameters for describing the basic radiofrequency environment of the SHVIA ILLR model as proposed in the *NPRM* for the digital ILLR model. As indicated by the Broadcasters and CDE, the methodology in the ILLR model as modified over time has been time-tested and proven successful. We expect that the new digital ILLR model will provide the same reliable and accurate predictions of signal availability as the analog SHVIA ILLR model. Like its predecessor, the new model incorporates features to account for the radio propagation environment through which television signals pass and the receiving systems used by consumers. These features are described in the "planning factors" that describe a set of assumptions for digital and analog television reception systems.[23] Since digital and analog television signals are transmitted in the same frequency bands, the planning factors affecting basic propagation of signals using the two different modulation methods and the background noise level are the same. We therefore have not modified in the digital ILLR model any of the parameters of the SHVIA ILLR model that describe basic propagation and the background noise levels. The planning factors that are different for digital and analog signals include antenna location (outdoor vs. indoor) and performance, time and location variability, and land use and land cover. We also observe that the planning factor differences for antenna location and performance and for time and location variability are incorporated into the threshold signal level for reception for digital television service, which the STELA directs to be set at the noise-limited levels specified in § 73.622(e)(1).

E. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.* The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from

[15] *See* 13 CFR 121.201, NAICS Code 515120.

[16] *Id.* This category description continues, "These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources." Separate census categories pertain to businesses primarily engaged in producing programming. *See* Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

[17] *See* News Release, "Broadcast Station Totals as of December 31, 2009," 2010 WL 676084 (F.C.C.)(dated Feb. 26, 2010) (*Broadcast Station Totals*); also available at *http://www.fcc.gov/mb/.*

[18] We recognize that this total differs slightly from that contained in *Broadcast Station Totals, supra* note 446; however, we are using BIA's estimate for purposes of this revenue comparison.

[19] *See Broadcast Station Totals, supra* note 239.

[20] "[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 CFR 121.103(a)(1).

[21] *See* 13 CFR 121.201, NAICS Code 515120.

[22] *See Broadcast Station Totals, supra* note 239.

[23] The planning factors for analog television assume a height of 30 feet, which is slightly different from the height of 10 meters (33 feet) used in the digital planning factors. The planning factors for analog TV are provided in Robert A. O'Conner, "Understanding Television's Grade A and Grade B Service Contours," *IEEE Transactions on Broadcasting,* Vol. BC–14, No. 4, December 1968 (O'Connor) at page 142; the planning factors of digital TV are set forth in OET Bulletin No. 69 at Table 3.

coverage of the rule, or any part thereof, for small entities.[24]

We are not adopting the revisions to the estimating methodology proposed by Mr. Shumate as we have not had an opportunity to fully explore the changes he suggests.[25] Nonetheless, we believe there may be merit in the improvements he describes for the methodology for predicting digital television signal strengths at individual locations and perhaps more generally, and that they warrant our further investigation as possible modifications to the digital ILLR model. We are therefore addressing his proposals for improving the ILLR methodology in the Further Notice of Proposed Rulemaking herein. We also are not acting on Adaptrum's suggestion that we allow optional use of the digital ILLR model for prediction of signal strengths for purposes of identifying unused spectrum in the TV bands where unlicensed devices could operate as it is beyond the scope of this proceeding.[26]

32. *Report to Congress:* The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[27] In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA.

33. *Paperwork Reduction Act Analysis:* This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

[24] 5 U.S.C. 603(c).

[25] *See* para.16 of the Report and Order, FCC 10–194.

[26] *See* para.17 of the Report and Order, FCC 10–194.

[27] *See* 5 U.S.C. 801(a)(1)(A).

Ordering Clauses

34. Pursuant to sections 1, 4, 301, and 339(c)(3) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, 301, 339(c)(3), and section 119(d)(10)(a) of the Copyright Act, 17 U.S.C. 119(d)(10)(a), this *report and order is hereby adopted.*

35. Part 73 of the Commission's rules is amended as specified in Appendix A and such rule amendment shall be effective January 21, 2011.

36. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *report and order,* including the Initial Regulatory Flexibility Certification, and IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 73

Communications equipment, Reporting and recordkeeping requirements, Television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

■ For the reasons discussed in the preamble, the Federal Communications Commission amends Part 73 to read as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336 and 339.

■ 2. Section 73.683 is amended by revising paragraphs (d) and (e) to read as follows:

§ 73.683 Field strength contours and presumptive determination of field strength at individual locations.

* * * * *

(d) For purposes of determining the eligibility of individual households for satellite retransmission of distant network signals under the copyright law provisions of 17 U.S.C. 119(d)(10)(A), field strength shall be determined by the Individual Location Longley-Rice (ILLR) propagation prediction model. Such eligibility determinations shall consider only the signals of network stations located in the subscriber's Designated Market Area. Guidance for use of the ILLR model in predicting the field strength of analog television signals for such determinations is provided in OET Bulletin No. 72 (stations operating with analog signals include some Class A stations licensed under part 73 of this chapter and some licensed low power TV and TV translator stations that operate under part 74 of this chapter). Guidance for use of the ILLR model in predicting the field strength of digital television signals for such determinations is provided in OET Bulletin No. 73 (stations operating with digital signals include all full service stations and some Class A stations that operate under part 73 of this chapter and some low power TV and TV translator stations that operate under Part 74 of this chapter). OET Bulletin No. 72 and OET Bulletin No. 73 are available at the FCC's Headquarters Building, 445 12th St., SW., Reference Information Center, Room CY–A257, Washington, DC, or at the FCC's Office of Engineering and Technology (OET) Web site: *http://www.fcc.gov/oet/info/documents/bulletins/.*

(e) If a location was predicted to be unserved by a local network station using a version of the ILLR model specified in OET Bulletin No. 72 or OET Bulletin No. 73, as appropriate, and the satellite subscriber at that location is receiving a distant signal affiliated with the same network from its satellite provider, the satellite subscriber shall remain eligible for receiving the distant signal from its satellite provider if that location is subsequently predicted to be served by the local station due to either a change in the ILLR model or a change in the station's operations that change its coverage.

* * * * *

[FR Doc. 2010–32037 Filed 12–21–10; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 75, No. 245
Wednesday, December 22, 2010

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

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133–AD76

Sample Income Data To Meet the Low-Income Definition

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: The NCUA is proposing to permit federal credit unions (FCUs) that do not qualify for a low-income designation using the geo-coding software the NCUA has developed for that purpose to submit an analysis of a statistically valid sample of their member income data as evidence they qualify. The current rule requires, as an alternative to NCUA's geo-coding software, that member data drawn from loan applications or member surveys be used to show a majority of the members are low-income. Permitting FCUs to use a statistically valid sample of member incomes drawn from loan files or a survey will ease the burden on FCUs attempting to qualify for a low-income designation.

DATES: Comments must be received on or before February 22, 2011.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *NCUA Web Site: http://www.ncua.gov/news/proposed_regs/proposed_regs.html.* Follow the instructions for submitting comments.
- *E-mail:* Address to *regcomments@ncua.gov.* Include "[Your name] Comments on Proposed Rule on Sample Data for Low-Income Designation" in the e-mail subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for e-mail.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.
- *Public Inspection:* All public comments are available on the agency's Web site at *http://www.ncua.gov/RegulationsOpinionsLaws/comments* as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6546 or send an e-mail to *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: The following agency staff may be contacted at the address listed above or the telephone numbers provided here. Robert Leonard, Director of Consumer Access, Office of Consumer Protection, (703) 518–1143; Olga Bruslavski, Economist, Office of the Chief Economist, (703) 518–6495; Regina Metz, Staff Attorney, Office of General Counsel, (703) 518–6540.

SUPPLEMENTARY INFORMATION:

Background

The Federal Credit Union Act (Act) authorizes the NCUA Board to define "low-income members" so that credit unions with a membership predominantly consisting of low-income members can benefit from certain statutory relief and receive assistance from the Community Development Revolving Loan Fund. 12 U.S.C. 1752(5), 1757a(b)(2)(A), 1757a(c)(2)(B), 1772c–1.

In 2008, the Board proposed substantial changes to the rule addressing low-income designation, which had previously been based on measuring median household income, with geographic differentials for certain areas with higher costs of living. 73 FR 22836 (April 28, 2008).[1] In brief, the Board proposed, and adopted in the final rule, replacement of median household income with median family income or median earnings for individuals as better measures, in line with standards used by other federal agencies. 73 FR 71909 (Nov. 26, 2008). NCUA also undertook as part of the regulatory changes to facilitate the low-income designation process by eliminating the requirement for credit unions to apply for the designation. NCUA is in the process of implementing geo-coding software to automate the low-income designation process for credit unions during the examination process.

NCUA will make the determination of whether a majority of an FCU's members are low-income based on data it obtains during the examination process. This will involve linking member address information to publicly available information from the U.S. Census Bureau to estimate member earnings. Using automated, geo-coding software, NCUA will use member street addresses collected during FCU examinations to determine the geographic area and metropolitan area for each member account. NCUA will then use income information for the geographic area from the Census Bureau and assign estimated earnings to each member.

73 FR at 71910–11. NCUA's software ensures that the same categories of data available for estimated member income at a particular credit union are compared with like categories of statistical data on income from the Census Bureau. In particular, individual member earnings information is compared to median individual earnings data and family income information is compared to median family income data.[2]

[1] Section 701.34 is the rule addressing low income designation and although it specifically addresses only federal credit unions, pursuant to § 741.204(b) of the NCUA Regulations, a state chartered credit union may obtain a low-income designation from its state regulator, with the concurrence of the appropriate NCUA regional director, on the same basis as provided in § 701.34(a).

[2] NCUA's geo-coding software, known within the agency as the "Low-Income Designation Assessment Tool," is currently a stand-alone software program developed by NCUA's Office of the Chief Information Officer with guidance from regional staff experienced in low-income designation. Regional staff as well as Economic Development Specialists currently use the tool as needed based on requests from credit unions. Eventually, the same software rules will be embedded into the NCUA AIRES examination software. The current version performs 30 different ratio calculations for each member based on a variety of factors and data to determine whether the member meets the low-income definition. The variety of ratios is expansive in order to provide all of the possible options for members to meet the definition. Factors recognize the following: (1) Data sources include both decennial income data as well as American Community Survey income data; (2) different data is incorporated for metro vs. non-metro geographic areas; and (3) ratio options include comparisons of census tract and block group income data, to zip code, county, MSA, state, and national data, plus

Recently, the Board issued an interim final rule amending § 701.34(a)(1) to clarify that median family income and median earnings for individuals are alternative bases on which credit union members may qualify as low income. 75 FR 47171 (Aug. 5, 2010).

In addition, the interim final rule also addressed the subsection of the rule where the option for credit unions to submit their own information for purposes of qualifying for the designation was amended to clarify that actual member data must be compared with a like category of statistical data. For example, if a credit union provides individual income information for members, the median earnings for individuals must be used to determine if the members are low-income.

The final rule in November 2008 also provided credit unions an alternative to relying on NCUA's geo-coding software, namely, the option of providing actual income information about their members as a basis for qualifying as a LICU. The Board is now proposing to amend the low-income rule further to permit credit unions that wish to submit their own data for purposes of qualifying for the designation to use a statistically valid, random sample of member incomes drawn from loan files or a member survey as the basis for the analysis.

Proposed Rule

Only one credit union has applied for a low-income designation using actual membership income data after failing to qualify on the basis of NCUA's geo-coding software. The Board recognizes several factors may be involved but, primarily, the Board believes credit unions may find it difficult to meet the requirement of collecting actual income data establishing the low-income status of at least 50% plus one of their members. Conducting a survey of members in which a credit union asks members to disclose their income poses the problem of achieving a sufficient response rate with the underlying issue of the general reluctance members may have about disclosing their income in a survey. Obtaining income information from loan applications, among other issues, may be a problem for credit unions because many simply have not made loans to over 50% of their members. For these reasons, the Board is proposing to permit those credit unions that do not qualify based on NCUA's geo-coding software to use a statistically valid, random sample of member incomes from loan files or a member survey as the basis for the analysis.[3]

Currently, § 701.34(a)(3), with the August 5, 2010 amendment, states as follows:

> Federal credit unions that do not receive notification that they qualify for a low-income credit union designation but believe they qualify may submit information to the regional director to demonstrate they qualify for a low-income credit union designation. For example, federal credit unions may provide actual member income from loan applications or surveys to demonstrate a majority of their membership is low-income members. Actual member income data must be compared to a like category of statistical data, for example, actual individual member income may only be compared to total median earnings for individuals for the metropolitan area where they live or national metropolitan area, whichever is greater.

12 CFR 701.34(a)(3). The proposed rule would add language to this paragraph permitting credit unions to rely on a data sample as long as it meets certain criteria, including a narrative describing sampling technique and evidence supporting its validity. The proposed rule would require the random sample be representative of the membership, sufficient in both number and scope on which to base conclusions, and have a minimal confidence level of 95% and a confidence interval of 5%.[4] The Board recognizes the 95% confidence level and 5% confidence interval is a widely accepted and used threshold for statistical significance in research and policy analysis.

NCUA will evaluate the sample income data and the supporting narrative to verify it is a statistically valid, random sample. NCUA will expect the narrative and supporting materials to address the following:

- Representativeness of Members. If a credit union is relying on income data drawn from its loan files, a credit union's submission needs evidence that members with loans are representative of the broader membership. If members with loans are not representative of the broader membership, the sampling methodology may not be appropriate. If a credit union is relying on income data from a survey, a credit union must provide evidence regarding the representativeness of its responses and adequacy of response rate.
- Income Definition and Timing: If relying on income data from a survey, the survey needs to be clear regarding its definition of income to ensure accurate responses from members and permit the credit union to use appropriate sources for comparison. If relying on income data from loan files, NCUA will expect the analysis to:
  - Clearly differentiate household versus individual income and income versus earnings in the loan files and use appropriate sources for comparison.[5]
  - Address the age of the income data found in loan files by excluding loan files over five years old.
  - Address issues related to income verification, for example, addressing general credit union practices related to income verification and percentage of loans in the selected sample with unverified income. For surveys, address credit union verification, if any, of self-reported income information from members.
- Based on membership size and conservative statistical sampling practices and requirements, establish minimum sample size of members with income data from loan files or valid survey responses.
- Describe the method used for sampling loan files or conducting a survey, including any external validation or oversight.
- For income data from loan files, submit the well-documented data set used in the analysis and, for surveys, a copy of the survey, data summary, and narrative, as necessary to describe the conduct of the survey.

NCUA staff will review a credit union's submission, may contact a credit union to resolve any questions about its submission or to request additional information, and will inform a credit union as to whether it qualifies as expeditiously as possible. The proposed rule does not establish a time frame for a NCUA staff's review and determination because the Board believes a submission under the proposed amendment is likely to

comparisons of county income data to CBSA, state, and national income data.

[3] NCUA's regulation on Supervisory Committee Audits and Verifications, 12 CFR part 715, permits a Supervisory Committee or its designee to use a statistical method in performing member account and passbook verifications. 12 CFR 715.8(b)(2). The amendment in this proposed rule includes much of the same criteria as in that rule for an acceptable sample with some changes in language to fit the context of this rule.

[4] Confidence levels and confidence intervals are statistical concepts that relate to the precision of the estimates produced by the sampling approach. Confidence level is the probability that the results of a sampling approach are within the confidence interval of the true answer. Confidence interval specifies the allowable margin of error around the true answer. There are a number of online resources that will compute required sample size given population, confidence levels, and confidence intervals including *http://www.raosoft.com/samplesize.html.*

[5] The interim final rule the Board issued in July 2010 clarified that where a credit union submits its own information for purposes of qualifying for the designation, actual member data must be compared with a like category of statistical data, meaning individual income information for members must be compared to the median earnings for individuals. 75 FR 47171 (Aug. 5, 2010).

present issues unique to the submitting credit union. The Board believes both credit unions and NCUA will benefit from having the flexibility to evaluate a credit union's submission and potentially resolve questions without regulatory time constraints. The Board anticipates that credit unions considering a submission will find it helpful to contact NCUA staff to discuss their approach to providing sample income data before undertaking a review of loan files or conducting a survey.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any regulation may have on a substantial number of small entities. 5 U.S.C. 603(a). For purposes of this analysis, NCUA considers credit unions having under $10 million in assets small entities. Interpretive Ruling and Policy Statement 03–2, 68 FR 31949 (May 29, 2003). As of December 31, 2007, out of approximately 8,410 federally insured credit unions, 3,599 had less than $10 million in assets.

This proposed rule directly affects all low-income credit unions, of which currently there are approximately 1,100. NCUA estimates approximately 700 low-income credit unions are small entities but that only one or two in a year will avail themselves of the option of providing actual data or sample data to meet the low-income criteria and receive the designation. Therefore, NCUA has determined this proposed rule will not have an impact on a substantial number of small entities.

Paperwork Reduction Act

The low-income rule contains a "collection of information" within the meaning of section 3502(3) of the Paperwork Reduction Act of 1995, 44 U.S.C. 3502(3), to the extent it permits federal credit unions that do not qualify under NCUA's geo-coding software the option of applying on the basis of actual membership income data and, as set out in this proposed amendment to the rule, the additional option of submitting a random and statistically valid sample of membership income data to meet the rule's requirement that a majority of its members are low-income as defined in the rule.

The proposed rule would permit FCUs, which do not qualify for a low-income designation using the geo-coding software the NCUA has developed for that purpose, to submit an analysis of a statistically valid sample of their member income data as evidence they qualify. NCUA does not believe many FCUs are likely to apply for the designation on the basis of their member income data, perhaps two applications per year.

If relying on income data drawn from loan files, NCUA estimates an FCU that maintains its loan files electronically can use statistical computer programs that are freely available and its own staff. In that case, staff time is estimated at about 40 hours. If an FCU uses the services of a contractor or other outside party, such as a computer programmer, it is estimated those services would cost approximately $100 per hour, for a cost of approximately $4,000. If an FCU conducts a survey, various free computer programs are available on the Internet. The costs of conducting a survey may vary significantly depending on the size of the membership. If an FCU uses the services of a contractor or other outside party to assist it in developing and conducting a survey, the costs are estimated at approximately $4,000 to $5,000.

In summary, NCUA estimates the total information collection burden represented by this proposal involving: 2 respondents, 80 annual burden hours, and an annual cost burden of approximately $10,000.

Anyone wishing to submit comments on this information collection requirement should direct them to the Office of Information and Regulatory Affairs, OMB, Attn: NCUA Desk Officer, New Executive Office Building, Washington, DC 20503, with a copy to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

The NCUA considers comments by the public on this proposed collection of information in:

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the NCUA, including whether the information will have a practical use;
- Evaluating the accuracy of the NCUA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.,* permitting electronic submission of responses.

The Paperwork Reduction Act requires OMB to make a decision concerning the collection of information contained in the proposed regulation between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the NCUA on the proposed regulation.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The proposed rule would not have substantial direct effect on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined this proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

NCUA has determined that this proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

Agency Regulatory Goal

NCUA's goal is to promulgate clear and understandable regulations that impose minimal regulatory burden. We request your comments on whether the proposed amendment is understandable and minimally intrusive if implemented as proposed.

List of Subjects in 12 CFR Part 701

Credit unions, Low income, Nonmember deposits, Secondary capital, Shares.

By the National Credit Union Administration Board, on December 16, 2010.

Mary F. Rupp,

Secretary of the Board.

For the reasons stated above, NCUA proposes to amend 12 CFR part 701 as follows:

PART 701—ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS

1. The authority for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1757, 1765, 1766, 1781, 1782, 1787, 1789; Title V, Pub. L. 109–351, 120 Stat. 1966.

2. Amend § 701.34 by adding the following at the end of paragraph (a)(3):

§ 701.34 Designation of low-income status; Acceptance of secondary capital accounts by low-income designated credit unions.

(a) * * *

(3) * * * A Federal credit union may rely on a sample of membership income data drawn from loan files or a member survey provided the federal credit union can demonstrate the sample is a statistically valid, random sample by submitting with its data a narrative describing its sampling technique and evidence supporting the validity of the analysis, including the actual data set used in the analysis. The random sample must be representative of the membership, must be sufficient in both number and scope on which to base conclusions, and must have a minimum confidence level of 95% and a confidence interval of 5%.

* * * * *

[FR Doc. 2010–32131 Filed 12–21–10; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 745

RIN 3133–AD79

Share Insurance and Appendix

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule with request for comments.

SUMMARY: Section 343 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) [1] provides that, on a temporary basis, the NCUA Board shall fully insure the net amount that any member or depositor at an insured credit union maintains in a noninterest-bearing transaction account. Although this insurance coverage is self-implementing, and therefore already in place, this proposed rule: clarifies the definition of the term "noninterest-bearing transaction account;" provides that this new insurance coverage is separate from, and in addition to, other coverage provided in NCUA's share insurance rules; and imposes certain notice and disclosure requirements.

DATES: Comments must be received on or before February 22, 2011.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *NCUA Web Site: http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html.* Follow the instructions for submitting comments.
- *E-mail:* Address to *regcomments@ncua.gov.* Include "[Your name] Comments on Proposed Rule 745, Share Insurance and Appendix" in the e-mail subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for e-mail.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

Public Inspection: All public comments are available on the agency's Web site at *http://www.ncua.gov/RegulationsOpinionsLaws/comments* as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6546 or send an e-mail to *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: Frank Kressman, Senior Staff Attorney, Office of General Counsel, at the above address or telephone (703) 518–6540.

SUPPLEMENTARY INFORMATION:

I. The Dodd-Frank Act

Section 343 of the Dodd-Frank Act amends the Federal Credit Union Act (FCU Act) to include full share insurance coverage, beyond the Standard Maximum Share Insurance Amount (SMSIA),[2] for the net amount held in a noninterest-bearing transaction account by any member or depositor at an insured credit union. Throughout this proposal, the term "noninterest-bearing" should be read as including "nondividend-bearing" to translate the provisions of the Dodd-Frank Act into credit union terminology.[3] Insured credit unions are not required to take any action to receive this additional insurance coverage. The additional coverage provided by Section 343 of the Dodd-Frank Act is temporary through December 31, 2012.

II. The Proposed Rule

Amendments to Share Insurance Rules

Section 343 of the Dodd-Frank Act amends the share insurance provisions of the FCU Act (12 U.S.C. 1787(k)(1)) to provide separate insurance coverage for noninterest-bearing transaction accounts. Accordingly, as discussed in detail below, NCUA proposes to revise its share insurance regulations in 12 CFR Part 745 to include this new temporary share insurance account category.

Definition of Noninterest-Bearing Transaction Account

The proposed rule incorporates the definition of noninterest-bearing transaction account in section 343 of the Dodd-Frank Act. Section 343 defines a noninterest-bearing transaction account as "an account or deposit maintained at an insured credit union with respect to which interest is neither accrued nor paid; on which the account holder or depositor is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone or other electronic media transfers, or other similar items for the purpose of making payments or transfers to third parties or others; and on which the insured credit union does not reserve the right to require advance notice of an intended withdrawal." This definition of noninterest-bearing transaction account encompasses only traditional, noninterest-bearing demand deposit (checking or share draft) accounts that allow for an unlimited number of deposits and withdrawals at any time,[4]

[1] Public Law 111–203 (July 21, 2010).

[2] The SMSIA is defined as $250,000. 12 CFR 745.1(e).

[3] Federal credit unions cannot offer interest-bearing accounts; they can only pay dividends pursuant to the Federal Credit Union Act. Some State chartered, Federally insured credit unions may offer interest-bearing accounts pursuant to their State credit union acts.

[4] The NCUA Board does not believe the general provisions of Article III, Section 5(a) of the Federal Credit Union Bylaws, or other similar provisions, affect the definition of noninterest-bearing transaction account or the share insurance coverage of this kind of account. Article III, Section 5(a) of the bylaws states that with respect to member withdrawals from share accounts, the Federal credit union's board of directors has the right, at any time, to require members to give up to 60 days written notice of intention to withdraw the whole or any part of the amounts paid in by members. The NCUA Board considers this a broad, administrative

Continued

whether held by a business, an individual, or other type of member. It does not include negotiable order of withdrawal (NOW) accounts, money-market accounts (MMA), or Interest on Lawyers Trust Accounts (IOLTA).

Under this proposal, whether an account is considered noninterest-bearing or nondividend bearing is determined by the terms of the account agreement and not by the fact that the dividend rate on an account may be zero percent at a particular point in time. For example, an insured credit union might offer an account with a dividend rate of zero percent except when the balance exceeds a prescribed threshold. Similarly, an account that normally bears dividends might have a dividend rate of zero for a particular period if the board of directors of the insured credit union where the account is maintained determines not to, or is prohibited from, declaring a dividend for that period. Such an account would not qualify as a noninterest-bearing transaction account even when the balance is less than the prescribed threshold or no dividend is declared and the dividend rate is zero percent for a particular period. Under the proposed rule, such an account would be treated as an interest-bearing or dividend-bearing account at all times because the account agreement provides for the payment of dividends under certain circumstances. However, the waiving of fees on an account would not be treated as the earning of dividends. For example, an insured credit union can sometimes waive fees or provide fee-reducing credits for members with share draft accounts. Under the proposed rule, such account features would not prevent an account from qualifying as a noninterest-bearing transaction account, as long as the account otherwise satisfies the definition of a noninterest-bearing transaction account.

The proposed rule's definition of noninterest-bearing transaction account would include official checks issued by insured credit unions, such as negotiable cashier's or certified checks. Ownership of such instruments and the right to full insurance coverage are determined pursuant to § 745.11 of NCUA's share insurance rules regarding accounts evidenced by negotiable instruments.

Funds swept (or transferred) from a share account to either another type of share account or a non-deposit account are treated as being in the account to which the funds were transferred prior to the time of failure. For example, if pursuant to an agreement between an insured credit union and its member, funds are swept daily from a noninterest-bearing transaction account to an account or product that is not a noninterest-bearing transaction account, then the funds in the resulting account or product would not be eligible for full insurance coverage as a noninterest-bearing transaction account. However, the proposed rule includes an exception from this treatment of swept funds in situations where funds are swept from a noninterest-bearing transaction account to a noninterest-bearing savings account, such as an MMA. Often referred to as "reserve sweeps," these products could entail an arrangement in which a single account is divided into two sub-accounts, a transaction account and an MMA. The amount and frequency of sweeps are often determined by an algorithm designed to minimize required reserves. In some situations, members may be unaware that this sweep mechanism is in place. Under the proposed rule, such accounts would be considered noninterest-bearing transaction accounts. Apart from this exception for reserve sweeps, MMAs and noninterest-bearing savings accounts do not qualify as noninterest-bearing transaction accounts.

Insurance Coverage

As noted, pursuant to section 343 of the Dodd-Frank Act, all funds held in noninterest-bearing transaction accounts are fully insured, without limit. As also specifically provided for in section 343 of the Dodd-Frank Act, this unlimited coverage is separate from, and in addition to, the coverage provided to members with respect to other accounts held at an insured credit union. This means that funds held in noninterest-bearing transaction accounts will not be counted for purposes of determining the amount of share insurance on shares held in other accounts, and in other rights and capacities, at the same insured credit union. For example, if a member has a $225,000 share certificate and a no-dividend share draft account with a balance of $300,000, both held in a single ownership capacity, he or she would be fully insured for $525,000 (plus dividends accrued on the share certificate), assuming the member has no other single-ownership funds at the same credit union. First, coverage of $225,000 (plus accrued dividends) would be provided for the share certificate as a single ownership account (12 CFR 745.3) up to the SMSIA of $250,000. Second, full coverage of the $300,000 share draft account would be provided separately, despite the share draft account also being held as a single ownership account, because the account qualifies for unlimited separate coverage as a noninterest-bearing transaction account.

Disclosure and Notice Requirements

NCUA proposes notice and disclosure requirements to ensure that credit union members are aware of and understand what types of accounts will be covered by the temporary share insurance coverage for noninterest-bearing transaction accounts. There are two such requirements. As explained in detail below, insured credit unions must post a prescribed notice in their main office, each branch and, if applicable, on their Web site, and insured credit unions must notify members individually of any action they take to affect the share insurance coverage of funds held in noninterest-bearing transaction accounts.

1. Posted Notice

The proposed rule would require each insured credit union that offers noninterest-bearing transaction accounts to post, prominently, a copy of the following notice in the lobby of its main office, in each branch and, if it offers Internet deposit services, on its Web site:

Notice of Changes in Temporary NCUA Insurance Coverage for Transaction Accounts

In accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act, through December 31, 2012, all funds in "noninterest-bearing transaction accounts" are insured in full by the National Credit Union Administration. This unlimited coverage is in addition to, and separate from, the coverage of at least $250,000 available to members under the NCUA's general share insurance rules.

The term "noninterest-bearing transaction account" includes a traditional share draft account (or demand deposit account) on which the insured credit union pays no dividend. It does not include any transaction account that may earn dividends, such as a negotiable order of withdrawal ("NOW") account, money-market account, or Interest on Lawyers Trust Account ("IOLTA"), even if share drafts may be drawn on the account.

The temporary full insurance coverage of "noninterest-bearing transaction accounts" expires on December 31, 2012. After December 31, 2012, funds in noninterest-bearing transaction accounts will be insured under the NCUA's general share insurance rules, subject to the Standard Maximum Share Insurance Amount of $250,000.

For more information about NCUA insurance coverage of transaction accounts, visit *http://www.ncua.gov.*

provision that does not alter the nature of an account that otherwise satisfies the definition of a noninterest-bearing transaction account.

2. Notice To Sweep Account and Other Members Whose Coverage on Noninterest-Bearing Transaction Accounts Is Affected by an Insured Credit Union Action

Under the proposed notice requirements, if an insured credit union modifies the terms of its account agreement so that the account may pay dividends, the insured credit union must notify affected members that the account no longer will be eligible for full share insurance coverage as a noninterest-bearing transaction account. Though such notifications would be mandatory, the proposed rule does not impose specific requirements regarding the form of the notice. Rather, NCUA would expect insured credit unions to act in a commercially reasonable manner and to comply with applicable State and Federal laws and regulations in informing members of changes to their account agreements.

III. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact any proposed regulation may have on a substantial number of small credit unions (those under $10 million in assets). The proposed amendments enhance share insurance coverage for members with no significant direct cost to credit unions. Accordingly, the NCUA has determined and certifies that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small credit unions within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612.

Paperwork Reduction Act

In accordance with section 3512 of the Paperwork Reduction Act of 1995 ("PRA"), *44 U.S.C. 3501 et seq.,* an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget ("OMB") control number. This Notice of Proposed Rulemaking ("NPR") contains disclosure requirements, some of which implicate PRA as more fully explained below.

The proposed new disclosure requirements are contained in sections 745.14(c)(1) and 745.14(c)(2). More specifically, section 745.14(c)(1) would require that each insured credit union that offers noninterest-bearing transaction accounts post a "Notice of Changes In Temporary NCUA Insurance Coverage For Transaction Accounts" in the lobby of its main office and domestic branches and, if it offers Internet deposit services, on its Web site. Section 745.14(c)(2) would require that insured credit unions notify members of any action that affects the share insurance coverage of their funds held in noninterest-bearing transaction accounts.

The disclosure requirement in section 745.14(c)(1) would normally be subject to PRA. However, because NCUA has provided the specific text for the notice and allows for no variance in the language, the disclosure is excluded from coverage under PRA because "the public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included" within the definition of "collection of information." 5 CFR 1320.3(c)(2). Therefore, NCUA is not submitting the section 745.14(c)(1) disclosure to OMB for review.

The disclosure requirement in section 745.14(c)(2) regarding sweep accounts and any action that affects the share insurance coverage of funds held in noninterest-bearing transaction accounts is mandatory for all insured credit unions, although insured credit unions would retain flexibility regarding the form of the notice. Therefore, in conjunction with publication of this NPR, NCUA is submitting to OMB a request to review the estimated burden associated with this disclosure requirement.

The estimated burden for the proposed new disclosure under section 745.14(c)(2) is as follows:

Title: "Disclosure of Share Account Status."

Affected Public: Insured credit unions.

Estimated Number of Respondents: 150.

Frequency of Response: On occasion (average of once per year per credit union).

Average Time per Response: 8 hours.

Estimated Annual Burden: 1,200 hours.

Comments are invited on:

(a) Whether this collection of information is necessary for the proper performance of NCUA functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the information collection, including the validity of the methodologies and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments may be submitted to NCUA by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail:* Address to *regcomments@ncua.gov.* Include "[Your name] Comments on PRA Collection for Proposed Rule 745, Share Insurance and Appendix" in the e-mail subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for e-mail.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

Comments may also be submitted to the OMB Desk Officer for the NCUA, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503 with a copy to Mary Rupp, Secretary of the Board, NCUA, 1775 Duke Street, Alexandria, VA 22314. All comments should refer to the "Share Insurance Regulations—Unlimited Coverage for Noninterest-Bearing Transaction Accounts."

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on State and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The proposed rule would not have substantial direct effect on the States, on the connection between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

NCUA has determined that this proposed rule would not affect family

well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

Agency Regulatory Goal

NCUA's goal is to promulgate clear and understandable regulations that impose minimal regulatory burden. We request your comments on whether the proposed amendments are understandable and minimally intrusive if implemented as proposed.

List of Subjects in 12 CFR Part 745

Credit unions, Share insurance.

By the National Credit Union Administration Board on December 16, 2010.

Mary F. Rupp,

Secretary of the Board.

For the reasons discussed above, NCUA proposes to amend 12 CFR Part 745 as follows:

PART 745—SHARE INSURANCE AND APPENDIX

1. The authority citation for Part 745 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1757, 1765, 1766, 1781, 1782, 1787, 1789.

2. Amend § 745.1 by adding a new paragraph (f) to read as follows:

§ 745.1 Definitions.

* * * * *

(f) The term *noninterest-bearing transaction account* means an account or deposit maintained at an insured credit union—

(1) With respect to which either interest or dividends are neither accrued nor paid;

(2) On which the account holder or depositor is permitted to make withdrawals by negotiable or transferable instrument, payment orders of withdrawal, telephone or other electronic media transfers, or other similar items for the purpose of making payments or transfers to third parties or others; and

(3) On which the insured credit union does not reserve the right to require advance notice of an intended withdrawal.

3. Add § 745.14 to read as follows:

§ 745.14 Noninterest-bearing transaction accounts.

(a) *Separate insurance coverage.* Through December 31, 2012, a member's funds in a "noninterest-bearing transaction account" (as defined in § 745.1(f) of this part) are fully insured, irrespective of the SMSIA. Such insurance coverage shall be separate from the coverage provided for other accounts maintained at the same insured credit union.

(b) *Certain swept funds.* NCUA will treat funds swept from a noninterest-bearing transaction account to a noninterest-bearing savings deposit account as being in a noninterest-bearing transaction account.

(c) *Disclosure and notice requirements.* (1) Each insured credit union that offers noninterest-bearing transaction accounts must post prominently the following notice in the lobby of its main office, in each branch and, if it offers Internet deposit services, on its Web site:

Notice of Changes in Temporary NCUA Insurance Coverage for Transaction Accounts

In accordance with the Dodd-Frank Wall Street Reform and Consumer Protection Act, through December 31, 2012, all funds in "noninterest-bearing transaction accounts" are insured in full by the National Credit Union Administration. This unlimited coverage is in addition to, and separate from, the coverage of at least $250,000 available to members under the NCUA's general share insurance rules.

The term "noninterest-bearing transaction account" includes a traditional share draft account (or demand deposit account) on which the insured credit union pays no interest or dividend. It does *not* include any transaction account that may earn interest or dividends, such as a negotiable order of withdrawal ("NOW") account, money-market account, or Interest on Lawyers Trust Account ("IOLTA"), even if share drafts may be drawn on the account.

The temporary full insurance coverage of "noninterest-bearing transaction accounts" expires on December 31, 2012. After December 31, 2012, funds in noninterest-bearing transaction accounts will be insured under the NCUA's general share insurance rules, subject to the Standard Maximum Share Insurance Amount of $250,000.

For more information about NCUA insurance coverage of transaction accounts, visit *http://www.ncua.gov.*

(2) If an insured credit union uses sweep arrangements, modifies the terms of an account, or takes other actions that result in funds no longer being eligible for full coverage under this section, the insured credit union must notify affected members and clearly advise them, in writing, that such actions will affect their share insurance coverage.

[FR Doc. 2010–32129 Filed 12–21–10; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–1024; Directorate Identifier 2010–NE–34–AD]

RIN 2120–AA64

Airworthiness Directives; General Electric Company GE90–76B; GE90–77B; GE90–85B; GE90–90B; and GE90–94B Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD would require initial and repetitive fluorescent penetrant inspections (FPIs) and eddy current inspections (ECIs) of the high-pressure compressor rotor (HPCR) 8–10 stage spool, part numbers (P/Ns) 1844M90G01 and 1844M90G02, for cracks between the 9–10 stages, at each piece-part exposure. This proposed AD was prompted by cracks discovered on one HPCR 8–10 spool between the 9–10 stages in the weld joint. We are proposing this AD to prevent failure of the HPCR 8–10 stage spool, uncontained engine failure, and damage to the airplane.

DATES: We must receive comments on this proposed AD by February 7, 2011.

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

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

Examining the AD Docket

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

available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Jason Yang, Aerospace Engineer, Engine Certification Office, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7747; fax: 781–238–7199; e-mail: *jason.yang@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–1024; Directorate Identifier 2010–NE–34–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

General Electric Company (GE) recently informed us of cracks discovered during a shop visit of a GE90–94B turbofan engine. The cracks were in the HPCR 8–10 stage spool weld joint between the 9–10 stages. These cracks can lead to failure of the HPCR 8–10 stage spool. GE informed us that the cracking is caused by defects during part manufacture, in the inertia weld process. This unsafe condition could also occur on GE90–76B; GE90–77B; GE90–85B; and GE90–90B turbofan engines, as they use the same design HPCR 8–10 stage spool. GE90 Engine Manual Chapter 5 requires mandatory inspections of the HPCR 8–10 stage spool, specifically, inspection of the weld joint between the 8–9 stages. Because of the cracking between the 9–10 stages in the weld joint, GE has updated Chapter 5 to include inspection of the weld joint between the 9–10 stages. They also changed the inertia weld process during manufacture. These cracks, if not corrected, could result in failure of the HPCR 8–10 stage spool, uncontained engine failure, and damage to the airplane.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require initial and repetitive FPIs and ECIs of the HPCR 8–10 stage spool, P/Ns 1844M90G01 and 1844M90G02 for cracks, at each piece-part exposure.

Costs of Compliance

We estimate that this proposed AD would affect 33 GE90–76B; GE90–77B; GE90–85B; GE90–90B; and GE90–94B engines installed on airplanes of U.S. registry. We also estimate that it would take about 2 work-hours per engine to perform one proposed inspection, and that the average labor rate is $85 per work-hour. Based on these figures, we estimate the total cost of the proposed AD to U.S. operators to be $5,610 for one inspection cycle.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

(1) Is not a "significant regulatory action" under Executive Order 12866,

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

(3) Will not affect intrastate aviation in Alaska, and

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

General Electric Company: Docket No. FAA–2010–1024; Directorate Identifier 2010–NE–34–AD.

Comments Due Date

(a) We must receive comments by February 7, 2011.

Affected ADs

(b) None.

Applicability

(c) This AD applies to General Electric Company GE90–76B; GE90–77B; GE90–85B; GE90–90B; and GE90–94B turbofan engines with a high-pressure compressor rotor (HPCR) 8–10 stage spool, part number (P/N) 1844M90G01 or 1844M90G02, installed. These engines are installed on but not limited to Boeing 777 series airplanes.

Unsafe Condition

(d) This AD was prompted by cracks discovered on one HPCR 8–10 spool between the 9–10 stages in the weld joint. We are issuing this AD to prevent failure of the HPCR 8–10 stage spool, uncontained engine failure, and damage to the airplane.

Compliance

(e) Comply with this AD within the compliance times specified, unless already done.

Inspections of the HPCR 8–10 Stage Spool

(f) At the next piece-part exposure after the effective date of this AD of the HPCR 8–10 stage spool, perform a fluorescent penetrant inspection (FPI) and eddy current inspection (ECI) of the weld joint between the 9–10 stages of the HPCR 8–10 stage spool for cracks.

(g) Thereafter, perform repetitive FPIs and ECIs of the weld joint between the 9–10 stages of the HPCR 8–10 stage spool for

cracks at every piece-part exposure of the HPCR 8–10 stage spool.

(h) Remove from service any HPCR 8–10 stage spool found cracked.

(i) Guidance on performing the FPI can be found in GE90 (GEK100700) Engine Manual, Chapter 72–31–08, Inspection 001.

(j) Guidance on performing the ECI can be found in GE90 (GEK100700) Engine Manual, Chapter 72–31–08, Special Procedures 001.

Definition

(k) For the purpose of this AD, piece-part exposure is when the HPCR stage 8–10 spool is completely disassembled using the disassembly instructions in the GE90 Engine Manual.

Alternative Methods of Compliance (AMOCs)

(l) The Manager, Engine Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19.

Related Information

(m) For more information about this AD, contact Jason Yang, Aerospace Engineer, Engine Certification Office, FAA, 12 New England Executive Park, Burlington, MA 01803; phone: 781–238–7747; fax: 781–238–7199; e-mail: *jason.yang@faa.gov.*

(n) For service information identified in this AD, contact General Electric Company, GE—Aviation, Room 285, 1 Neumann Way, Cincinnati, OH 45215, telephone 513–552–3272; fax 513–552–3329; e-mail: *geae.aoc@ge.com.* For information on the availability of this material at the FAA, call 781–238–7125.

Issued in Burlington Massachusetts, on December 10, 2010.

Peter A. White,

Assistant Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2010–32156 Filed 12–21–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 73

[Docket No. FAA–2010–1146; Airspace Docket No. 10–ASO–25]

Proposed Amendment of Restricted Areas R–2907A and R–2907B, Lake George, FL; and R–2910, Pinecastle, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to expand the lateral and vertical limits of restricted areas R–2907A and R–2907B, Lake George, FL; and restricted area R–2910, Pinecastle, FL. The U.S. Navy requested this action to provide the additional airspace needed to contain laser operations and other hazardous activities and to permit realistic training in current tactics. This action would enhance the margin of safety for air traffic in the Lake George and Pinecastle, FL, areas.

DATES: Comments must be received on or before February 7, 2011.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2010–1146 and Airspace Docket No. 10–ASO–25, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.* Comments on environmental and land use aspects should be directed to: Commanding Officer, Naval Air Station Jacksonville, FL, Environmental Department, Attn: Mr. Bill Raspett, Bldg 1 Box 2, NAS Jacksonville, FL 32212–0020; telephone: (904) 542–4229.

FOR FURTHER INFORMATION CONTACT: Paul Gallant, Airspace Regulations and ATC Procedures Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Communications should identify both docket numbers (FAA Docket No. FAA–2010–1146 and Airspace Docket No. 10–ASO–25) and be submitted in triplicate to the Docket Management System (*see* **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA–2010–1146 and Airspace Docket No. 10–ASO–25." The postcard will be date/time stamped and returned to the commenter.

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

Availability of NPRMs

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

You may review the public docket containing the proposal, any comments received and any final disposition in person at the Dockets Office (*see* **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Eastern Service Center, Federal Aviation Administration, 1701 Columbia Ave., College Park, GA 30337.

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

Background

The Pinecastle, FL, and Lake George, FL, restricted areas have, for many years, satisfied military training requirements. However, with the introduction of higher-performance and more versatile, multi-role fighter aircraft, as well as advanced weapons systems and employment tactics, the available airspace at the Pinecastle and Lake George complexes is inadequate to satisfy training requirements. In order to fully exploit the capabilities of today's fighter/attack aircraft and provide essential training that replicates the conditions units are encountering today during wartime deployments, it is necessary to expand the vertical and

lateral limits of the current restricted areas. The U.S. Navy has proposed that the FAA expand R–2907A, R–2907B and R–2910 to provide enhanced air-to-ground weapons delivery tactical training to transform the Pinecastle/Lake George complex into a modern viable training asset.

Proposal

The FAA is proposing an amendment to 14 CFR part 73 to realign and expand the vertical and lateral limits of restricted areas R–2907A and R–2907B, Lake George, FL, and R–2910, Pinecastle, FL. This proposal would expand the boundaries of R–2907A westward to encompass that restricted airspace currently designated as R–2907B. In addition, the vertical limits in that section would be raised to FL 230 to match the current R–2907A ceiling. New restricted airspace would be established immediately to the north of the newly incorporated section of R–2907A. This new restricted area would extend northward from the expanded R–2907A boundary to abut the boundary of the southern half of existing restricted area R–2906, Rodman, FL. The R–2907B designation would be redescribed to identify this new restricted area. The new R–2907B would extend from 500 feet MSL up to FL 230. It should be noted that R–2906 would not be modified in any way by this proposal.

This proposal would also expand and restructure R–2910. The current designation, R–2910, would be removed and replaced by four sections: R–2910A, R–2910B, R–2910C and R–2910D. The new R–2910A would consist of existing restricted airspace contained in the current northwest extension of R–2910; the current R–2910 circular area; and that existing part of R–2910 that extends southeastward from the circular area to latitude 29°00′01″ North. The vertical limits of R–2910A would extend from the surface up to FL 230. The remaining section of the current R–2910 (*i.e.,* the airspace south of latitude 29°00′01″ North) would be split into two new subareas, designated R–2910B and R–2910C, that would extend from the surface to 6,000 feet mean sea level (MSL). Setting the ceiling of these two subareas at 6,000 feet MSL would provide airspace to enable nonparticipating aircraft to circumnavigate the R–2910 complex while remaining outside the Orlando Class B airspace area. Also, dividing this part of the restricted area into B and C subareas would permit sections not needed for the military mission to be released to accommodate air traffic control requirements.

Additional new restricted airspace would be established within the airspace that lies between the new R–2910A and the expanded R–2907A. This new area would be designated R–2910D. R–2910D would be bounded on the north by R–2907A; on the south by R–2910A; on the east by the current eastern boundary of the Palatka 1 military operations area (MOA); and on the west by the western boundary of the Palatka 1 MOA. The northwesternmost end of R–2910D would be defined by a line that extends between lat. 29°15′55″ N., long. 81°56′40″ W. (located on the boundary of the Palatka 1 MOA) and lat. 29°20′06″ N., long. 81°51′49″ W. (at the northwest corner of the modified R–2907A). The vertical limits of R–2910D would be from 500 feet MSL to FL 230.

The time of designation for all of the above modified restricted areas would remain the same as currently published for the existing areas; that is: Intermittent, 0500–0100 local time, daily; other times by NOTAM 6 hours in advance. During periods when the airspace is not needed by the using agency for its designated purpose, the airspace would be returned to the controlling agency (*i.e.,* Jacksonville ARTCC) for access by other airspace users.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would restructure restricted airspace at the Pinecastle, FL and Lake George, FL, military ranges to enhance safety and accommodate essential military training.

Environmental Review

This proposal will be subjected to an environmental analysis in accordance with FAA Order 1050.1E, "Environmental Impacts: Policies and Procedures," prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 73

Airspace, Prohibited areas, Restricted areas.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 73 as follows:

PART 73—SPECIAL USE AIRSPACE

1. The authority citation for part 73 continues to read as follows:

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

§ 73.29 [Amended]

2. § 73.29 is amended as follows:

* * * * *

R–2907A Lake George, FL [Amended]

By removing the current boundaries, controlling agency and using agency and substituting the following:

Boundaries. Beginning at lat. 29°22′51″ N., long. 81°31′19″ W.; to lat. 29°12′31″ N., long. 81°29′59″ W.; to lat. 29°12′31″ N., long. 81°38′29″ W.; to lat. 29°15′06″ N., long. 81°39′59″ W.; to lat. 29°15′06″ N., long. 81°51′49″ W.; to lat. 29°20′06″ N., long. 81°51′49″ W.; to lat. 29°20′06″ N., long. 81°39′59″ W.; to lat. 29°23′01″ N., long. 81°39′59″ W.; to lat. 29°23′01″ N., long. 81°38′54″ W.; thence clockwise along the 5-NM arc centered at lat. 29°19′12″ N., long. 81°35′14″ W. to the point of beginning.

Controlling agency. FAA Jacksonville ARTCC.

Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Jacksonville (FACSFAC JAX), Jacksonville, FL.

* * * * *

R–2907B Lake George, FL [Amended]

By removing the current boundaries, designated altitudes and using agency and substituting the following:

Boundaries. Beginning at lat. 29°25′41″ N., long. 81°41′47″ W.; to lat. 29°23′01″ N., long. 81°39′59″ W.; to lat. 29°20′06″ N., long. 81°39′59″ W.; to lat. 29°20′06″ N., long. 81°51′49″ W.; to lat. 29°29′30″ N., long.

81°51′41″ W.; thence counterclockwise along a 5-NM arc centered at lat. 29°29′01″ N., long. 81°45′59″ W. to the point of beginning.

Designated altitudes. 500 feet MSL to FL 230.

Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Jacksonville (FACSFAC JAX), Jacksonville, FL.

* * * * *

R–2910 Pinecastle, FL [Removed]

* * * * *

R–2910A Pinecastle, FL [New]

Boundaries. Beginning at lat. 29°07′58″ N., long. 81°48′29″ W.; to lat. 29°10′01″ N., long. 81°50′34″ W.; to lat. 29°14′01″ N., long. 81°45′49″ W.; to lat. 29°11′51″ N., long. 81°42′59″ W.; thence clockwise along a 5-NM arc centered at lat. 29°06′53″ N., long. 81°42′54″ W. to lat. 29°10′14″ N., long. 81°38′39″ W.; to lat. 29°00′00″ N., long. 81°30′00″ W.; to lat. 29°00′01″ N., long. 81°42′29″ W.; to lat. 29°03′15″ N., long. 81°46′50″ W.; thence clockwise along a 5-NM arc centered at lat. 29°06′53″ N., long. 81°42′54″ W. to the point of beginning.

Designated altitudes. Surface to FL 230.

Time of designation. Intermittent, 0500–0100 local, daily; other times by NOTAM, 6 hours in advance.

Controlling agency. FAA, Jacksonville ARTCC.

Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Jacksonville (FACSFAC JAX), Jacksonville, FL.

* * * * *

R–2910B Pinecastle, FL [New]

Boundaries. Beginning at lat. 29°00′00″ N., long. 81°30′00″ W.; to lat. 28°57′56″ N., long. 81°28′24″ W.; to lat. 28°55′20″ N., long. 81°36′12″ W.; to lat. 29°00′01″ N., long. 81°42′29″ W.; to the point of beginning.

Designated altitudes. Surface to 6,000 feet MSL.

Time of designation. Intermittent, 0500–0100 local, daily; other times by NOTAM, 6 hours in advance.

Controlling agency. FAA, Jacksonville ARTCC.

Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Jacksonville (FACSFAC JAX), Jacksonville, FL.

* * * * *

R–2910C Pinecastle, FL [New]

Boundaries. Beginning at lat. 28°57′56″ N., long. 81°28′24″ W.; to lat. 28°53′39″ N., long. 81°33′56″ W.; to lat. 28°55′20″ N., long. 81°36′12″ W.; to the point of beginning.

Designated altitudes. Surface to 6,000 feet MSL.

Time of designation. Intermittent, 0500–0100 local, daily; other times by NOTAM, 6 hours in advance.

Controlling agency. FAA, Jacksonville ARTCC.

Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Jacksonville (FACSFAC JAX), Jacksonville, FL.

* * * * *

R–2910D Pinecastle, FL [New]

Boundaries. Beginning at lat. 29°12′31″ N., long. 81°29′59″ W.; to lat. 29°00′00″ N., long. 81°30′00″ W.; to lat. 29°10′14″ N., long. 81°38′39″ W.; thence counterclockwise along a 5-NM arc centered at lat. 29°06′53″ N., long. 81°42′54″ W.; to lat. 29°11′51″ N., long. 81°42′59″ W.; to lat. 29°14′01″ N., long. 81°45′49″ W.; to lat. 29°10′01″ N., long. 81°50′34″ W.; to lat. 29°15′55″ N., long. 81°56′40″ W.; to lat. 29°20′06″ N., long. 81°51′49″ W.; to lat. 29°15′06″ N., long. 81°51′49″ W.; to lat. 29°15′06″ N., long. 81°39′59″ W.; to lat. 29°12′31″ N., long. 81°38′29″ W.; to the point of beginning.

Designated altitudes. 500 feet MSL to FL 230.

Time of designation. Intermittent, 0500–0100 local, daily; other times by NOTAM, 6 hours in advance.

Controlling agency. FAA, Jacksonville ARTCC.

Using agency. U.S. Navy, Fleet Area Control and Surveillance Facility, Jacksonville (FACSFAC JAX), Jacksonville, FL.

* * * * *

Issued in Washington, DC, on December 14, 2010.

Edith V. Parish,

Manager, Airspace, Regulations and ATC Procedures.

[FR Doc. 2010–32046 Filed 12–21–10; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 229, 239 and 249

[Release Nos. 33–9164; 34–63548; File No. S7–41–10]

RIN 3235–AK83

Mine Safety Disclosure

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: We are proposing amendments to our rules to implement Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 1503(a) of the Act requires issuers that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8–K disclosing the receipt of certain orders and notices from the Mine Safety and Health Administration.

DATES: Comments should be received on or before January 31, 2011.

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

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*);
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number S7–41–10 on the subject line; or
- Use the Federal Rulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

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

All submissions should refer to File Number S7–41–10. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for Web site viewing and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Jennifer Zepralka, Senior Special Counsel, or Jennifer Riegel, Attorney-Advisor, Division of Corporation Finance at (202) 551–3300, at the U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are proposing to add new Item 106 to Regulation S–K,[1] amend Item 601 of Regulation S–K,[2] and amend Forms 8–K,[3] 10–Q,[4] 10–K,[5] 20–F [6] and 40–F [7] under the Securities Exchange Act of 1934 ("Exchange Act").[8] In addition, we propose to amend General Instruction

[1] 17 CFR 229.10 *et seq.*

[2] 17 CFR 229.601.

[3] 17 CFR 249.308.

[4] 17 CFR 249.308a.

[5] 17 CFR 249.310.

[6] 17 CFR 249.220f.

[7] 17 CFR 249.240f.

[8] 15 U.S.C. 78a *et seq.*

I.A.3(b) of Form S–3 [9] under the Securities Act of 1933 ("Securities Act").[10]

I. Background and Summary

Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") [11] requires issuers that are required to file reports with the Commission pursuant to sections 13(a) or 15(d) of the Exchange Act and that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose specified information about mine health and safety in their periodic reports filed with the Commission.[12] Section 1503(b) of the Act requires each issuer that is an operator, or that has a subsidiary that is an operator, of a coal or other mine to file a current report on Form 8–K with the Commission reporting receipt of certain shutdown orders and notices of patterns or potential patterns of violations.[13]

The disclosure requirements set forth in Section 1503 of the Act refer to and are based on the safety and health requirements applicable to mines under the Federal Mine Safety and Health Act of 1977 (the "Mine Act"),[14] which is administered by the U.S. Labor Department's Mine Safety and Health Administration ("MSHA"). Under the Mine Act, MSHA is required to inspect surface mines at least twice a year and underground mines at least four times a year [15] to determine whether there is compliance with health and safety standards or with any citation, order or decision issued under the Mine Act and whether an imminent danger exists. MSHA also conducts spot inspections [16] and inspections pursuant to miners' complaints.[17] If violations of safety or health standards are found, MSHA inspectors will issue citations to the mine operators. Among other activities under the Mine Act, MSHA also assesses and collects civil monetary penalties for violations of mine safety and health standards.[18]

MSHA maintains a data retrieval system on its Web site that allows users to examine data on inspections, violations, and accidents, as well as information about dust samplings, at specific mines throughout the United States.[19] The information provided by the MSHA data retrieval system is based on data gathered from various MSHA systems. For example, when citations, orders or violations are issued by MSHA to mine operators, the information about such citations, orders or violations is entered by MSHA into MSHA's systems and subsequently reflected in the data retrieval system within a short period of time. The data retrieval system allows a user to search for information based on the identification numbers assigned to specific mines or contractors (MSHA Mine ID or Contractor ID), as well as by operator name, mine name, contractor name or controller name.[20] In all cases, the information is displayed in the data retrieval system on a mine-by-mine basis.[21]

In addition, an independent adjudicative agency, the Federal Mine Safety and Health Review Commission (the "FMSHRC"), provides administrative trial and appellate review of legal disputes arising under the Mine Act.[22] Most cases deal with civil penalties proposed by MSHA to be assessed against mine operators and address whether the alleged safety and health violations occurred, as well as the appropriateness of proposed penalties.[23] The FMSHRC's administrative law judges decide cases at the trial level and the five-member FMSHRC provides appellate review. Appeals from the FMSHRC's decisions are to the U.S. courts of appeals.[24]

The disclosure requirements set forth in the Act are currently in effect.[25] However, the Act states that the Commission is "authorized to issue such rules or regulations as are necessary or appropriate for the protection of investors and to carry out the purposes of [Section 1503]." [26] Accordingly, we are proposing to amend our rules to implement and specify the scope and application of the disclosure requirements set forth in the Act and to require a limited amount of additional disclosure to provide context for certain items required by the Act.

Specifically, we are proposing amendments to Form 10–K, Form 10–Q, Form 20–F and Form 40–F to require the disclosure required by Section 1503(a) of the Act and certain additional disclosures. The disclosure requirements for Forms 10–Q and 10–K would be set forth in new Item 106 of Regulation S–K. Because the information required to be disclosed under proposed Item 106 of Regulation S–K would be set forth in an exhibit to the filing, we are proposing to amend Item 601 of Regulation S–K to add a new exhibit to Form 10–K and Form 10–Q. We are proposing to amend Forms 20–F and 40–F to include the same disclosure requirements as those proposed for issuers that are not foreign private issuers. In addition, we are proposing to add a new item to Form 8–K to implement the requirement imposed by Section 1503(b) of the Act, and to amend Form S–3 to add the new Form 8–K item to the list of Form 8–K items the untimely filing of which will not result in loss of Form S–3 eligibility.

II. Discussion of the Proposed Amendments

A. Required Disclosure in Periodic Reports

As noted above, the requirements in Section 1503(a) are already in effect. We are proposing to codify the requirements into our disclosure rules in order to facilitate consistent compliance with them by reporting companies.

In order to implement the disclosure requirement set forth in Section 1503(a) of the Act, we are proposing to add new Item 4 to Part II of Form 10–Q and new Item 4(b) to Part I of Form 10–K, which would require the information required by new Items 106 and 601(b)(95) of Regulation S–K; new Item 16J to Form 20–F; and new Paragraph (18) of General Instruction B of Form 40–F. These proposed items would be identical in substance and entitled, "Mine Safety Disclosure." As discussed in detail below, the proposed items would require issuers to provide in their periodic reports and in exhibits to their periodic reports the information listed in Section 1503(a) of the Act and certain

[9] 17 CFR 239.13.

[10] 15 U.S.C. 77a *et seq.*

[11] Pub. L. 111–203 (July 21, 2010).

[12] Section 1503(a) of the Act.

[13] Section 1503(b) of the Act.

[14] 30 U.S.C. 801 *et seq.*

[15] 30 U.S.C. 813(a). Seasonal or intermittent operations are inspected less frequently. *See* Mine Safety and Health Administration, Program Policy Manual, Volume I, Section 103, available at *http://www.msha.gov/REGS/COMPLIAN/PPM/PMMAINTC.HTM.*

[16] 30 U.S.C. 813(i).

[17] 30 U.S.C. 813(g).

[18] 30 U.S.C. 820. *See also* "MSHA's Statutory Functions" available at *http://www.msha.gov/MSHAINFO/MSHAINF1.HTM.*

[19] *See http://www.msha.gov/DRS/DRSHOME.HTM.*

[20] The controller is the company or individual that MSHA's Office of Assessments has determined to have ultimate control or ownership of the operator.

[21] When the disclosure requirements of Section 1503 of the Act were introduced, Senator Rockefeller noted his concern that "there is no requirement to publicly disclose safety records" of mining companies. *See* SA 3886 (an amendment to SA 3739 to S. 3217, 111th Cong. (May 6, 2010); *Press Release: Rockefeller Requires Mining Companies to Disclose Safety Records,* May 7, 2010, available at *http://rockefeller.senate.gov/press/record.cfm?id=324768&.*

[22] 30 U.S.C. 815(d).

[23] "About FMSHRC" on *http://www.fmshrc.gov/fmshrc.html.*

[24] 30 U.S.C. 816.

[25] *See* Section 1503(f) of the Act.

[26] Section 1503(d)(2) of the Act.

additional disclosure designed to provide context for such information.

1. Scope

Section 1503(a) of the Act mandates that specified disclosure be provided in each periodic report filed with the Commission by every issuer that is required to file reports with the Commission pursuant to sections 13(a) or 15(d) of the Exchange Act and that is "an operator, or that has a subsidiary that is an operator, of a coal or other mine." The Act specifies that the term "operator" is to have the meaning given such term in section 3 of the Mine Act.[27] The Act also specifies that the term "coal or other mine" is to mean a coal or other mine as defined in section 3 of the Mine Act,[28] that is subject to the provisions of the Mine Act.[29]

We are proposing to include references to these definitions in new Item 106[30] and Item 601(b)(95)[31] of Regulation S–K, the instructions to new Item 16J of Form 20–F[32] and the notes to new Paragraph (18) of General Instruction B of Form 40–F.[33] Because the Act's definition of "coal or other mine" is limited to those mines that are subject to the provisions of the Mine Act, and the Mine Act applies only to mines located in the United States,[34] we are proposing that, for each required disclosure item discussed below,[35] the information would be required only for coal or other mines (as defined in the Mine Act) located in the United States. As a result, issuers that operate (or have subsidiaries that operate) mines outside the United States would not have to disclose information about such mines under the proposal. Thus, for example, an issuer that operates mines in both the United States and Canada would only be required to include information about its U.S. mines. While our proposals are limited to implementing the requirements of the Act and, therefore, do not extend to foreign mines, to the extent mine safety issues are material under our current rules, disclosure could be required pursuant to the following items of Regulation S–K: Item 303 (Management's Discussion and Analysis of Financial Condition and Results of Operations), Item 503(c) (Risk Factors), Item 101 (Description of Business) or Item 103 (Legal Proceedings).

As proposed, we would include smaller reporting companies and foreign private issuers[36] within the scope of the proposed rules implementing Section 1503(a) of the Act. We believe their inclusion is consistent with the plain language of Section 1503(a), which applies broadly to issuers that are required to file reports under sections 13(a) or 15(d) of the Exchange Act. Because foreign private issuers are not subject to Regulation S–K, we are proposing to amend Forms 20–F and 40–F to require the specified mine safety disclosure about mines subject to the Mine Act operated by a foreign private issuer (or a subsidiary of such foreign private issuer).[37]

Finally, we believe that the language of the Act referring to "each coal or other mine" is intended to elicit disclosure of any citations, orders or violations for each distinct mine covered by the Mine Act, and is not intended to permit disclosure by grouping mines by project or geographic region.[38] Although this approach may result in issuers reporting a significant volume of information in their periodic reports, this approach accords with the plain language of the Act. As noted above, information on a mine-by-mine basis is currently made publicly available through MSHA's data retrieval system.

Request for Comment

(1) Section 1503 of the Act provides definitions of the terms "operator" and "coal or other mine" but does not define the term "subsidiary." Under Item 1–02(x) of Regulation S–X, a "subsidiary" of a specified person is "an affiliate controlled by such person directly, or indirectly through one or more intermediaries," which would apply to this disclosure in the absence of another definition. Is this definition appropriate for purposes of Section 1503, or should we include a different definition for "subsidiary" for purposes of Section 1503 disclosure? If so, how should we define that term?

(2) In conformity with the language of Section 1503(a), we are proposing to apply the Act's periodic report disclosure requirement only to mines that are subject to the Mine Act, and not to mines in other jurisdictions. Is this approach appropriate? Will issuers that operate (or have subsidiaries that operate) mines in the United States be at a competitive advantage or disadvantage compared to issuers that operate mines in other jurisdictions because of the lack of disclosure about

[27] Section 1503(e)(3) of the Act. Section 3(d) of the Mine Act provides that an "operator" means any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine. 30 U.S.C. 802.

[28] Section 3(h) of the Mine Act:

(1) "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment;

(2) For purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities;

[29] Section 1503(e)(2) of the Act.

[30] *See* proposed Item 106 of Regulation S–K (17 CFR 229.106).

[31] *See* proposed Item 601(b)(95) of Regulation S–K (17 CFR 229.601(b)(95)).

[32] *See* instructions to proposed Item 16J under Part II of Form 20–F.

[33] *See* notes to proposed Paragraph (18) of General Instruction B of Form 40–F.

[34] The Mine Act covers each "coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine * * *" 30 U.S.C. 803. "'Commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof, or within the District of Columbia or a possession of the United States, or between points in the same State but through a point outside thereof." 30 U.S.C. 802(b). "'State' includes a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and the Trust Territory of the Pacific Islands." 30 U.S.C. 802(c).

[35] *See* Section II.A.4 below for a discussion of the proposed disclosure requirements.

[36] See the definition of "smaller reporting company" in 17 CFR 240.12b–2 and the definition of "foreign private issuer" in 17 CFR 240.3b–4.

[37] *See* Section IX below for the text of proposed amendments. As discussed in Section II.B.3 below, we are not proposing to require foreign private issuers to comply with Section 1503(b) of the Act by filing Forms 8–K.

[38] To facilitate public input on implementation of the Act, the Commission has provided a series of e-mail links, organized by topic, on its website at *http://www.sec.gov/spotlight/regreformcomments.shtml.* The public comments we received on the topic of mine safety disclosure are available on our website at *http://www.sec.gov/comments/df-title-xv/specialized-disclosures/specializeddisclosures.shtml.* We received input from a commentator suggesting that the Commission adopt a materiality standard for reporting the matters under Section 1503(a) where an issuer has numerous operations. *See* letter from Rio Tinto. However, because Section 1503 does not appear to contemplate materiality thresholds, we are not proposing to include such a threshold for the disclosure requirement.

non-U.S. mines? Should we instead expand the disclosure requirement to cover mines in all jurisdictions? If so, how would we address disclosure requirements for mines not subject to the Mine Act? How would we address the disclosure requirements if a jurisdiction does not have clear mine safety regulations?

(3) Section 1503 of the Act does not contemplate an exception from disclosure for smaller reporting companies. Should the requirements apply to smaller reporting companies, as proposed, or should we exempt smaller reporting companies from the disclosure requirement or some portion of the disclosure requirement? Are there alternative accommodations we should consider for smaller reporting companies?

(4) Section 1503 of the Act also does not contemplate any exception from disclosure for foreign private issuers. Should the requirements apply to foreign private issuers, as proposed? If not, why not?

(5) As proposed, the required disclosure must be provided for each mine for which the issuer or a subsidiary of the issuer is an operator. How burdensome would such disclosure be for issuers to prepare? Could this approach produce such a volume of information that investors will be overwhelmed? Should we instead require disclosure by project or geographic region? Would this approach be consistent with Section 1503(a) of the Act?

(6) General Instruction I to Form 10–K and General Instruction H to Form 10–Q contain special provisions for the omission of certain information by wholly-owned subsidiaries. General Instruction J to Form 10–K contains special provisions for the omission of certain information by asset-backed issuers. Should either or both of these types of registrants be permitted to omit the proposed mine safety disclosure in the annual reports on Form 10–K and quarterly reports on Form 10–Q?

2. Location of Disclosure

The Act states that companies must include the disclosure in their periodic reports required pursuant to sections 13(a) or 15(d) of the Exchange Act. We are proposing to require issuers that have matters to report in accordance with Section 1503(a) to include brief disclosure in Part II of Form 10–Q, Part I of Form 10–K and Forms 20–F and 40–F noting that they have mine safety violations or other regulatory matters to report in accordance with Section 1503(a), and that the required information is included in an exhibit to the filing.[39] The exhibit would include the detailed disclosure about specific violations and regulatory matters required by Section 1503(a) as implemented in our new rules. We are proposing this approach in order to facilitate access to the information about detailed mine safety matters without overburdening the traditional Exchange Act reports with extensive new disclosures. We note that in the event that mine safety matters raise concerns that should be addressed in other parts of a periodic report, such as risk factors, the business description, legal proceedings or management's discussion and analysis, inclusion of this new disclosure would not obviate the need to discuss mine safety matters as appropriate.

We are not proposing any particular presentation requirements for the new disclosure, although we encourage issuers to use tabular presentations whenever possible if to do so would facilitate investor understanding.

Request for Comment

(7) Because the Act states that issuers must include the mine safety disclosure in each periodic report filed with the Commission, we are proposing to require the disclosure in each filing on Forms 10–Q, 10–K, 20–F and 40–F. For issuers that file using the domestic forms (Forms 10–Q and 10–K), should we, instead only require the disclosure annually? Would such an approach be consistent with the Act?

(8) As proposed, we would not specify a particular presentation for the disclosure. Should we require a specific presentation, tabular or otherwise? If so, please provide details on an appropriate presentation.

(9) We are proposing to require the information to be presented in an exhibit to the periodic report, with brief disclosure in the body of the report noting that the issuer has mine safety matters to report and referring to the required exhibit. Is this approach appropriate? Should we instead require the information to be presented in the body of the periodic report?

(10) As noted above, Section 1503(a) requires the disclosure to be included in periodic reports. Should we also require the information to be included in registration statements?

(11) Should we require the disclosure to be provided in an interactive data format? Why or why not? Would investors find interactive data to be a useful tool to analyze the information provided and generate statistics for their own use? If so, what format would be most appropriate for providing standardized data disclosure—for example, eXtensible Markup Language (XML) or eXtensible Business Reporting Language (XBRL)? Could the use of interactive data make it possible for issuers to reduce reporting costs by using the same data that is already available through MSHA's data retrieval system?

3. Time Periods Covered

Section 1503(a) of the Act states that each periodic report must include disclosure "for the time period covered by such report." Accordingly, we are proposing that each Form 10–Q would include the required disclosure for any orders, violations or citations received, penalties assessed or legal actions initiated during the quarter covered by the report.[40] We are also proposing that each Form 10–K would include disclosure covering both the fourth quarter of the issuer's fiscal year, and cumulative information for the entire fiscal year. We believe this is consistent with Section 1503(a), since a Form 10–K covers both the fourth quarter and the entire year. For each of Forms 20–F and 40–F, the disclosure would be required for the issuer's fiscal year.

Because mine operators have the right to contest orders, violations or citations they receive through the administrative process,[41] there is a possibility an operator's challenge would result in dismissal of the order, violation or citation or in a reduction in the severity of the order, violation or citation below the level that triggers disclosure under Section 1503(a). One mining company[42] has suggested that we not require disclosure of citations that, prior to the periodic filing, have been dismissed or resolved such that they fall below the reportable level, or alternatively that the issuer be able to elaborate its position with respect to citations, such as whether the citations have been or will be challenged or if the issuer believes the severity of the citation is unwarranted. Based on the language of Section 1503(a) of the Act, we are not proposing to allow issuers to exclude information about orders, violations or citations that were received during the time period covered by the report but

[39] Proposed Item 4 under Part II of Form 10–Q, proposed Item 4(b) under Part I of Form 10–K, proposed Item 16J under Part II of Form 20–F and proposed paragraph B.(18) under the General Instructions to Form 40–F.

[40] As noted in Sections II.A.4.f and j below, we are also proposing to require disclosure of the total amounts of assessments of penalties outstanding as of the last day of the quarter and of any developments material to previously reported legal actions that occur during the quarter.

[41] *See* 30 U.S.C. 815(d).

[42] *See* letter from Rio Tinto.

subsequently were dismissed or reduced. However, the proposal would not prohibit the inclusion of additional information to provide context to the required disclosure. We would expect that issuers will include disclosure that complies with our existing disclosure requirements when providing any such context.

Request for Comment

(12) We are proposing to require the Form 10–K to include both disclosure about orders, citations, violations, assessments and legal actions received or initiated during the fourth quarter and the aggregate data for the whole year. Is this approach consistent with Section 1503(a)? Would it be consistent with Section 1503(a) to limit the information to the fourth quarter data? Alternatively, should we require the Form 10–K to include only fourth quarter information, or only the full year information?

(13) As proposed, issuers would be required to report all orders, violations or citations received during the period covered by the report, regardless of whether such order, violation or citation was subsequently dismissed or reduced below a reportable level prior to the filing of the periodic report. Should we instead allow such orders, violations or citations to be excluded from the disclosure?

4. Required Disclosure Items

Section 1503(a) of the Act includes a list of items to be disclosed in periodic reports. We are reiterating those items in new proposed Item 106 of Regulation S–K.[43] In addition, we are proposing instructions to certain of the disclosure items specified in Section 1503(a) to clarify the scope of the disclosure we would expect issuers to provide in order to comply with the statute's requirements. In addition, in order to provide context to investors, we are proposing one additional disclosure item not required by the Act that would require issuers to briefly describe the categories of violations, orders or citations included in the other items required by Section 1503(a).

We discuss each disclosure item below. Under our proposal, each issuer that is required under Section 1503(a) to provide this disclosure [44] would be required to provide the following for each coal or other mine [45] for the time period covered by the report (as discussed above).[46]

a. *The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104 of the Mine Act for which the operator received a citation from MSHA.*

Section 104 of the Mine Act requires MSHA inspectors to issue various citations or orders for violations of health or safety standards.[47] Violations are cited by MSHA inspectors, giving the operator time for abatement of the violation. A violation of a mandatory safety standard that is reasonably likely to result in a reasonably serious injury or illness under the unique circumstance contributed to by the violation is referred to by MSHA as a "significant and substantial" violation (commonly called a "S&S" violation).[48] In writing each citation or order, the MSHA inspector determines whether the violation is "S&S" or not.[49] The MSHA data retrieval system currently provides information about all citations and orders issued and notes which of those citations or orders are "S&S." [50]

Because the language of Section 1503(a)(1)(A) references violations that could "significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104" of the Mine Act, we are proposing to require disclosure under this item of all citations received under section 104 of the Mine Act that note an S&S violation.

Request for Comment

(14) Is it appropriate to limit this disclosure item to only S&S violations, or should we require disclosure of every violation under section 104 of the Mine Act? [51]

b. *The total number of orders issued under section 104(b) of the Mine Act.*

Section 104(b) of the Mine Act covers violations that had previously been cited under section 104(a) that, upon follow-up inspection by MSHA, are found not to have been totally abated within the prescribed time period, which results in the issuance of an order requiring the mine operator to immediately withdraw all persons (except certain authorized persons) from the mine. The proposed rule would implement the Act's requirement to disclose this information.

The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health and safety standards under section 104(d) of the Mine Act.

Section 104(d) of the Mine Act covers similar violations as discussed above, except that the standard is that the violation could significantly and substantially contribute to the cause and effect of a safety or health hazard, but the conditions do not cause imminent danger, and the inspector finds that the violation is caused by an unwarrantable failure of the operator to comply with the health and safety standards. The proposed rule would implement the Act's requirement to disclose this information.

c. *The total number of flagrant violations under section 110(b)(2) of the Mine Act.*

Section 110(b)(2) of the Mine Act is a penalty provision that provides that violations that are deemed to be "flagrant" may be assessed a maximum civil penalty. The term "flagrant" with respect to a violation means "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." [52] The proposed rule would implement the Act's requirement to disclose this information.

[43] In this release, we reference new Item 106 of Regulation S–K when discussing the proposed disclosure requirements, but note that the same analyses apply to the corresponding provisions in proposed Item 16J of Form 20–F and proposed Paragraph (18) of General Instruction B of Form 40–F.

[44] *See* Section II.A.1 above.

[45] *See* Section II.A.1 above.

[46] *See* Section II.A.3 above. Note that compliance with Section 1503 of the Act is currently required, regardless of whether we adopt the proposed changes to our disclosure rules.

[47] 30 U.S.C. 814.

[48] *Secretary of Labor* v. *Mathies Coal Company,* 6 FMSHRC 1 (January 1984). *See also* MSHA Program Policy Manual February 2003 (Release I–13) Vol. 1, p.21, located at *http://www.msha.gov/regs/complian/ppm/PDFVersion/PPM%20Vol%20I.pdf* ("MSHA Program Policy Manual Vol. 1") which provides guidelines for interpreting Section 104(d)(1) and (e)(1) of the Mine Act [30 U.S.C. 814(d)(1) and (e)(1)]. In determining whether conditions created by a violation could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, inspectors must determine whether there is an underlying violation of a mandatory health or safety standard, whether there is a discrete safety or health hazard contributed to by the violation, whether there is a reasonable likelihood that the hazard contributed to will result in an injury or illness, and whether there is a reasonable likelihood that the injury or illness in question will be of a reasonably serious nature. *Id.*

[49] MSHA Program Policy Manual Vol. 1, p. 23.

[50] The MSHA data retrieval system can be accessed at *http://www.msha.gov/drs/drshome.HTM.*

[51] MSHA reports that in 2009 (preliminary), of the 175,079 citations and orders issued and not vacated, 33% were designated S&S. In 2008, of the 174,473 citations and orders issued by MSHA and not vacated, 30% were designated S&S. See U.S. Department of Labor, Mine Safety and Health Administration, Mine Safety and Health at a Glance (May 19, 2010), available at *http://www.msha.gov/MSHAINFO/FactSheets/MSHAFCT10.HTM.*

[52] 30 U.S.C. 820(b)(2).

d. *The total number of imminent danger orders issued under section 107(a) of the Mine Act.*

An imminent danger order is issued under section 107(a) of the Mine Act if the MSHA inspector determines there is an imminent danger in the mine. The order requires the operator of the mine to cause all persons (except certain authorized persons) to be withdrawn from the mine until the imminent danger and the conditions that caused such imminent danger cease to exist. This type of order does not preclude the issuance of a citation under section 104 or a penalty under section 110. The proposed rule would implement the Act's requirement to disclose this information.

e. *The total dollar value of proposed assessments from MSHA under the Mine Act.*

Each issuance of a citation or order by MSHA results in the assessment of a civil penalty against the mine operator. Penalties are assessed according to a formula that considers several factors, including a history of previous violations, size of operator's business, negligence by the operator, gravity of the violation, operator's good faith in trying to correct the violation promptly and the effect of the penalty on the operator's ability to stay in business.[53]

Because Section 1503(a) requires issuers to disclose the total dollar value of proposed assessments "for the time period covered by" the periodic report, we are proposing to require that issuers disclose the total dollar amount of assessments of penalties proposed by MSHA during the time period covered by the report. We are also proposing that the disclosure include the cumulative total of all proposed assessments of penalties outstanding as of the last day of the period covered by the report. We understand that proposed assessments may remain outstanding for extended periods of time, and believe such disclosure would provide a clearer picture of the most current health and safety issues for the issuer, as well as information about the magnitude of outstanding penalty assessments.

When any civil penalty is proposed to be assessed by MSHA, the mine operator has 30 days following receipt of the notice of proposed penalty to pay the penalty or file a contest and request a hearing before a FMSHRC administrative law judge.[54] Because Section 1503(a)(1)(F) of the Act references the total dollar amount of proposed assessments from MSHA during the time period covered by the report, we are proposing that this disclosure include any dollar amounts of penalty assessments proposed during the time period that the issuer is contesting with MSHA or the FMSHRC. However, the proposal would not prohibit the inclusion of additional information noting that certain proposed assessments of penalties are being contested to provide context to the required disclosure. We would expect that issuers will include disclosure that complies with our existing disclosure requirements when providing any such context.

Request for Comment

(15) As proposed, the new rules would require disclosure of the total dollar amounts of assessments of penalties proposed by MSHA during the time period covered by the report, and also the cumulative total of all proposed assessments of penalties outstanding as of the date of the report. Is this approach appropriate?

(16) As proposed, issuers would be required to include in the total dollar amount any proposed assessments of penalties that are being contested. Should issuers be permitted to exclude proposed assessments that are being contested? Should issuers be permitted to note the contested amounts separately?

f. *The total number of mining-related fatalities.*

Section 1503(a)(1)(G) of the Act sets forth the requirement to disclose the total number of mining-related fatalities, and our proposed rule would set forth this requirement. We note that Section 1503(a)(1)(G) is the only provision of the Act that does not specifically reference the Mine Act, a specific notice, order or citation from MSHA, or the FMSHRC. However, because, as discussed above,[55] the application of Section 1503 is limited to mines that are subject to the provisions of the Mine Act, we believe that this disclosure requirement encompasses mining-related fatalities only at mines that are subject to the Mine Act. MSHA regulations require the reporting of all fatalities at a mine.[56] MSHA has also established policies and procedures for determining whether a fatality is unrelated to mining activity (commonly referred to as "non-chargeable" to the mining industry).[57] Since the MSHA regulations provide a comprehensive scheme of regulation, reporting and assessment for mine-related fatalities, we believe the disclosure required by this section is intended to include all fatalities that are required to be disclosed under MSHA regulations, unless the fatality is determined to be "non-chargeable" to the mining industry.

MSHA regulations require the operator of a mine to contact MSHA at once without delay and within 15 minutes at a toll-free number, once the operator knows or should know that an accident has occurred involving: (a) A death of an individual at the mine; (b) an injury of an individual at the mine which has a reasonable potential to cause death; (c) an entrapment of an individual at the mine which has a reasonable potential to cause death; or (d) any other accident.[58] In addition, MSHA regulations require each operator to prepare and file a report with MSHA of each accident, occupational injury, or occupational illness occurring at each mine, indicating therein whether such injury or illness resulted in death.[59]

MSHA investigates all deaths on mine property.[60] Deaths that have been determined to be "non-chargeable" are not counted in the statistics MSHA uses to assess the safety performance of the mining industry.[61] These "non-chargeable" deaths include, among other things, homicides, suicides, deaths due to natural causes, and deaths involving trespassers.[62] In cases where it is questionable whether a death is chargeable to the mining industry, MSHA may refer the case to its Fatality Review Committee.[63] Each of the four members of the Fatality Review Committee conducts an independent review of the facts and circumstances surrounding the questionable death to determine whether it is chargeable to the mining industry.[64]

The proposed disclosure requirement encompasses all fatalities required to be reported pursuant to MSHA regulations, unless the fatality has been determined to be "non-chargeable" to the mining industry. We believe that this interpretation of the statutory language

[53] 30 U.S.C. 815(b)(1)(B).

[54] *See* 30 CFR 100.7. If the proposed penalty is not paid or contested within 30 days of receipt, the proposed penalty becomes a final order of the FMSHRC and is not subject to review by any court or agency.

[55] *See* Section II.A.1 above.

[56] *See* 30 CFR 50.10 and 50.20.

[57] *See* MSHA Accident/Illness Investigation Handbook, Chapter 2 Release 2 (February 2004) p. 9 located at *http://www.msha.gov/READROOM/HANDBOOK/PH00-I-5.pdf* ("MSHA Accident/Illness Handbook").

[58] 30 CFR 50.10; *see also* Section 103(j) of the Mine Act [30 U.S.C. 813(j)].

[59] 30 CFR 50.20. *See also* Item 18 of Section C of MSHA Form 7000–1 located at *http://www.msha.gov/forms/70001inb.htm.*

[60] *See* MSHA Accident/Illness Handbook at p. 9.

[61] *Id* at p. 10.

[62] *Id. See also* MSHA Fatal Injury Guideline Matrix located at *http://www.msha.gov/Fatals/Chargeability/ChargeabilityMatrix.pdf.*

[63] MSHA Accident/Illness Handbook at p. 10.

[64] *Id.*

is appropriate because it will result in consistency among reporting obligations.

Request for Comment

(17) As proposed, we would require disclosure of mining-related fatalities only at mines that are subject to the Mine Act. However, many foreign jurisdictions already require mine operators to report mining-related fatalities.[65] Would it be more appropriate to instead require disclosure of mining-related fatalities at all mines operated by companies that file periodic reports with the Commission, regardless of the location of the mine? For example, under such an approach, a foreign private issuer would have to disclose all mining-related fatalities at mines in its home country or any other jurisdiction, and domestic issuers would be required to disclose mining-related fatalities at mines outside of the United States. Would this be appropriate? How difficult would it be for issuers to compile and report this information? Would such an approach impose significant costs on issuers?

(18) Should we, as proposed, require disclosure of all fatalities required to be reported pursuant to MSHA regulations, unless the fatality has been determined to be "non-chargeable" to the mining industry? Should we add an instruction to the rule specifying this interpretation of the disclosure requirement? Would it be more appropriate to instead require disclosure of all fatalities regardless of the determination that it was "non-chargeable"? Should we provide further guidance as to the timing of reporting for fatalities that are under review by MSHA's Fatality Review Committee?

(19) If we were to require disclosure of mining-related fatalities regardless of the location of the mine, what standard, if any, should we apply for determining whether a fatality is related or unrelated to mining activity? For example, would it be appropriate to apply the MSHA framework to non-U.S. jurisdictions, or to look to each non-U.S. jurisdiction's mine safety regulatory scheme for guidance?

g. *A list of mines for which the issuer or a subsidiary received written notice from MHSA of a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of the Mine Act.*

If MSHA determines that a mine has a "pattern" of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, under section 104(e) of the Mine Act and MSHA regulations the agency is required to notify the operator of the existence of such pattern. The proposed rule would implement the Act's requirement to disclose this information.

h. *A list of mines for which the issuer or a subsidiary received written notice from MHSA of the potential to have such a pattern.*

MSHA regulations state that MSHA will give the operator written notice of the potential to have a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of the Mine Act.[66] The proposed rule would implement the Act's requirement to disclose this information.

i. *Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.*

The FMSHRC is an independent agency established by the Mine Act that provides administrative trial and appellate review of legal disputes arising under the Mine Act.[67] We are proposing that any legal actions before the FMSHRC involving a coal or other mine for which the issuer or a subsidiary of the issuer is the operator be disclosed in the periodic report covering the time period during which the legal action was initiated. This disclosure would include, but not be limited to, any actions brought by the issuer or a subsidiary of the issuer before the FMSHRC to contest citations or penalties imposed by MSHA.[68] As proposed, the new rules would require the information about pending legal actions to be updated in subsequent periodic reports if there are developments material to the legal action that occur during the time period covered by such report.[69] Mine operators frequently contest proposed assessments[70] and we believe that information about the resolution of pending legal actions would be useful in this context.

As proposed, the disclosure required by this item would include the date the pending legal action was instituted and by whom (*e.g.,* MSHA or the mine operator), the name and location of mine involved, and a brief description of the category of violation, order or citation underlying the proceeding. We believe this limited additional information is necessary to make the information more useful to investors by putting the disclosure in context.

Request for Comment

(20) As proposed, information about pending legal actions would be disclosed in the periodic report covering the period in which the action was initiated, with updates in subsequent reports for developments material to the pending action. Is this appropriate? Should we instead limit the disclosure to only those legal actions initiated during the period covered by the periodic report? Should we specifically require issuers to provide disclosure when a contested assessment has been vacated during the time period covered by the report?

(21) Is the contextual information we are proposing to require to be included for each pending legal action appropriate? Should we require any other information about pending legal actions to be disclosed?

j. *A brief description of each category of violations, orders and citations reported*

Although not required by Section 1503 of the Act, we are proposing to require issuers to provide a brief description of each category of violations, orders and citations reported under new Items 106(a)(1) and 106(a)(2) of Regulation S–K[71] so that investors can understand the basis for the violations, orders or citations

[65] *See e.g.,* Mines Safety and Inspection Act 1994 (Western Australia); Mine Health and Safety Act, 1996, Department of Mineral Resources Regulations, Chapter 23—Reporting of Accidents and Dangerous Occurences (Republic of South Africa).

[66] *See* 30 CFR 104.4.

[67] 30 U.S.C. 815(d).

[68] Other types of cases that would be disclosed include, for example, those relating to orders to close a mine, miners' charges of safety related discrimination or miners' requests for compensation after a mine is idled by a closure order. *See* "About FMSHRC" at *http://www.fmshrc.gov/fmshrc.html.*

[69] *See* Section IX below for the text of proposed amendments.

[70] *See* Number of Penalties Assessed and Percent Contested, January 2007—July 2010 (Graphs and Charts), as of 09/09/2010, available at *http://www.msha.gov/stats/ContestedCitations/Civil%20Penalties%20Assessed%20and%20Contested.pdf.* The graphs illustrate that during the time period between January 2007 through July 2010, the percent of penalties contested ranged from approximately 10% to approximately 30% of the number of penalties assessed, and the percent of penalty dollars contested ranged from approximately 30% to approximately 75% of the penalty dollars assessed.

[71] This proposed requirement would also apply to the corresponding categories of citations, orders and violations to be reported under proposed Item 16J(a) and (b) of Form 20–F and proposed Paragraph (18)(a) and (b) to General Instruction B of Form 40–F.

referenced. For example, we would expect that an issuer that reports receipt of an order under section 107(a) of the Mine Act would include disclosure stating that such orders are issued for situations in which MSHA determines an imminent danger exists and result in orders of immediate withdrawal from the area of the mine affected by the condition. We believe this is appropriate to provide investors with context to the disclosure required by Section 1503(a) of the Act. We are concerned that without such a requirement, investors may be presented with disclosure that simply references the various provisions of the Mine Act, and would have to research the Mine Act and MSHA's rules to be able to assess the information.

Request for Comment

(22) Will the proposed disclosure providing a brief description of each category of violations, orders and citations reported be useful for investors, or would the information otherwise provided in the proposed exhibit to the periodic report be sufficient? Is there any other disclosure we should require in order to put the disclosures required by Section 1503(a) of the Act in context for investors?

B. Form 8–K Filing Requirement

1. Triggering Events

Section 1503(b) of the Act requires each issuer that is an operator, or has a subsidiary that is an operator, of a coal or other mine to report on Form 8–K the receipt of certain notices from MSHA.[72] We are proposing to revise Form 8–K to add new Item 1.04, which would require filing of Form 8–K within four business days of the receipt by an issuer (or a subsidiary of the issuer) of:

- An imminent danger order under section 107(a) of the Mine Act;[73]
- Written notice from MSHA of a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of the Mine Act;[74] or
- Written notice from MSHA of the potential to have a pattern of such violations.[75]

These orders and notices are also required to be disclosed under Section 1503(a) of the Act in issuers' periodic reports. We believe the plain language of Section 1503 of the Act requires such orders and notices to be reported both in issuers' Forms 8–K and their periodic reports. For example, if an issuer receives from MSHA one of the orders or notices specified above during the second quarter of the year, the issuer would file a Form 8–K reporting the receipt of the order or notice within four business days of receipt, include information about such order or notice in accordance with new Regulation S–K Item 106 in its Form 10–Q for the second quarter and include information regarding this violation in the annual cumulative total for the fiscal year in its Form 10–K for that fiscal year.

Request for Comment

(23) The events that would trigger filing under proposed Item 1.04 are also events that are required to be disclosed in periodic reports under Section 1503(a) of the Act and our proposed Item 106 of Regulation S–K. Should we revise our proposal to minimize duplicative disclosure such as by not requiring repetition of information previously reported? Would such an approach be consistent with the Act? Would our proposed disclosure approach be unduly burdensome for issuers or confusing to investors?

2. Required Disclosure and Filing Deadline

Section 1503(b) of the Act does not specify the disclosure that issuers should provide in the required Form 8–K filing. We are proposing that new Item 1.04 of Form 8–K require, in each case, disclosure of the date of receipt of the order or notice, the category of order or notice, and the name and location of the mine involved.

In addition, Section 1503(b) of the Act does not specify a filing deadline for the required Form 8–K. Consistent with our approach to other Form 8–K items, we are proposing that the current report under new Item 1.04 be required to be filed no later than four business days after the triggering event. We believe that, because the triggering events are clear and do not require management to make rapid materiality judgments, the four business day deadline provides adequate time for issuers to prepare accurate and complete information.

Request for Comment

(24) Is there any other information that should be required to be disclosed under proposed Item 1.04 of Form 8–K? Will the information that we are proposing to require in the Form 8–K be useful for investors?

(25) Should the filing period for a Form 8–K under proposed Item 1.04 be four business days, as proposed, or should the filing period be longer? What factors should we consider in deciding whether to make the filing period longer?

3. Treatment of Foreign Private Issuers

Foreign private issuers are not required to file current reports on Form 8–K.[76] Instead, they are required to file under the cover of Form 6–K[77] copies of all information that the foreign private issuer makes, or is required to make, public under the laws of its jurisdiction of incorporation, files, or is required to file, under the rules of any stock exchange, or otherwise distributes to its security holders.[78] We do not propose to change these reporting requirements.[79] As described above,[80] we are proposing changes to Forms 20–F and 40–F that would require a foreign private issuer to disclose in each annual report the items described in Section 1503(a) of the Act. The proposed amendments include the same information that will be required of other issuers, including disclosure of the receipt during the foreign private issuer's past fiscal year of any imminent danger order issued under section 107(a) of the Mine Act,[81] written notice from MSHA of a pattern of violations of mandatory health or safety standards that are of such a nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of the Mine Act,[82] or written notice from

[72] Section 1503(b) of the Act.

[73] *See* Section II.A.4.e. above for a description of an imminent danger order issued under section 107(a) of the Mine Act [30 U.S.C. 817(a)].

[74] *See* Section II.A.4.h. above for a description of the written notice regarding a pattern of violations under section 104(e) of the Mine Act [30 U.S.C. 814(e)].

[75] *See* Section II.A.4.i. above for a description of the written notice from MSHA of the potential to have a pattern of violations under section 104(e) of the Mine Act [30 U.S.C. 814(e)].

[76] *See* Exchange Act Rules 13a–11 and 15d–11 [17 CFR 240.13a–11 and 15d–11].

[77] Referenced in 17 CFR 249.306.

[78] *See* Exchange Act Rule 13a–6 [17 CFR 240.13a–16].

[79] This approach is consistent with the manner in which the Commission implemented Sections 306 and 406 of the Sarbanes-Oxley Act of 2002. *See Insider Trades During Pension Fund Blackout Periods,* SEC Release No. 34–47225 (Jan. 22, 2003) [68 FR 4338] and *Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002,* SEC Release No. 33–8177 (Jan. 23, 2003) [68 FR 5110]. *See also* letter from Rio Tinto.

[80] *See* Section II.A. above for a description of all the proposed disclosure requirements to Forms 20–F and 40–F.

[81] *See* Section II.A.4.e. above.

[82] *See* Section II.A.4.h. above.

MSHA of the potential to have a pattern of such violations.[83]

Request for Comment

(26) Should we require foreign private issuers to file disclosure about the receipt of imminent danger orders or notices of a pattern or potential pattern of violations within four days under cover of Form 8–K, Form 6–K or a special report on Form 20–F? Should we otherwise require a foreign private issuer to promptly disclose the receipt of such order or notices? Does a divergent treatment of U.S. issuers and foreign private issuers in connection with current reporting disadvantage U.S. issuers? Should this be addressed in our rules, and if so, how? To what extent, if any, would foreign private issuers have additional burdens or costs associated with reporting these events on a current basis?

C. Amendment to General Instruction I.A.3.(b) of Form S–3

We are proposing to amend General Instruction I.A.3.(b) of Form S–3 to provide that an untimely filing on Form 8–K regarding new Item 1.04 would not result in loss of Form S–3 eligibility. Under our existing rules, the untimely filing on Form 8–K of certain items does not result in loss of Form S–3 eligibility, so long as Form 8–K reporting is current at the time the Form S–3 is filed. We believe that it is appropriate to add proposed Item 1.04 to the list of Form 8–K items in General Instruction I.A.3.(b) of Form S–3.

In the past, when we have adopted new disclosure requirements that differed from the traditional periodic reporting obligations of companies, we have acknowledged concerns about the potentially harsh consequences of the loss of Form S–3 eligibility, and addressed such concerns by specifying that untimely filing of Form 8–K relating to certain topics would not result in the loss of Form S–3 eligibility.[84] We note that Section 1503(b) of the Act does not address the Securities Act implications of a failure to timely file a Form 8–K. Therefore, we are proposing to provide that untimely filing of the new Item 1.04 Form 8–K would not result in the loss of Form S–3 eligibility.

We are not proposing to include new Item 1.04 in the list in Rules 13a–11(c) and 15d–11(c) under the Exchange Act of Form 8–K items eligible for a limited safe harbor from liability under Section 10(b) or Rule 10b–5 under the Exchange Act.[85] In 2004, when we adopted the limited safe harbor, we noted our view that the safe harbor is appropriate if the triggering event for the Form 8–K requires management to make a rapid materiality determination.[86] The filing of an Item 1.04 Form 8–K is triggered by an event that does not require management to make a rapid materiality determination, and we believe that it is not necessary to extend the safe harbor to this new item. We solicit comment below on whether this treatment is appropriate for proposed Item 1.04.

Request for Comment

(27) Should we, as proposed, amend General Instruction I.A.3(b) of Form S–3 to add proposed Item 1.04 to the list of items on Form 8–K with respect to which an issuer's failure timely to file the Form 8–K will not result in the loss of Form S–3 eligibility? Why or why not? If we were to adopt a current reporting requirement for foreign private issuers for the information covered by Section 1503(b) of the Act, should we approach Form F–3 eligibility in the same manner?

(28) As proposed, we would not include proposed Item 1.04 in the list of items in Rules 13a–11(c) and 15d–11(c) with respect to which the failure to file a report on Form 8–K will not be deemed to be a violation of Section 10(b) or Rule 10b–5. Should we instead add proposed Item 1.04 to the safe harbor? Why or why not?

III. General Request for Comment

We request and encourage any interested person to submit comments on any aspect of our proposals, other matters that might have an impact on the amendments, and any suggestions for additional changes. With respect to any comments, we note that they are of greatest assistance to our rulemaking initiative if accompanied by supporting data and analysis of the issues addressed in those comments and by alternatives to our proposals where appropriate.

IV. Paperwork Reduction Act

A. Background

Certain provisions of the proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA).[87] We are submitting the proposed amendments to the Office of Management and Budget (OMB) for review in accordance with the PRA.[88] The titles for the collection of information are:

(A) "Regulation S–K" (OMB Control No. 3235–0071);

(B) "Form 10–K" (OMB Control No. 3235–0063);

(C) "Form 10–Q" (OMB Control No. 3235–0070);

(D) "Form 8–K" (OMB Control No. 3235–0060);

(E) "Form 20–F" (OMB Control No. 3235–0288); and

(F) "Form 40–F" (OMB Control No. 3235–0381).

These regulations and forms were adopted under the Securities Act and the Exchange Act. They set forth the disclosure requirements for periodic and current reports filed by companies to inform investors.[89] The hours and costs associated with preparing disclosure, filing forms and retaining records constitute reporting and cost burdens imposed by each collection of information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

As discussed in more detail above, the proposed rule and form amendments would implement Section 1503 of the Act. Section 1503(a) requires issuers that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8–K disclosing the receipt of certain orders and notices from MSHA. We are proposing to add new Items 106 and 601(b)(95) to Regulation S–K and amend Forms 10–Q, 10–K, 20–F and 40–F under the Exchange Act to implement and, to a limited degree, enhance the

[83] *See* Section II.A.4.i. above.

[84] *See Selective Disclosure and Insider Trading,* SEC Release No. 33–7881 (Aug. 15, 2000) [65 FR 51715]; *Additional Form 8–K Disclosure Requirements and Acceleration of Filing Date,* SEC Release No. 33–8400 (March 16, 2004) [69 FR 15594] (the "Additional Form 8–K Disclosure Release").

[85] Rules 13a–11(c) and 15d–11(c) each provides that "[n]o failure to file a report on Form 8–K that is required solely pursuant to Item 1.01, 1.02, 2.03, 2.04, 2.05, 2.06, 4.02(a), 5.02(e) or 6.03 of Form 8–K shall be deemed a violation of" Section 10(b) of the Exchange Act or Rule 10b–5 thereunder.

[86] Additional Form 8–K Disclosure Release at 69 FR 15607.

[87] 44 U.S.C. 3501 *et seq.*

[88] 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[89] Forms 20–F and 40–F may also be used by foreign private issuers to register a class of securities under the Exchange Act. In addition, Form 20–F sets forth many of the disclosure requirements for registration statements filed by foreign private issuers under the Securities Act.

disclosure requirement set forth in Section 1503(a) of the Act. We are also proposing to add new Item 1.04 to Form 8–K to implement the requirement of Section 1503(b) of the Act. In addition, we are proposing to amend General Instruction I.A.3(b) of Securities Act Form S–3.

Issuers are currently required to comply with the provisions of Section 1503 of the Act, therefore the Act has already increased the burdens and costs for issuers by requiring the disclosure set forth in Sections 1503(a) and (b) of the Act. Most of the information called for by the new disclosure requirements is publicly disclosed by MSHA and readily available to issuers, who receive the notices, orders and citations directly from MSHA and can also access the information via MSHA's data retrieval system. Further, the proposed disclosure item for periodic reports requiring disclosure of mining-related fatalities is already subject to a collection of information under MSHA regulations.[90] Our proposed amendments would incorporate the Act's requirements into Regulation S–K and related forms, and would require certain additional disclosure to provide context to the disclosure items required by the Act.

We anticipate that the proposed new Items 106 and 601(b)(95) of Regulation S–K would increase existing disclosure burdens for annual reports on Form 10–K and quarterly reports on Form 10–Q by requiring disclosure about certain mine health and safety violations designated by the Act. Because Regulation S–K does not apply directly to Forms 20–F and 40–F,[91] we propose to amend those forms to include the same disclosure requirements as those proposed for issuers that are not foreign private issuers.[92] We anticipate that new Item 1.04 of Form 8–K would increase the existing disclosure burden for current reports on Form 8–K by requiring issuers to file a Form 8–K upon receipt of three types of notices or orders from MSHA relating to mine health and safety concerns and specifying the information required about the orders or notices required to be disclosed.

Compliance with the proposed amendments would be mandatory. Responses to the information collections would not be kept confidential, and there would be no mandatory retention period for the information disclosed.

B. Burden and Cost Estimates Related to the Proposed Amendments

We anticipate that the proposed rule and form amendments, if adopted, would increase the burdens and costs for issuers that would be subject to the proposed amendments. For purposes of the PRA, we estimate the total annual increase in paperwork burden for all affected companies to comply with our proposed collection of information requirements to be approximately 1,677 hours of company personnel time and approximately $263,500 for the services of outside professionals. These estimates include the time and the cost of implementing disclosure controls and procedures, preparing and reviewing disclosure, filing documents and retaining records. In deriving our estimates, we assume that:

- For Forms 10–K, 10–Q and 8–K, an issuer incurs 75% of the annual burden required to produce each form, and outside firms, including legal counsel, accountants and other advisors retained by the issuer incur 25% of the annual burden required to produce the form at an average cost of $400 per hour; [93] and
- For Forms 20–F and 40–F, a foreign private issuer incurs 25% of the annual burden required to produce each form, and outside firms retained by the issuer incur 75% of the burden require to produce each form at an average cost of $400 per hour.

The portion of the burden carried by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours.

We have based our estimates of the effect that the adopted rule and form amendments would have on those collections of information primarily on our understanding that the information required to be disclosed is readily available to issuers, and that therefore the burden imposed by the disclosure requirements is mainly in formatting the information in order to comply with our disclosure requirements and ensuring that appropriate disclosure controls and procedures are in place to facilitate reporting of the information. In this regard, we note that mine operators receive the relevant notices, citations and similar information directly from MSHA, and that issuers could also access the information via MSHA's publicly available data retrieval system.

1. Regulation S–K

While the proposed rule and form amendments would make revisions to Regulation S–K, the collection of information requirements for that regulation are reflected in the burden hours estimated for Forms 10–K and 10–Q. The rules in Regulation S–K do not impose any separate burden. Consistent with historical practice, we are proposing to retain an estimate of one burden hour to Regulation S–K for administrative convenience.

2. Form 10–K

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety violations in Commission filings in accordance with Section 1503 of the Act, we estimate that, of the 13,545 Form 10–Ks filed annually, approximately 95 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the proposed rule and form amendments. For purposes of the PRA, we assume that each such filer would have disclosures about mine safety violations to include in its Form 10–K. We further estimate that the proposed rule and form amendments would add 5 burden hours to the total burden hours required to produce each Form 10–K.

3. Form 20–F

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety violations in Commission filings in accordance with Section 1503 of the Act, we currently estimate that of the 942 Form 20–F annual reports filed annually by foreign private issuers, approximately 15 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the proposed rule and form amendments. For purposes of the PRA, we assume that each such filer would have disclosures about mine safety violations to include in its Form 20–F. As with Form 10–K, we estimate that the proposed rule and form amendments would add 5 burden hours to the total burden hours required to produce each Form 20–F.

[90] 30 CFR 50.10 and 50.20.

[91] While Form 20–F may be used by any foreign private issuer, Form 40–F is only available to a Canadian issuer that is eligible to participate in the U.S.-Canadian Multijurisdictional Disclosure System ("MJDS").

[92] Proposed Item 16J under Part II of Form 20–F and proposed paragraph (18) to General Instruction B of Form 40–F.

[93] The $400 per hour cost for outside legal services is the same estimate used by the Commission for these services in the proposed consolidated audit trail rule: Exchange Act Release No. 62174 (May 26, 2010): 75 FR 32556 (June 8, 2010).

4. Form 40–F

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety violations in Commission filings in accordance with Section 1503 of the Act, we currently estimate that of the 205 Form 40–F annual reports filed annually by foreign private issuers, approximately 15 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the proposed rule and form amendments. For purposes of the PRA, we assume that each such filer would have disclosures about mine safety violations to include in its Form 40–F. As with Forms 10–K and 20–F, we estimate that the proposed rule and form amendments would add 5 burden hours to the total burden hours required to produce each Form 40–F annual report.

5. Form 10–Q

Based on a review of companies filing under certain SICs, as well as a review of companies that are currently providing disclosure of mine safety violations in Commission filings in accordance with Section 1503 of the Act, we estimate that, of the 32,462 Form 10–Qs filed annually, approximately 285 are filed by companies that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the proposed rule and form amendments.[94] For purposes of the PRA, we assume that each such filer would have disclosures about mine safety violations to include in each Form 10–Q. We further estimate that the proposed rule and form amendments would add 5 burden hours to the total burden hours required to produce each Form 10–Q.

6. Form 8–K

We estimate that companies annually file 115,795 Form 8–Ks. Only companies that are operators, or have subsidiaries that are operators, of coal or other mines (as defined in the Mine Act, and subject to the Mine Act) are required to comply with the proposed new Form 8–K requirement. For purposes of the PRA, we estimate that there will be approximately 95 Form 8–K filers under new Item 1.04, which is based on our estimate of the number of Form 10–K filers that operate, or have a subsidiary that operates, a mine subject to the Mine Act, and that therefore would be affected by the proposed rule and form amendments. In addition, we understand that the triggering events for Form 8–K filing set forth in Section 1503(b)(2)—the receipt of written notice from MSHA that the coal or other mine has a pattern of violations or the potential to have such a pattern—are very rare, while the triggering event set forth in Section 1503(b)(1)—the receipt of an imminent danger order—is more common.[95] For purposes of this calculation, we assume that each potential filer under proposed Item 1.04 of Form 8–K would file three Forms 8–K per year under new Item 1.04 and we estimate that the proposed amendments to Form 8–K would add 1 burden hour to the total burden hours required to produce each Form 8–K.

C. Summary of Proposed Changes to Annual Compliance Burden in Collection of Information

The table below illustrates the total incremental annual compliance burden of the collection of information in hours and in cost under the proposed amendments for annual reports, quarterly reports and current reports on Form 8–K under the Exchange Act (Table 1). There is no change to the estimated burden of the collection of information under Regulation S–K because the burdens that Regulation S–K imposes are reflected in our revised estimates for the forms. The burden estimates were calculated by multiplying the estimated number of annual responses by the estimated average number of hours it would take a company to prepare and review the proposed disclosure requirements.

Form	Current annual response	Current burden hours	Increase in burden hours	Proposed burden hours	Current professional costs ($)	Increase in professional costs ($)	Proposed professional costs ($)
10–K	13,545	21,363,548	356	21,363,904	2,848,473,000	47,500	2,848,520,500
20–F	942	622,907	19	622,926	743,089,980	22,500	743,112,480
40–F	205	21,884	19	21,903	26,260,500	22,500	26,283,000
10–Q	32,462	4,559,793	1,069	4,560,862	607,972,400	142,500	608,114,900
8–K	115,795	493,436	214	493,650	65,791,500	28,500	65,820,000

D. Request for Comment

Pursuant to 44 U.S.C. 3506(c)(2)(B), we request comment in order to:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility;
- Evaluate the accuracy of our estimates of the burden of the proposed collections of information;
- Determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected;
- Evaluate whether there are ways to minimize the burden of the collections of information on those who respond, including through the use of automated collection techniques or other forms of information technology; and
- Evaluate whether the proposed amendments would have any effects on any other collections of information not previously identified in this section.

Any member of the public may direct to us any comments concerning the accuracy of these burden estimates and any suggestions for reducing the burdens. Persons who desire to submit comments on the collection of information requirements should direct their comments to the OMB, Attention: Desk Officer for the Securities and Exchange Commission, Office of

[94] We estimate that approximately 95 companies with a Form 10–Q filing obligation would be affected by the proposed rule and form amendments. Each such company would file three quarterly reports on Form 10–Q per year. 95 companies x 3 Forms 10–Q per year = 285 Forms 10–Q.

[95] *See* U.S. Department of Labor, Office of Inspector General, *In 32 Years MSHA Has Never Successfully Exercised Its Pattern of Violations Authority,* Report Number 05–10–005–06–001 (Sept. 29, 2010). According to data available on MSHA's website, 631 and 562 imminent danger orders under Section 107(a) were issued during fiscal 2010 and 2009, respectively. *See* Violations Data Set (as of Nov. 12, 2010), available at *http://www.msha.gov/OpenGovernmentData/OGIMSHA.asp* (on file with the Division of Corporation Finance). Note that this number includes all imminent danger orders issued to all companies subject to MSHA's jurisdiction, not only to reporting companies that are subject to the disclosure requirements of Section 1503 of the Act.

Information and Regulatory Affairs, Washington, DC 20503, and send a copy of the comments to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090, with reference to File No. S7–41–10. Requests for materials submitted to the OMB by us with regard to these collections of information should be in writing, refer to File No. S7–41–10 and be submitted to the Securities and Exchange Commission, Office of Investor Education and Advocacy, 100 F Street NE., Washington DC 20549–0213. Because the OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, your comments are best assured of having their full effect if the OMB receives them within 30 days of publication.

V. Cost-Benefit Analysis

A. Introduction and Objectives of Proposals

We are proposing the rule and form amendments discussed in this release to implement the disclosure requirements set forth in Section 1503 of the Act and to require limited additional disclosure to provide context for certain items required by that Section. Section 1503(a) of the Act requires issuers that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8–K disclosing the receipt of certain orders and notices from the Mine Safety and Health Administration.

As discussed in detail above, the disclosure requirements set forth in Section 1503 of the Act refer to and are based on the safety and health requirements applicable to mines under the Mine Act and administered by MSHA. MSHA inspectors issue citations, orders and decisions directly to mine operators during the course of inspections and MSHA assesses and collects civil monetary penalties for violations. Information on a mine-by-mine basis about inspections, violations, and accidents is publicly available on MSHA's data retrieval system on its Web site.[96] Therefore, we believe the information required to be disclosed under Section 1503 of the Act and our proposed rules is readily available to issuers. Further, because the disclosure requirements set forth in Section 1503 are currently in effect, we assume that issuers have already begun to develop the necessary controls and procedures to review and prepare the information required by Section 1503 of the Act for filing with the Commission, such that the additional incremental disclosure we are proposing to provide context for certain items required by that Section will not require issuers to implement additional controls and procedures.

We are proposing amendments to Form 10–K, Form 10–Q, Form 20–F and Form 40–F to provide for the disclosure required by Section 1503(a) of the Act and certain additional disclosures. New Item 106 of Regulation S–K, new Item 16J of Form 20–F and new Paragraph (18) of General Instruction B of Form 40–F would detail the information to be disclosed in accordance with Section 1503(a) of the Act, and the proposed amendment to Item 601 of Regulation S–K would set forth the exhibit requirement for Form 10–K and Form 10–Q for the information required to be disclosed under proposed Item 106 of Regulation S–K. We are also proposing amendments to Form 8–K to add new Item 1.04 to implement the requirement imposed by Section 1503(b) of the Act. Finally, we propose to amend General Instruction I.A.3.(b) of Form S–3 to add new Form 8–K Item 1.04 to the list of Form 8–K items the untimely filing of which will not result in loss of Form S–3 eligibility.

The Commission is sensitive to the costs and benefits that would be imposed by the proposed rule and form amendments. The discussion below focuses on the costs and benefits of the decisions made by the Commission to fulfill the mandates of the Act, rather than the cost and benefits of the mandates of the Act itself. However, to the extent that the Commission helps achieve the benefits intended by the Act, the two types of benefits are not entirely separable.

B. Benefits

The proposed rulemaking is intended to implement the requirements of Section 1503 of the Act. Our proposed Regulation S–K and form amendments would implement the requirements of the Act by reiterating the disclosure items listed in Section 1503, which are currently in effect. We are also proposing to require limited additional disclosure in periodic reports addressing:

- Brief descriptions of the categories of violations, orders or citations disclosed in response to the Section 1503(a) disclosure requirement;
- Total dollar values of proposed penalty assessments from MSHA; and
- Descriptions of legal actions pending before the FMSHRC and developments material to previously reported pending legal actions.

In addition, our proposed amendment to Form 8–K would require additional disclosure beyond that specifically designated by Section 1503(b) of the Act by specifying the information required about the orders or notices required to be disclosed, and specifying a four business day filing deadline for Forms 8–K filed under proposed Item 1.04.

We believe the enhanced disclosures in periodic reports about the categories of violations will improve the ability of investors to understand the statutorily required information about mine safety violations without having extensive knowledge of the Mine Act and the violations, orders and citations referenced therein. We believe that investors would also benefit from the proposed disclosure in periodic reports of the total dollar value of the assessments and the description of legal actions and developments relating to legal actions because it would place the required disclosures in context.

Our proposed amendment to Form 8–K specifying that the form is to be filed within four business days of receipt of the order or notice designated under Section 1503(b) of the Act would provide issuers and investors with certainty about the timing of that disclosure requirement.

Our proposed rule and form amendments also specify for issuers how, in what form, and when to report the mine safety information required by the Act. These rules are designed to facilitate compliance with the new statutory requirements.

C. Costs

The vast majority of the costs resulting from the disclosures required by Section 1503 of the Act arise whether or not we adopt rules to implement the Section. Moreover, the information required to be disclosed under Section 1503 is already subject to an extensive recordkeeping regime under MSHA and is readily available to issuers via MSHA's data retrieval system. The primary costs to result from this rulemaking are costs associated with the formatting and filing of the information and certain additional disclosures we are proposing: the description of the incidents, total dollar value of the proposed penalty assessments and the description of legal actions, as noted above. Given that this information

[96] *See http://www.msha.gov/DRS/DRSHOME.HTM.*

should be readily available to issuers and the additional information does not require a substantial amount of additional disclosure, we believe that these costs would be small.[97]

D. Request for Comment

We request data to quantify the costs and the value of the benefits described above. We seek estimates of these costs and benefits, as well as any costs and benefits not already defined, that may result from the adoption of these proposed amendments. We also request qualitative feedback on the nature of the benefits and costs described above and any benefits and costs we may have overlooked.

VI. Consideration of Impact on the Economy, Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[98] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Section 2(b)[99] of the Securities Act and Section 3(f)[100] of the Exchange Act require us, when engaging in rulemaking where we are required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

Our proposed amendments would implement the requirements of Section 1503 of the Act. We have proposed a few additional disclosure requirements to provide investors with context for the information required to be disclosed under Section 1503. We believe the additional disclosure will improve the ability of investors to understand the statutorily required information about mine safety violations without having extensive knowledge of the Mine Act and the orders, citations and violations referenced therein.

We do not believe that the additional disclosure we have proposed in our rulemaking would impose a burden on competition. Section 1503 of the Act imposed the substance of the disclosure requirements set forth in our proposals. The additional disclosure that we have proposed to require is not substantial, but rather brief descriptions to place the mine safety disclosures in context. In addition, we believe the additional information should be readily available to issuers. Accordingly, since the additional disclosure is designed to provide context to the information required to be disclosed by Section 1503 of the Act, and does not place a significant burden on the issuer, we believe that it will not impose a burden on competition. Likewise, we do not expect that the additional disclosure we are proposing to require would have a significant impact on capital formation.

We believe that the proposed clarifications to the mine safety information required by the Act will provide direction and consistency as to how, in what form, and when to report the relevant information. We believe that the specifications in the rulemaking will improve the efficiency of the reporting process for issuers and provide for a more efficient and effective review of the information by investors.

The loss of eligibility by an issuer to use Form S–3 could significantly restrict the ability of a company to raise capital and may be a disproportionately large negative consequence of an untimely filing of a Form 8–K. To address this potential burden on capital formation, we are proposing to revise the eligibility rules under Form S–3 so that an untimely filing of a report under new Item 1.04 of Form 8–K would not result in a loss of eligibility to use that form.

We request comment on whether the proposed amendments would promote efficiency, competition, and capital formation or have an impact or burden on competition. Commentators are requested to provide empirical data and other factual support for their view to the extent possible.

VII. Small Business Regulatory Enforcement Fairness Act

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)[101] we solicit data to determine whether the proposed rule amendments constitute a "major" rule. Under SBREFA, a rule is considered "major" where, if adopted, it results or is likely to result in:

- An annual effect on the economy of $100 million or more (either in the form of an increase or a decrease);
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment or innovation.

Commentators should provide empirical data on (a) the potential annual effect on the economy; (b) any increase in costs or prices for consumers or individual industries; and (c) any potential effect on competition, investment or innovation.

VIII. Initial Regulatory Flexibility Act Analysis

This Initial Regulatory Flexibility Analysis has been prepared in accordance with the Regulatory Flexibility Act.[102] It relates to proposed revisions to Regulation S–K and forms under the Securities Act and the Exchange Act regarding disclosure about mine safety.

A. Reasons for, and Objectives of, the Proposed Action

We are proposing rulemaking to implement the disclosure requirements set forth in Section 1503 of the Act and to require limited additional disclosure to provide context for certain items required by the Act. Section 1503(a) of the Act requires issuers that are operators, or that have a subsidiary that is an operator, of a coal or other mine to disclose in their periodic reports filed with the Commission information regarding specified health and safety violations, orders and citations, related assessments and legal actions, and mining-related fatalities. Section 1503(b) of the Act mandates the filing of a Form 8–K disclosing the receipt of certain orders and notices from MSHA.

B. Legal Basis

We are proposing the amendments pursuant to Sections 7, 10, and 19(a) of the Securities Act, Sections 12, 13, 15 and 23 of the Exchange Act, and Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

C. Small Entities Subject to the Proposed Action

The proposed amendments would affect some companies that are small entities. The Regulatory Flexibility Act defines "small entity" to mean "small business," "small organization," or "small governmental jurisdiction."[103]

[97] For purposes of the PRA, we estimate the total cost of the disclosure to be approximately 1,677 hours of company personnel time and approximately $263,500 for the services of outside professionals. However, this amount includes the costs associated with the disclosure requirement of Section 1503 of the Act, as well as our proposed additional disclosure. As discussed above, the proposed additional disclosure is only a small portion of the burden of the disclosure requirement; therefore, we believe the costs of the additional disclosure would be a small fraction of the total amount disclosed for PRA purposes.

[98] 15 U.S.C. 78w(a).

[99] 15 U.S.C. 77b(b).

[100] 15 U.S.C. 78c(f).

[101] 5 U.S.C. 603.

[102] 5 U.S.C. 601.

[103] 5 U.S.C. 601(6).

The Commission's rules define "small business" and "small organization" for purposes of the Regulatory Flexibility Act for each of the types of entities regulated by the Commission. Securities Act Rule 157 [104] and Exchange Act Rule 0–10(a) [105] define a company, other than an investment company, to be a "small business" or "small organization" if it had total assets of $5 million or less on the last day of its most recent fiscal year. We believe that our proposals would affect small entities that (i) are required to file reports under Sections 13(a) or 15(d) of the Exchange Act and (ii) operate, or have a subsidiary that operates, a coal or other mine, and therefore are required to provide mine safety disclosure under Section 1503 of the Act. We estimate that there are approximately 25 companies that would currently be required to provide the Section 1503 disclosure and that may be considered small entities. We note that there are a significant number of small entities that are exploration stage mining companies that would be required to provide the Section 1503 disclosure if such companies were to become operators, or have subsidiaries that become operators, of coal or other mines subject to the Mine Act.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The disclosure requirements we are proposing today are intended to implement the disclosure requirements set forth in Section 1503 of the Act and to require additional disclosure to provide context for certain items required by the Act. These amendments would require small entities that are required to file reports under Sections 13(a) or 15(d) of the Exchange Act and operate, or have a subsidiary that operates, a coal or other mine to provide mine safety disclosure under applicable rules and forms.

Small entities would be required to include the disclosure in their annual report on Form 10–K, Form 20–F or Form 40–F and, if applicable, quarterly report on Form 10–Q and current report on Form 8–K. We are proposing amendments to Form 10–K, Form 10–Q, Form 20–F and Form 40–F to require the disclosure required by Section 1503(a) of the Act and certain additional disclosures. New Item 106 of Regulation S–K, new Item 16J of Form 20–F and new Paragraph (18) of General Instruction B of Form 40–F would detail the information to be disclosed in accordance with Section 1503(a) of the Act, and the proposed amendment to Item 601 of Regulation S–K would set forth the exhibit requirement for Form 10–K and Form 10–Q for the information required to be disclosed under proposed Item 106 of Regulation S–K. We are also proposing amendments to Form 8–K to add new Item 1.04 to implement the requirement imposed by Section 1503(b) of the Act. Finally, we propose to amend General Instruction I.A.3.(b) of Form S–3 to add new Form 8–K Item 1.04 to the list of Form 8–K items the untimely filing of which will not result in loss of Form S–3 eligibility.

E. Duplicative, Overlapping, or Conflicting Federal Rules

Section 1503 of the Act imposed the disclosure requirements set forth in Sections 1503(a) and (b) of the Act, regardless of whether the Commission adopts rules to implement those provisions. Our proposed amendments incorporate the Act's requirements into Regulation S–K and related forms. The disclosure requirement of Section 1503(a)(1)(G) of the Act, which requires disclosure of mining-related fatalities, overlaps to some extent with a disclosure requirement under MSHA rules. MSHA requires companies to report immediately any death of an individual at a mine,[106] which MSHA then makes available to the public through its data retrieval system on its Web site, *http://www.msha.gov.*

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. In connection with the proposed disclosure amendments, we considered the following alternatives:

(1) Establishing differing compliance or reporting requirements or timetables which take into account the resources available to smaller entities;

(2) Exempting smaller entities from coverage of the disclosure requirements, or any part thereof;

(3) The clarification, consolidation, or simplification of disclosure for small entities; and

(4) Use of performance standards rather than design standards.

Section 1503 of the Act requires all entities, including small entities, that are required to file reports under Sections 13(a) or 15(d) of the Exchange Act and operate, or have a subsidiary that operates, a coal or other mine to provide mine safety disclosure under applicable rules and forms. These requirements apply without regard to whether we adopt rules to implement them. The proposed amendments implement the disclosure requirements set forth in Section 1503 of the Act, and require additional disclosure to provide context for certain items required by the Act. Given the statutory disclosure requirements in Section 1503 of the Act, the Act does not appear to contemplate separate compliance or reporting requirements for smaller entities. We nevertheless solicit comment on the propriety of a complete or partial exemption from the requirements for smaller entities.

Our proposed amendments would require clear and straightforward disclosure of the information required by Section 1503 of the Act. We have used design rather than performance standards in connection with the proposed amendments. By specifying in the Act the disclosure required, Congress appears to have contemplated that consistent, comparable disclosure would be provided. We believe that the specific disclosure requirements in the proposed amendments would promote consistent and comparable disclosure among all companies that operate, or have a subsidiary that operates, a coal or other mine. Further, based on our past experience, we believe that specific disclosure requirements for this information would be more useful to investors than would a performance standard.

Currently, small entities are subject to some different compliance or reporting requirements under Regulation S–K and the proposed amendments would not affect these requirements. The proposed disclosure requirements would apply to small entities to the same extent as larger issuers. We do not believe these disclosures will create a significant new burden, and we believe this approach is consistent with the requirements of the Act.

G. Solicitation of Comments

We encourage the submission of comments with respect to any aspect of this Initial Regulatory Flexibility Analysis. In particular, we request comments regarding:

- How the proposed amendments can achieve their objective while lowering the burden on small entities;
- The number of small entities that may be affected by the proposed amendments;
- The existence or nature of the potential impact of the proposed amendments on small entities discussed in the analysis; and
- How to quantify the impact of the proposed amendments.

[104] 17 CFR 230.157.

[105] 17 CFR 240.0–10(a).

[106] *See* 30 CFR 50.10.

Respondents are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed rule amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves.

IX. Statutory Authority and Text of the Proposed Amendments

The amendments contained in this release are being adopted under the authority set forth in Sections 7, 10, and 19(a) of the Securities Act; Sections 12, 13, 15 and 23 of the Exchange Act and Section 1503 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

List of Subjects in 17 CFR Parts 229, 239 and 249

Reporting and recordkeeping requirements, Securities.

Text of the Amendments

For the reasons set out in the preamble, the Commission proposes to amend title 17, chapter II, of the Code of Federal Regulations as follows:

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

1. The authority citation for part 229 continues to read in part as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 777iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78*l,* 78m, 78n, 78o, 78u–5, 78w, 78*ll,* 78mm, 80a–8, 80a–9, 80a–20, 80a–29, 80a–30, 80a–31(c), 80a–37, 80a–38(a), 80a–39, 80b–11, and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Section 229.106 is added to read as follows:

§ 229.106 (Item 106) Mine safety disclosure.

(a) A registrant that is the operator, or that has a subsidiary that is an operator, of a coal or other mine shall provide the information specified below for the time period covered by the report:

(1) For each coal or other mine of which the registrant or a subsidiary of the registrant is an operator, identify the mine and disclose:

(i) The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 814) for which the operator received a citation from the Mine Safety and Health Administration.

(ii) The total number of orders issued under section 104(b) of such Act (30 U.S.C. 814(b)).

(iii) The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health or safety standards under section 104(d) of such Act (30 U.S.C. 814(d)).

(iv) The total number of flagrant violations under section 110(b)(2) of such Act (30 U.S.C. 820(b)(2)).

(v) The total number of imminent danger orders issued under section 107(a) of such Act (30 U.S.C. 817(a)).

(vi) The total dollar value of proposed assessments from the Mine Safety and Health Administration under such Act (30 U.S.C. 801 *et seq.*).

Instruction to Item 106(a)(1)(vi): Registrants must provide the total dollar value of assessments proposed by MSHA during the period covered by the report, and also provide the total dollar value of all outstanding assessments as of the last day of the period covered by the report, regardless of whether the registrant has challenged or appealed the assessment.

(vii) The total number of mining-related fatalities.

(2) A list of coal or other mines, of which the registrant or a subsidiary of the registrant is an operator, that receive written notice from the Mine Safety and Health Administration of:

(i) A pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of such Act (30 U.S.C. 814(e)); or

(ii) The potential to have such a pattern.

(3) For each violation, order or citation disclosed in response to (a)(1) and (a)(2) above, a brief description of category of violation, order or citation.

(4) Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.

Instruction to Item 106(a)(4): The registrant must report any legal actions commenced during the time period covered by the report, as well as any developments material to a legal action previously reported under this provision occurring during the period covered by the report. Registrants must disclose the date the action was instituted, by whom, the name and location of the mine involved, and a brief description of the category of violation, order or citation underlying the proceeding.

(b) *Definitions.* For purposes of this Item:

(1) The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 *et seq.*).

(2) The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

Instructions to Item 106:

1. The registrant must provide the information required by this Item as specified by § 229.601(b)(95) of this chapter. In addition, the registrant must provide a statement, in an appropriately captioned section of the periodic report, that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and this Item is included in exhibit 95 to the periodic report.

2. When the disclosure required by this item is included in an exhibit to an annual report on Form 10–K, the information is to be provided for the fourth quarter of the registrant's fiscal year, as well as for the entire fiscal year.

3. Amend § 229.601 by revising paragraphs (a)(36) through (a)(98) in the exhibit table in paragraph (a), and adding paragraph (b)(95), to read as follows:

§ 229.601 (Item 601) Exhibits.

(a) * * *

Exhibit Table

* * * * *

EXHIBIT TABLE

	Securities Act forms								Exchange Act forms				
	S–1	S–3	S–4[1]	S–8	S–11	F–1	F–3	F–4[1]	10	8–K[2]	10–D	10–Q	10–K
* * *	*			*		*			*		*		
					*								
(36) through (94) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
(95) Mine Safety Disclosure Exhibit	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	x	x
(96) through (98) [Reserved]	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A		
* * *	*			*		*			*		*		
					*								

[1] An exhibit need not be provided about a company if: (1) With respect to such company an election has been made under Form S–4 or F–4 to provide information about such company at a level prescribed by Form S–3 or F–3; and (2) the form, the level of which has been elected under Form S–4 or F–4, would not require such company to provide such exhibit if it were registering a primary offering.

[2] A Form 8–K exhibit is required only if relevant to the subject matter reported on the Form 8–K report. For example, if the Form 8–K pertains to the departure of a director, only the exhibit described in paragraph (b)(17) of this section need be filed. A required exhibit may be incorporated by reference from a previous filing.

* * * * *

(b) * * *

(95) *Mine Safety Disclosure Exhibit.* A registrant that is an operator, or that has a subsidiary that is an operator, of a coal or other mine must provide the information required by Item 106 of Regulation S–K (§ 229.106 of this chapter) in an exhibit to its Exchange Act annual or quarterly report. For purposes of this Item:

(1) The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 *et seq.*).

(2) The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

* * * * *

PART 239—FORMS PRESCRIBED UNDER THE SECURITIES ACT OF 1933

4. The authority citation for part 239 continues to read in part as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 77z–2, 77z–3, 77sss, 78c, 78l, 78m, 78n, 78o(d), 78u–5, 78w(a), 78ll(d), 77mm, 79e, 79f, 79g, 79j, 79l, 79m, 79n, 79q, 79t, 404 80a–2(a), 80a–3, 80a–8, 80a–9, 80a–10, 80a–13, 80a–24, 80a–26, 80a–29, 80a–30, and 80a–37, unless otherwise noted.

* * * * *

5. Amend Form S–3 (referenced in § 239.13) by revising General Instruction I.A.3.(b) to read as follows:

Note: The text of Form S–3 does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM S–3 REGISTRATION STATEMENT UNDER THE SECURITIES ACT OF 1933

* * * * *

GENERAL INSTRUCTIONS

I. Eligibility Requirements for Use of Form S–3 * * *

A. *Registrant Requirements.* * * *

3. * * *

(b) has filed in a timely manner all reports required to be filed during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement, other than a report that is required solely pursuant to Item 1.01, 1.02, 1.04, 2.03, 2.04, 2.05, 2.06, 4.02(a) or 5.02(e) of Form 8–K (§ 249.308 of this chapter). If the registrant has used (during the twelve calendar months and any portion of a month immediately preceding the filing of the registration statement) Rule 12b–25(b) (§ 240.12b–25(b) of this chapter) under the Exchange Act with respect to a report or a portion of a report, that report or portion thereof has actually been filed within the time period prescribed by that rule.

* * * * *

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

6. The authority citation for part 249 continues to read in part as follows:

Authority: 15 U.S.C. 78a *et seq.* and 7201 *et seq.;* and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

7. Amend Form 20–F (referenced in § 249.220f) by adding Item 16J, and adding Instruction 19 to the Instructions as to Exhibits, of Form 20–F, to read as follows:

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 20–F

* * * * *

Item 16J. Mine Safety Disclosure

If the registrant is the operator, or has a subsidiary that is an operator, of a coal or other mine, include the information set forth below for the time period covered by the annual report. In an appropriately captioned section of the annual report, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and this Item is included in a specified exhibit to the annual report. Include the following information in an exhibit to the annual report.

(a) For each coal or other mine of which the registrant or a subsidiary of the registrant is an operator, identify the mine and disclose:

(i) The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 814) for which the operator received a citation from the Mine Safety and Health Administration.

(ii) The total number of orders issued under section 104(b) of such Act (30 U.S.C. 814(b)).

(iii) The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health or safety standards under section 104(d) of such Act (30 U.S.C. 814(d)).

(iv) The total number of flagrant violations under section 110(b)(2) of such Act (30 U.S.C. 820(b)(2)).

(v) The total number of imminent danger orders issued under section 107(a) of such Act (30 U.S.C. 817(a)).

(vi) The total dollar value of proposed assessments from the Mine Safety and Health Administration under such Act (30 U.S.C. 801 *et seq.*).

Instruction to Item 16J(a)(vi): Registrants must provide the total dollar value of assessments proposed by MSHA during the period covered by the report, and also provide the total dollar value of all outstanding assessments as of the last day of the period covered by the report, regardless of whether the registrant has challenged or appealed the assessment.

(vii) The total number of mining-related fatalities.

(b) A list of coal or other mines, of which the registrant or a subsidiary of the registrant is an operator, that receive written notice from the Mine Safety and Health Administration of:

(i) A pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of such Act (30 U.S.C. 814(e)); or

(ii) the potential to have such a pattern.

(c) For each violation, order or citation disclosed in response to (a) and (b) above, a brief description of the category of violation, order or citation.

(d) Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.

Instructions to Item 16J(d): 1. Item 16J only applies to annual reports, and not to registration statements on Form 20–F.

2. The exhibit described in this Item must meet the requirements under Instruction 19 as to Exhibits of this Form.

3. The registrant must report any legal actions commenced during the time period covered by the report, as well as any developments material to a legal action previously reported under this provision occurring during the period covered by the report. Registrants must disclose the date the action was instituted, by whom, the name and location of the mine involved, and a brief description of the category of violation, order or citation underlying the proceeding.

* * * * *

Instruction to Item 16J

For purposes of this Item:

1. The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 *et seq.*).

2. The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

* * * * *

INSTRUCTIONS AS TO EXHIBITS

* * * * *

19. The mine safety disclosure required by Item 16J.

A registrant that is the operator, or that has a subsidiary that is an operator, of a coal or other mine must provide the information specified in Item 16J in an exhibit to its annual report on Form 20–F.

20 through 99. [Reserved]

* * * * *

8. Amend Form 40–F (referenced in § 249.240f) by adding Paragraph (18) to General Instruction B. to read as follows:

* * * * *

(18) Mine safety disclosure. If the registrant is the operator, or has a subsidiary that is an operator, of a coal or other mine, include the information set forth below for the time period covered by the annual report. In an appropriately captioned section of the annual report, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and this Item is included in a specified exhibit to the annual report. Include the following information in an exhibit to the annual report.

(a) For each coal or other mine of which the registrant or a subsidiary of the registrant is an operator, identify the mine and disclose:

(i) The total number of violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard under section 104 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 814) for which the operator received a citation from the Mine Safety and Health Administration.

(ii) The total number of orders issued under section 104(b) of such Act (30 U.S.C. 814(b)).

(iii) The total number of citations and orders for unwarrantable failure of the mine operator to comply with mandatory health or safety standards under section 104(d) of such Act (30 U.S.C. 814(d)).

(iv) The total number of flagrant violations under section 110(b)(2) of such Act (30 U.S.C. 820(b)(2)).

(v) The total number of imminent danger orders issued under section 107(a) of such Act (30 U.S.C. 817(a)).

(vi) The total dollar value of proposed assessments from the Mine Safety and Health Administration under such Act (30 U.S.C. 801 *et seq.*).

Instruction to paragraph (18)(a)(vi): Registrants must provide the total dollar value of assessments proposed by MSHA during the period covered by the report, and also provide the total dollar value of all outstanding assessments as of the last day of the period covered by the report, regardless of whether the registrant has challenged or appealed the assessment.

(vii) The total number of mining-related fatalities.

(b) A list of coal or other mines, of which the registrant or a subsidiary of the registrant is an operator, that receive written notice from the Mine Safety and Health Administration of:

(i) A pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of such Act (30 U.S.C. 814(e)); or

(ii) the potential to have such a pattern.

(c) For each violation, order or citation disclosed in response to (a) and (b) above, a brief description of the category of violation, order or citation.

(d) Any pending legal action before the Federal Mine Safety and Health Review Commission involving such coal or other mine.

Instruction to paragraph (18)(d): The registrant must report any legal actions commenced during the time period covered by the report, as well as any developments material to a legal action previously reported under this provision occurring during the period covered by the report. Registrants must disclose the date the action was instituted, by whom, the name and location of the mine involved, and a brief description of the category of violation, order or citation underlying the proceeding.

* * * * *

Notes to Paragraph (18) of General Instruction B:

For purposes of this Item:

1. The term *coal or other mine* means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 *et seq.*).

2. The term *operator* has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

3. Instruction B(18) only applies to annual reports, and not to registration statements on Form 40–F.

* * * * *

9. Amend Form 8–K (referenced in § 249.308) by adding Item 1.04 under the caption "Information to Be Included in the Report" after the General Instructions to read as follows:

Note: The text of Form 8–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 8–K

* * * * *

General Instructions

* * * * *

Information to Be Included in the Report

* * * * *

Item 1.04 Mine Safety—Reporting of Shutdowns and Patterns of Violations.

(a) If the registrant or a subsidiary of the registrant has received, with respect to a coal or other mine of which the registrant or a subsidiary of the registrant is an operator—

• an imminent danger order issued under section 107(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 817(a));

• a written notice from the Mine Safety and Health Administration that the coal or other mine has a pattern of violations of mandatory health or safety standards that are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards under section 104(e) of such Act (30 U.S.C. 814(e)); or

• a written notice from the Mine Safety and Health Administration that the coal or other mine has the potential to have such a pattern, disclose the following information:

(1) The date of receipt by the issuer or a subsidiary of such order or notice.

(2) A brief description of the category of order or notice.

(3) The name and location of the mine involved.

Instructions to Item 1.04.

1. The term "coal or other mine" means a coal or other mine, as defined in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802), that is subject to the provisions of such Act (30 U.S.C. 801 *et seq.*).

2. The term "operator" has the meaning given the term in section 3 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 802).

* * * * *

10. Amend Form 10–Q (referenced in § 249.308a) by adding Item 4 in Part II to read as follows:

Note: The text of Form 10–Q does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 10–Q

* * * * *

PART II

* * * * *

Item 4. Specialized Disclosures * * *

If applicable, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and Item 106 of Regulation S–K (17 CFR 229.106) is included in exhibit 95 to the quarterly report.

* * * * *

11. Amend Form 10–K (referenced in § 249.310) by adding paragraph (b) to Item 4 in Part I to read as follows:

Note: The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

FORM 10–K

* * * * *

PART I

* * * * *

Item 4. Specialized Disclosures * * *

(b) If applicable, provide a statement that the information concerning mine safety violations or other regulatory matters required by Section 1503(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act and Item 106 of Regulation S–K (17 CFR 229.106) is included in exhibit 95 to the annual report.

* * * * *

By the Commission.

Dated: December 15, 2010.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–31941 Filed 12–21–10; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 40

[Docket No. RM10–8–000]

Electric Reliability Organization Interpretations of Interconnection Reliability Operations and Coordination and Transmission Operations Reliability Standards

Issued December 16, 2010.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: Under section 215 of the Federal Power Act (FPA), the Federal Energy Regulatory Commission (Commission) proposes to approve the North American Electric Reliability Corporation's (NERC) proposed interpretation of certain specific requirements of the Commission-approved Reliability Standards, TOP–005–1, Operational Reliability Information, and IRO–005–1, Reliability Coordination—Current-Day Operations. Specifically, the interpretation addresses whether a Special Protection System (or SPS) that is operating with only one communication channel in service is "degraded" under these standards. The Commission proposes to approve the interpretation, discussed below, as being consistent with and not expanding or changing the existing Reliability Standards. However, to address Commission concerns that the interpretation fails to specify that a Special Protection System that has lost a communication channel be reported, the Commission also proposes to direct NERC pursuant to section 215 (d)(5) of the FPA to develop modifications to the TOP–005–1 and IRO–005–1 Reliability Standards, as discussed below, through its Reliability Standards development process. The Commission seeks comments on its proposal.

DATES: Comments are due February 7, 2011.

ADDRESSES: You may submit comments, identified by docket number and in accordance with the requirements posted on the Commission's Web site, *http://www.ferc.gov.* Comments may be submitted by any of the following methods:

• *Agency Web Site:* Documents created electronically using word processing software should be filed in native applications or print-to-PDF format, and not in a scanned format, at

http://www.ferc.gov/docs-filing/efiling.asp.

• *Mail/Hand Delivery:* Commenters unable to file comments electronically must mail or hand deliver an original copy of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426. These requirements can be found on the Commission's Web site; *see, e.g.,* the "Quick Reference Guide for Paper Submissions," available at *http://www.ferc.gov/docs-filing/efiling.asp* or via phone from FERC Online Support at 202–502–6652 or toll-free at 1–866–208–3676.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: 1. Under section 215 of the Federal Power Act (FPA), the Federal Energy Regulatory Commission (Commission) proposes to approve the North American Electric Reliability Corporation's (NERC) proposed interpretation of certain specific requirements of the Commission-approved Reliability Standards, TOP–005–1, Operational Reliability Information, and IRO–005–1, Reliability Coordination—Current-Day Operations.[1] Specifically, the interpretation addresses whether a Special Protection System (or SPS) that is operating with only one communication channel in service is "degraded" under these standards. The Commission proposes to approve the interpretation, discussed below, as being consistent with and not expanding or changing the existing Reliability Standards. However, to address Commission concerns that the interpretation fails to specify that a Special Protection System that has lost a communication channel be reported, the Commission also proposes to direct NERC pursuant to section 215(d)(5) of the FPA to develop modifications to the TOP–005–1 and IRO–005–1 Reliability Standards, as discussed below, through its Reliability Standards development process. The Commission seeks comments on its proposal.

I. Background

A. FPA Section 215 and Mandatory Reliability Standards

2. Section 215 of the FPA requires a Commission-certified Electric Reliability Organization (ERO) to develop mandatory and enforceable Reliability Standards, which are subject to Commission review and approval. Once approved, the Reliability Standards may be enforced by the ERO, subject to Commission oversight, or by the Commission independently.[2]

3. Pursuant to section 215 of the FPA, the Commission established a process to select and certify an ERO[3] and, subsequently, certified NERC as the ERO.[4] On April 4, 2006, as modified on August 28, 2006, NERC submitted to the Commission a petition seeking approval of 107 proposed Reliability Standards. On March 16, 2007, the Commission issued a Final Rule, Order No. 693, approving 83 of these 107 Reliability Standards and directing other action related to these Reliability Standards.[5] In addition, pursuant to section 215(d)(5) of the FPA, the Commission directed NERC to develop modifications to 56 of the 83 approved Reliability Standards.[6]

4. In Order No. 693, the Commission approved the previous versions of the IRO–005–1[7] and TOP–005–1 Reliability Standards, directing NERC to develop modifications to the standards. For IRO–005–1, the Commission directed NERC to develop modifications to the standard in order to include Measures and Levels of Non-Compliance specific to interconnection reliability operating limit (IROL) violations during normal and contingency conditions.[8] For TOP–005–1, the Commission directed NERC to develop a modification to include the operational status of Special Protection Systems and power system stabilizers in the types of information that transmission operators are expected to share, unless otherwise agreed.[9] NERC reports that its interpretation was originally developed based on a review of version IRO–005–1 of the Reliability Coordination—Current-Day Operations Reliability Standard. According to NERC, the intervening changes resulting in the current versions are not material to the substance of the interpretation.[10] Therefore, although our discussion of the interpretation will refer for convenience to the IRO–005–1 and TOP–005–1 versions of the Reliability Standards, the discussion in this NOPR is intended to apply equally to subsequent versions of the standards.

5. Also in Order No. 693, the Commission declined to approve standards addressing Special Protection System design, operation, and coordination, finding them to be "fill in the blank" standards.[11] Such fill-in-the-blank standards would require the regional reliability organizations to develop criteria for use by users, owners or operators within each region. In Order No. 693, the Commission required NERC to submit supplemental information for the fill-in-the-blank standards, including standards for Special Protection System design, and found that absent such information the Commission was not in a position to

[1] The Commission is not proposing any new or modified text to its regulations. As provided in 18 CFR Part 40, proposed Reliability Standards will not become effective until approved by the Commission, and the ERO must post on its Web site each effective Reliability Standard. The proposed interpretations would assist entities in complying with the Reliability Standards.

[2] *See* 16 U.S.C. 824o(e)(3).

[3] *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards,* Order No. 672, FERC Stats. & Regs. ¶ 31,204, *order on reh'g,* Order No. 672–A, FERC Stats. & Regs. ¶ 31,212 (2006).

[4] *North American Electric Reliability Corp.,* 116 FERC ¶ 61,062, *order on reh'g & compliance,* 117 FERC ¶ 61,126 (2006), *aff'd sub nom. Alcoa, Inc.* v. *FERC,* 564 F.3d 1342 (DC Cir. 2009).

[5] *Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, FERC Stats. & Regs. ¶ 31,242, *order on reh'g,* Order No. 693–A, 120 FERC ¶ 61,053 (2007).

[6] 16 U.S.C. 824o(d)(5). Section 215(d)(5) provides, "The Commission * * * may order the Electric Reliability Organization to submit to the Commission a proposed reliability standard or a modification to a reliability standard that addresses a specific matter if the Commission considers such a new or modified reliability standard appropriate to carry out this section."

[7] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 945.

[8] *Id.* P 951.

[9] *Id.* P 1648 (directing revisions to TOP–005–1, Attachment 1). The Commission proposed to accept a new version of the Operational Reliability Information Reliability Standard, TOP–005–2, in *Mandatory Reliability Standards for Interconnection Reliability Operating Limits,* NOPR, Docket No. RM10–15–000, 75 FR 71613 (Nov. 24, 2010), 133 FERC ¶ 61,151, at P 65 (2010) (requesting comment whether the list of minimum electric system reliability data in TOP–005–1, Attachment 1 is beneficial for reliability coordinators to meet the requirements of IRO–008–1 and IRO–009–1).

[10] The Order No. 693 directive to add the operational status of Special Protection Systems and power system stabilizers to the types of information to be provided under TOP–005–1 remains outstanding.

[11] *Mandatory Reliability Standards for the Bulk-Power System,* Order No. 693, FERC Stats. & Regs. ¶ 31,242, at P 1520, 1528, *et seq.* (2007) (declining to approve or remand certain Special Protection Systems-related Reliability Standards, including PRC–012–0, Special Protection System Review Procedure; PRC–013–0, Special Protection System Database; PRC–014–0, Special Protection System Assessment). The Commission used the term fill-in-the-blank standards to refer to proposed standards that required the regional reliability organizations to develop at a later date criteria for use by users, owners or operators within each region.

approve or remand those Reliability Standards.

6. The NERC glossary provides definitions of terms used in the Reliability Standards and defines a "Special Protection System" (or SPS) as:

> An automatic protection scheme designed to detect abnormal or predetermined system conditions and take corrective actions other than and/or in addition to the isolation of faulted component to maintain system reliability. Such action may include changes in demand, generation (MW and MVAR), or system configuration to maintain system stability, acceptable voltage or power flows.[12]

7. Special Protection Systems generally are used to address system reliability vulnerabilities in lieu of installing more costly additional Bulk-Power System facilities. For instance, a Special Protection System may be used to control generator output to limit line loading after a contingency, or a Special Protection System may rely on pre-determined operational protocols to reconfigure the system in response to identified system conditions to prevent system instability or cascading outages, and protect other facilities in response to transmission outages.

8. Since Order No. 693 was issued, NERC has produced a white paper providing background for its Protection System Reliability Standards development effort.[13] After this standards development effort was initiated, the NERC Regional Reliability Standards Working Group identified the Special Protection System standard as one that required regional standard development.[14] The Commission understands that the regional standard development efforts are currently ongoing.

9. NERC's Rules of Procedure provide that a person that is "directly and materially affected" by Bulk-Power System reliability may request an interpretation of a Reliability Standard.[15] The ERO's "standards process manager" will assemble a team with relevant expertise to address the requested interpretation and also form a ballot pool. NERC's Rules provide that, within 45 days, the team will draft an interpretation of the Reliability Standard, with subsequent balloting. If approved by ballot, the interpretation is appended to the Reliability Standard and filed with the applicable regulatory authority for regulatory approval.

B. Reliability Standards and Interpretation Request

1. Reliability Standard IRO–005–1

10. Reliability Standard IRO–005–1 applies to transmission operators, balancing authorities, reliability coordinators and purchasing selling entities. The IRO–005–1 Purpose statement provides: "The Reliability Coordinator must be continuously aware of conditions within its Reliability Coordinator Area and include this information in its reliability assessments. The Reliability Coordinator must monitor Bulk Electric System parameters that may have significant impacts upon the Reliability Coordinator Area and neighboring Reliability Coordinator Areas." Requirement R12 of Reliability Standard IRO–005–1 requires the transmission operator to immediately notify the reliability coordinator of the status of certain Special Protections Systems, whenever those Special Protection Systems are armed, including any degradation or potential failure to operate as expected. Requirement R12 provides:

> Whenever a Special Protection System that may have an inter-Balancing Authority, or inter-Transmission Operator impact (*e.g.,* could potentially affect transmission flows resulting in a SOL or IROL violation) is armed, the Reliability Coordinator shall be aware of the impact of the operation of that Special Protection System on inter-area flows. The Transmission Operator shall immediately inform the Reliability Coordinator of the status of the Special Protection System including any degradation or potential failure to operate as expected.

2. Reliability Standard TOP–005–1

11. Reliability Standard TOP–005–1 applies to transmission operators, balancing authorities, reliability coordinators and purchasing selling entities, and has the stated purpose of ensuring that reliability entities have the operating data needed to monitor system conditions within their areas.[16]

12. Requirement R3 of Reliability Standard TOP–005–1 requires each balancing authority and transmission operator to provide its neighboring balancing authorities and transmission operators with operating data to allow them to perform operational reliability assessments and to coordinate reliable operations. Included in the types of data to be reported are "New or degraded special protection systems." TOP–005–1, Requirement R3 provides:

> Upon request, each Balancing Authority and Transmission Operator shall provide to other Balancing Authorities and Transmission Operators with immediate responsibility for operational reliability, the operating data that are necessary to allow these Balancing Authorities and Transmission Operators to perform operational reliability assessments and to coordinate reliable operations. Balancing Authorities and Transmission Operators shall provide the types of data as listed in Attachment 1–TOP–005–0 "Electric System Reliability Data," unless otherwise agreed to by the Balancing Authorities and Transmission Operators with immediate responsibility for operational reliability.

3. Manitoba Hydro Interpretation Request

13. Manitoba Hydro requested clarification from NERC of the meaning of the term "degraded/degradation" as used in NERC Reliability Standards TOP–005–1 and IRO–005–1.[17] Specifically, Manitoba Hydro asked whether a Special Protection System that is operating with only one communication channel in service would be considered "degraded" for the purposes of these standards. Manitoba Hydro stated:

> Unlike other facilities, Special Protection Systems are required by NERC standards to be designed with redundant communication channels, so that if one communication channel fails the SPS is able to remain in operation. Requirement R1.3 of NERC Standard PRC–012–0 requires a Regional Reliability Organization with Transmission Owners that use SPSs to have a documented review procedure to ensure that SPSs comply with reliability standards and criteria, including: "Requirements to demonstrate that the SPS shall be designed so that a single SPS component failure, when the SPS was intended to operate, does not prevent the interconnected transmission system from meeting the performance requirements in TPL–001–0, TPL–002–0 and TPL–003–0." Accordingly, SPSs are designed to continue to perform their function with only one communication channel in service.

14. According to Manitoba Hydro, a Special Protection System should not be considered "degraded" if it is operating with one communication channel out of service. Manitoba Hydro supported its position as consistent with the Institute of Electrical and Electronics Engineers, Inc. (IEEE) definition of degraded as "the inability of an item to perform its

[12] In the Western Interconnection, a Special Protection System is called a "Remedial Action Scheme."

[13] NERC System Protection and Control Subcommittee (SPCS), November 18, 2008 white paper on *Protection System Reliability, Redundancy of Protection System Elements available at http://www.nerc.com/filez/spctf.html* (posted Jan. 14, 2009).

[14] NERC Regional Reliability Standards Working Group, Notes on October 29, 2009 meeting, *available at http://www.nerc.com/filez/rrswg.html.*

[15] NERC Rules of Procedure, Appendix 3A, Reliability Standards Development Procedure, Version 6.1, at 26–27 (2007).

[16] Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1642.

[17] The NERC Petition provides a copy of Manitoba Hydro's November 28, 2008 request for interpretation as Exhibit A.

required function."[18] Manitoba Hydro cites NERC Reliability Standard PRC–012–0, Requirement R1.3 and asserts that Special Protection Systems are designed to continue to perform their function with only one communication channel in service.[19] Manitoba Hydro cites the NERC glossary as defining the function of a Special Protection System "to detect abnormal or predetermined system conditions, and take corrective actions other than and/or in addition to the isolation of faulted components to maintain system reliability." Manitoba Hydro concludes that a Special Protection System with one communication channel out of service can still fully perform its function and, therefore, that a Special Protection System with one communication channel out of service is not degraded.

C. NERC Petition

15. NERC submitted its Petition for Approval of Interpretations to Reliability Standard TOP–005–1—Operational Reliability Information and Reliability Standard IRO–005–1—Reliability Coordination—Current Day Operations (Petition) on November 24, 2009, seeking Commission approval of the interpretations referenced in the title of its pleading.

16. Consistent with the NERC Rules of Procedure, NERC assembled a team to respond to the requests for interpretation and presented the proposed interpretations to industry ballot, using a process similar to the process it uses for the development of Reliability Standards.[20] According to NERC, the interpretations were developed and approved by industry stakeholders using the NERC Reliability Standards Development Procedure and approved by the NERC Board of Trustees (Board).

17. In response to Manitoba Hydro's interpretation request, NERC provided the following:

> TOP–005–1 does not provide, nor does it require, a definition for the term "degraded."
>
> The IRO–005–1 ([Requirement] R12) standard implies that degraded is a condition that will result in a failure of an SPS to operate as designed. If the loss of a communication channel will result in the failure of an SPS to operate as designed, then the Transmission Operator would be mandated to report that information. On the other hand, if the loss of a communication channel will not result in the failure of the SPS to operate as designed, then such a condition can be, but is not mandated to be, reported.

18. Also, in a background description of the interpretation, NERC affirms that transmission operators are required to provide information such as that listed in the examples upon request, "whether or not [a facility] is or is not in some undefined 'degraded' state."[21]

19. In addition, the background section accompanying the interpretation emphasizes that the information to be provided under IRO–005–1 relates to events that may have a significant impact on the system, especially where operating limits are or may be exceeded. Specifically it states:

> IRO–005–1 mandates that each Reliability Coordinator monitor predefined base conditions (Requirement R1), collect additional data when operating limits are or may be exceeded (Requirement R3), and identify actual or potential threats (Requirement R5). The basis for that request is left to each Reliability Coordinator. The Purpose statement of IRO–005–1 focuses on the Reliability Coordinator's obligation to be aware of conditions that may have a "significant" impact upon its area and to communicate that information to others (Requirements R7 and R9). Please note: it is from this communication that Transmission Operators and Balancing Authorities would either obtain or would know to ask for [Special Protection System] information from another Transmission Operator.[22]

20. In addition, the NERC Petition states:

> The NERC Board of Trustees, in approving these interpretations, did so using a standard of strict construction that does not expand the reach of the standard or correct a perceived gap or deficiency in the standard. However, the NERC Board of Trustees recommended that any gaps or deficiencies in a Reliability Standard that are evident through the interpretation process be addressed promptly by the standard drafting team.[23]

21. NERC reports that it will examine any gaps or deficiencies in Reliability Standards TOP–005–1 and IRO–005–2 when it develops the next version of these standards through the Reliability Standards development process.

22. According to NERC, the interpretations do not modify the language contained in the requirements under review. NERC states that the interpretations do not represent new or modified Reliability Standard requirements and will provide instruction and guidance of the intent and application of the requirements. NERC requests that the Commission approve the interpretations and make them effective immediately after approval, consistent with the Commission's procedures.

II. Proposed Determination

23. We propose to approve NERC's interpretation of Reliability Standards IRO–005–1, Requirement R12, and TOP–005–1, Requirement R3. We believe that the ERO has presented a reasonable interpretation that is not inconsistent with the language of the Reliability Standards. However, we are concerned that the interpretation highlights a potential gap in reliability. While not required by the Reliability Standards as interpreted by the ERO, we are concerned that a Special Protection System that has lost a communication channel could compromise system reliability, for the reasons explained below. Accordingly, pursuant to section 215 (d)(5) of the FPA, we propose to direct that the ERO develop modifications to the Reliability Standards to address our concern. Specifically, we propose to direct the ERO to develop modifications to IRO–005–1, Requirement R12, and TOP–005–1, Requirement R3.

A. Discussion

24. The Commission proposes to approve the interpretation. We agree with the ERO that the failure of a Special Protection System to operate as designed is, for the purpose of Reliable Operation, degraded and reportable under Reliability Standards IRO–005–1, Requirement R12 and TOP–005–1, Requirement R3. The Commission is concerned, however, that this interpretation may create a reliability gap concerning the reporting requirements for a Special Protection System that is able to operate as designed but still poses a reliability risk to Bulk-Power System with the loss of a single communication channel with redundant design.

25. In its November 18, 2008 white paper, "Protection System Reliability,

[18] Manitoba Hydro's request for interpretation at 4–5 (citing full IEEE definitions of *degraded:* "A failure that is gradual, or partial or both; for example, the equipment degrades to a level that, in effect, is a termination of the ability to perform its required function," and *failure* (*Reliability*): "The termination of the ability of an item to perform its required function." IEEE 100, The Authoritative Dictionary of IEEE Standards Terms (7th ed.) (2000)).

[19] According to Manitoba Hydro, PRC–012–0, Requirement R1.3 requires a Special Protection System to be designed so that, when the Special Protection System is intended to operate, a single component failure does not prevent the interconnected transmission system from meeting the performance requirements in TPL–001–0, TPL–002–0 and TPL–003–0. In Order No. 693, the Commission did not approve PRC–012–0, finding that was a fill-in-the-blank standard and lacked regional review procedures for Special Protection Systems.

[20] NERC Reliability Standards Development Procedure at 26–27.

[21] NERC Petition, Exhibit B at 5 (proposing text of interpretation as Appendix 1 to IRO–005–1 and TOP–005–1).

[22] *Id.* Exhibit B at 6.

[23] NERC Petition at 5.

Redundancy of Protection System Elements," the NERC System Protection and Control Subcommittee (SPCS) explained that "[r]edundancy means that two or more functionally equivalent Protection Systems are used to protect each electric system element." [24] The SPCS also explained in its white paper that "[a] fundamental concept of redundancy is that Protection Systems need to be designed such that electric system faults will be cleared, even if a component of the Protection System fails." [25] In accordance with the analysis provided in the SPCS white paper, redundancy of Protection System components is neither unnecessary nor superfluous. Rather, redundancy is necessary to ensure that no single point of failure of a Protection System component results in the inability of the Bulk-Power System to meet the system performance requirements established in the TPL Reliability Standards.[26] In other words, redundant communication channels are a means to provide for the reliable operation of the Special Protection System. Should a communication channel fail at the time the Special Protection System is required to operate, the designed redundancy of the Special Protection System ensures that the Bulk-Power System can meet its reliability performance requirements.

26. Our concern is that, given NERC's proposed interpretation, a loss of a communication channel, a necessary and inherent performance requirement of a Special Protection System, may not be considered a reportable event under the current reporting requirements. Because Special Protection Systems are by their nature used to address system reliability vulnerabilities to prevent system instability, cascading outages, and protect other facilities in response to contingencies, a failure of the remaining communication component of a Special Protection System creates a reliability risk to the Bulk-Power System. This means that where one communication channel has failed, the Special Protection System may not be able to meet the performance criteria of the Reliability Standards and in particular the performance criteria specified in the Transmission Planning (TPL) standards. In such a situation, the Special Protection System, though capable of operating as designed following the loss of one communication channel, may not be able to withstand a second component failure. It is our view that such a Special Protection System would be operating at some state less than the normal secure state and should need to be reported to the appropriate reliability entities in order for these reliability entities to accurately assess operational reliability.

B. Commission Proposal

27. For the reasons stated above, the Commission proposes to direct the ERO to develop modification to Reliability Standards IRO–005–2 and TOP–005–1.1 through its standards development process. The ERO's revision would address the potential reliability gap discussed above to ensure that a component failure, wherein a Special Protection System may not be able to perform as designed to ensure required Bulk-Power System performance, is reported to the appropriate reliability entities. Accordingly, pursuant to section 215 (d)(5) of the FPA, we propose to direct NERC to develop modifications to the Reliability Standards to address our concern. Specifically, we propose to direct NERC to develop modifications to Reliability Standards IRO–005–2 and TOP–005–1.1 to address the potential reliability gap discussed above to ensure that a component failure, wherein a Special Protection System may not be able to perform as designed to ensure required Bulk-Power System performance, is reported to the appropriate reliability entities. We seek comment on this proposal. In particular, we seek comment from reliability coordinators and transmission operators whether this information would be useful in the operation and coordination of the transmission system.

III. Information Collection Statement

28. The Office of Management and Budget (OMB) regulations require that OMB approve certain reporting and recordkeeping (collections of information) imposed by an agency.[27] The information contained here is also subject to review under section 3507(d) of the Paperwork Reduction Act of 1995.[28]

29. As stated above, the Commission previously approved, in Order No. 693, materially similar versions of each of the Reliability Standards that are the subject of the current rulemaking. This NOPR proposes to approve the interpretation of these previously approved Reliability Standards, which was developed by NERC as the ERO. In doing so, the Commission proposes certain issues to be addressed and clarifications to be made. The proposed interpretations, as clarified, relate to existing Reliability Standards and the Commission does not expect them to add to or otherwise increase entities' current reporting burden.[29]

30. For the purposes of reviewing this interpretation, the Commission seeks information concerning whether the interim interpretation as approved will cause respondents to alter reporting frequencies and potentially impose an additional burden.

31. We will submit this proposed rule to OMB for informational purposes.

Title: Electric Reliability Organization Interpretations of Interconnection Reliability Operations and Coordination and Transmission Operations Reliability Standards.

Action: Proposed Collection.

OMB Control No.: 1902–0244.

Respondents: Businesses or other for-profit institutions; not-for-profit institutions.

Frequency of Responses: On Occasion.

Necessity of the Information: This proposed rule would approve an interpretation of the specific requirements of two Commission-approved Reliability Standards. The proposed rule would find the interpretation just, reasonable, not unduly discriminatory or preferential, and in the public interest.

32. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [*Attention:* Ellen Brown, Office of the Executive Director, *Phone:* (202) 502–8663, *fax:* (202) 273–0873, *e-mail: data.clearance@ferc.gov*].

33. For submitting comments concerning the collection(s) of information and the associated burden estimate(s), please send your comments to the contact listed above and to the Office of Information and Regulatory Affairs, Office of Management and

[24] NERC SPCS white paper at 9, available at *http://www.nerc.com/filez/spctf.html* (dated Jan. 14, 2009).

[25] *Id.; see also* Table 4–3 in the white paper noting possible responses to communication channel failure including adding a redundant channel or performing testing to ensure that delayed fault clearing does not violate the planning standards.

[26] We note proposed NERC Reliability Standard PRC–012–0, Requirement R1.3 establishes a performance requirement for Special Protection Systems. Proposed Requirement R1.3 states: "Requirements to demonstrate that the SPS shall be designed so that single SPS component failure, when the SPS was intended to operate, does not prevent the interconnected transmission system from meeting the performance requirements defined in Reliability Standards TPL–001–0, TPL–002–0, and TPL–003–0." Proposed reliability standard PRC–012–0 has not yet been approved as mandatory and enforceable by the Commission.

[27] 5 CFR 1320.11.

[28] 44 U.S.C. 3507(d).

[29] *See* Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 1901–1907.

Budget, Washington, DC 20503 [*Attention:* Desk Officer for the Federal Energy Regulatory Commission, phone (202) 395–7345, *fax:* (202) 395–7285, *e-mail: oira_submission@omb.eop.gov*].

IV. Environmental Analysis

34. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[30] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[31] The actions proposed herein fall within this categorical exclusion in the Commission's regulations.

V. Regulatory Flexibility Act

35. The Regulatory Flexibility Act of 1980 (RFA)[32] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and that minimize any significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[33] The SBA has established a size standard for electric utilities, stating that a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million megawatt hours.[34] The RFA is not implicated by this proposed rule because the interpretations discussed herein will not have a significant economic impact on a substantial number of small entities.

36. In Order No. 693, the Commission adopted policies to minimize the burden on small entities, including approving the ERO compliance registry process to identify those entities responsible for complying with mandatory and enforceable Reliability Standards. The ERO registers only those distribution providers or load serving entities that have a peak load of 25 MW or greater and are directly connected to the bulk electric system or are designated as a responsible entity as part of a required under-frequency load shedding program or a required under-voltage load shedding program. Similarly, for generators, the ERO registers only individual units of 20 MVA or greater that are directly connected to the bulk electric system, generating plants with an aggregate rating of 75 MVA or greater, any blackstart unit material to a restoration plan, or any generator that is material to the reliability of the Bulk-Power System. Further, the ERO will not register an entity that meets the above criteria if it has transferred responsibility for compliance with mandatory Reliability Standards to a joint action agency or other organization. The Commission estimated that the Reliability Standards approved in Order No. 693 would apply to approximately 682 small entities (excluding entities in Alaska and Hawaii), but also pointed out that the ERO's Compliance Registry Criteria allow for a joint action agency, generation and transmission (G&T) cooperative or similar organization to accept compliance responsibility on behalf of its members. Once these organizations register with the ERO, the number of small entities registered with the ERO will diminish and, thus, significantly reduce the impact on small entities.[35]

37. Finally, as noted above, this proposed rule addresses an interpretation of the IRO–005–1 and TOP–005–1 Reliability Standards, which were already approved in Order No. 693, and, therefore, is not expected to create an additional regulatory impact on small entities.

VI. Comment Procedures

38. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due February 7, 2011. Comments must refer to Docket No. RM10–8–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

39. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

40. Commenters unable to file comments electronically must mail or hand deliver an original copy of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

41. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VII. Document Availability

42. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

43. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

44. User assistance is available for eLibrary and the Commission's Web site during normal business hours from FERC Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or e-mail at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the Public Reference Room at *public.referenceroom@ferc.gov*.

By direction of the Commission.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32074 Filed 12–21–10; 8:45 am]

BILLING CODE 6717–01–P

[30] *Regulations Implementing the National Environmental Policy Act of 1969,* Order No. 486, FERC Stats. & Regs. ¶ 30,783 (1987).

[31] 18 CFR 380.4(a)(2)(ii).

[32] 5 U.S.C. 601–612.

[33] 13 CFR 121.101.

[34] 13 CFR 121.201, Sector 22, Utilities, & n. 1.

[35] To be included in the compliance registry, the ERO determines whether a specific small entity has a material impact on the Bulk-Power System. If these small entities should have such an impact then their compliance is justifiable as necessary for Bulk-Power System reliability.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 40

[Docket No. RM09–9–000]

Version One Regional Reliability Standards for Facilities Design, Connections, and Maintenance; Protection and Control; and Voltage and Reactive

December 17, 2010.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of proposed rulemaking.

SUMMARY: Under section 215 of the Federal Power Act, the Commission proposes to approve four revised regional Reliability Standards developed by the Western Electricity Coordinating Council and approved by the North American Electric Reliability Corporation, which the Commission has certified as the Electric Reliability Organization responsible for developing and enforcing mandatory Reliability Standards. These regional Reliability Standards have been designated by WECC as FAC–501–WECC–1—Transmission Maintenance, PRC–004–WECC–1—Protection System and Remedial Action Scheme Misoperation, VAR–002–WECC–1—Automatic Voltage Regulators, and VAR–501–WECC–1—Power System Stabilizer. Proposed FAC–501–WECC–1 addresses transmission maintenance for specified transmission paths in the Western Interconnection. Proposed PRC–004–WECC–1 addresses the analysis of misoperations that occur on transmission and generation protection systems and remedial action schemes in the Western Interconnection. Proposed VAR–002–WECC–1 is meant to ensure that automatic voltage regulators remain in service on synchronous generators and condensers in the Western Interconnection. Proposed VAR–501–WECC–1 is meant to ensure that power system stabilizers remain in service on synchronous generators in the Western Interconnection. In addition, under section 215(d)(5) of the Federal Power Act, the Commission proposes to direct the Western Electricity Coordinating Council, working through its standards development process, to develop modifications to these to regional Reliability Standards to address specific issues, as discussed below.

DATES: Comments are due February 22, 2011.

ADDRESSES: You may submit comments, identified by docket number and in accordance with the requirements posted on the Commission's Web site, *http://www.ferc.gov.* Comments may be submitted by any of the following methods:

- Agency Web Site: Documents created electronically using word processing software should be filed in native applications or print-to-PDF format, and not in a scanned format, at *http://www.ferc.gov/docs-filing/efiling.asp.*
- Mail/Hand Delivery: Commenters unable to file comments electronically must mail or hand-deliver an original copy of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426. These requirements can be found on the Commission's Web site, *see,* e.g., the "Quick Reference Guide for Paper Submissions," *available at http://www.ferc.gov/docs-filing/efiling.asp* or via phone from FERC Online support at (202) 502–6652 or toll-free at 1–866–208–3676.

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1. Under section 215 of the Federal Power Act (FPA),[1] the Commission proposes to approve four revised regional Reliability Standards developed by the Western Electricity Coordinating Council (WECC) and approved by the North American Electric Reliability Corporation (NERC), which the Commission has certified as the Electric Reliability Organization (ERO) responsible for developing and enforcing mandatory Reliability Standards.[2] These regional Reliability Standards have been designated by WECC as FAC–501–WECC–1—Transmission Maintenance, PRC–004–WECC–1—Protection System and Remedial Action Scheme Misoperation, VAR–002–WECC–1—Automatic Voltage Regulators, and VAR–501–WECC–1—Power System Stabilizer. Proposed FAC–501–WECC–1 addresses transmission maintenance for specified transmission paths in the Western

[1] 16 U.S.C. 824o (2006).

[2] *North American Electric Reliability Corp.,* 116 FERC ¶ 61,062, *order on reh'g & compliance,* 117 FERC ¶ 61,126 (2006), *aff'd sub nom. Alcoa, Inc.* v. *FERC,* 564 F.3d 1342 (D.C. Cir. 2009).

Interconnection. Proposed PRC–004–WECC–1 addresses the analysis of misoperations that occur on transmission and generation protection systems and remedial action schemes in the Western Interconnection. Proposed VAR–002–WECC–1 is meant to ensure that automatic voltage regulators remain in service on synchronous generators and condensers in the Western Interconnection. Proposed VAR–501–WECC–1 is meant to ensure that power system stabilizers remain in service on synchronous generators in the Western Interconnection. Under section 215(d)(5) of the Federal Power Act, the Commission proposes to direct WECC, through its standard development process, to develop modifications to these regional Reliability Standards to address specific issues, as discussed below.

2. Related, the Commission also seeks comment on whether it should direct the ERO to develop modifications to the NERC Reliability Standards addressing the use of automatic voltage regulators and power system stabilizers. The Commission's concerns regarding the NERC Reliability Standard are introduced here as they correspond with certain elements of the WECC standards that are the subject of the immediate proceeding. However, any proposal to direct the development of modifications to the NERC Reliability Standards would be addressed in a separate proceeding.

I. Background

A. Mandatory Reliability Standards

3. Section 215 of the FPA requires a Commission-certified ERO to develop mandatory and enforceable Reliability Standards, which are subject to Commission review and approval. Once approved, the Reliability Standards may be enforced by the ERO, subject to Commission oversight, or by the Commission independently.[3]

4. Reliability Standards that the ERO proposes to the Commission may include Reliability Standards that are proposed to the ERO by a Regional Entity to be effective in that region.[4] A Regional Entity is an entity that has been approved by the Commission to enforce Reliability Standards under delegated authority from the ERO.[5] When the ERO reviews a regional Reliability Standard that would be applicable on an interconnection-wide basis and that has been proposed by a Regional Entity organized on an interconnection-wide basis, the ERO must rebuttably presume that the regional Reliability Standard is just, reasonable, not unduly discriminatory or preferential, and in the public interest.[6] In turn, the Commission must give "due weight" to the technical expertise of the ERO and of a Regional Entity organized on an interconnection-wide basis.[7]

5. In Order No. 672, the Commission urged uniformity of Reliability Standards, but recognized a potential need for regional differences.[8] Accordingly, the Commission stated that:

> As a general matter, we will accept the following two types of regional differences, provided they are otherwise just, reasonable, not unduly discriminatory or preferential and in the public interest, as required under the statute: (1) A regional difference that is more stringent than the continent-wide Reliability Standard, including a regional difference that addresses matters that the continent-wide Reliability Standard does not; and (2) a regional Reliability Standard that is necessitated by a physical difference in the Bulk-Power System.[9]

B. Western Electricity Coordinating Council

6. On April 19, 2007, the Commission accepted delegation agreements between NERC and each of eight Regional Entities.[10] In its order, the Commission accepted WECC as a Regional Entity organized on an Interconnection-wide basis. As a Regional Entity, WECC oversees transmission system reliability in the Western Interconnection. The WECC region encompasses nearly 1.8 million square miles, including 14 western U.S. states, the Canadian provinces of Alberta and British Columbia, and the northern portion of Baja California in Mexico.

7. In June 2007, the Commission approved eight regional Reliability Standards for WECC including the currently-effective WECC PRC–STD–001–1, PRC–STD–003–1, PRC–STD–005–1, VAR–STD–002a–1, and VAR–STD–002b–1.[11] The Commission directed WECC to develop certain modifications to WECC PRC–STD–001–1, PRC–STD–003–1, PRC–STD–005–1, VAR–STD–002a–1, and VAR–STD–002b–1, as identified by NERC in its filing letter for the current standards.[12] For example, the Commission determined that: (1) Regional definitions should conform to definitions set forth in the NERC Glossary of Terms Used in Reliability Standards (NERC Glossary), unless a specific deviation has been justified; and (2) documents that are referenced in the Reliability Standard should be attached to the Reliability Standard. The Commission also found that it is important that regional Reliability Standards and NERC Reliability Standards achieve a reasonable level of consistency in their structure so that there is a common understanding of the elements.

II. Proposed Regional Reliability Standards

8. On March 25, 2009, NERC submitted a petition (NERC Petition) to the Commission seeking approval of four WECC regional Reliability Standards.[13] The four proposed WECC regional Reliability Standards are designated as FAC–501–WECC–1, PRC–004–WECC–1, VAR–002–WECC–1, and VAR–501–WECC–1.[14] In its petition, NERC explains that the four proposed regional Reliability Standards are meant to replace certain currently approved regional Reliability Standards:

- FAC–501–WECC–1 is intended to replace the current approved PRC–STD–005–1;
- PRC–004–WECC–1 is intended to replace WECC PRC–STD–001–1 and PRC–STD–003–1;
- VAR–002–WECC–1 is intended to replace WECC VAR–STD–002a–1; and
- VAR–501–WECC–1 is intended to replace WECC VAR–STD–002b–1.

NERC states that the NERC board of trustees approved the proposed regional Reliability Standards on October 29, 2008, on the condition that WECC address certain shortcomings raised during the comment periods in the next revision of the Reliability Standards.

9. NERC requests an effective date for FAC–501–WECC–1, VAR–002–WECC–1, and VAR–501–WECC–1 of the first day of the first quarter after Commission approval. For PRC–004–WECC–1, NERC requests an effective date of the first day of the second quarter after approval by the Commission.

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[3] 16 U.S.C. 824o(e)(3).

[4] 16 U.S.C. 824o(e)(4).

[5] 16 U.S.C. 824o(a)(7) and (e)(4).

[6] 18 CFR 39.5 (2010).

[7] 16 U.S.C. 824o(d)(2).

[8] *Rules Concerning Certification of the Electric Reliability Organization; Procedures for the Establishment, Approval, and Enforcement of Electric Reliability Standards,* Order No. 672, 71 FR 8662 (Feb. 17, 2006), FERC Stats. & Regs. ¶ 31,204, at P 290, *order on reh'g,* Order No. 672–A, 71 FR 19814 (Apr. 18, 2006), FERC Stats. & Regs. ¶ 31,212 (2006).

[9] *Id.* P 291.

[10] *North American Electric Reliability Corp.,* 119 FERC ¶ 61,060, at P 432 (2007).

[11] *North American Electric Reliability Corp.,* 119 FERC ¶ 61,260 (2007).

[12] *Id.*

[13] *See* 18 CFR 39.5(a) (requiring the ERO to submit regional Reliability Standards on behalf of a Regional Entity).

[14] The proposed regional Reliability Standards are not attached to the NOPR. They are, however, available on the Commission's eLibrary document retrieval system in Docket No. RM09–9–000 and are posted on the ERO's Web site, *available at http://www.nerc.com.*

III. Discussion

10. As discussed below, the Commission proposes to approve FAC–501–WECC–1, PRC–004–WECC–1, VAR–002–WECC–1, and VAR–501–WECC–1 as just, reasonable, not unduly discriminatory or preferential, and in the public interest. In addition, under section 215(d)(5) of the FPA and section 39.5(f) of our regulations, the Commission proposes to direct WECC to develop certain modifications to further clarify the requirements of the proposed WECC regional Reliability Standards.

A. FAC–501–WECC–1—Transmission Maintenance

11. NERC PRC–005–1 applies to all transmission and generator owners as well as distribution providers that own a transmission protection system. The Reliability Standard is meant to ensure that all transmission and generation protection systems affecting the reliability of the Bulk-Power System are maintained and tested.

12. On June 8, 2007, the Commission approved a WECC regional Reliability Standard that corresponds to the NERC Reliability Standard PRC–005–1.[15] WECC PRC–STD–005–1 applies to transmission owners and operators identified in an attached table titled "Major WECC Transfer Paths in the Bulk Electric System" (WECC Transfer Path Table) and to owners of remedial action schemes identified in the "Major WECC Remedial Action Schemes" table (WECC Remedial Action Schemes Table). WECC PRC–STD–005–1 requires each transmission owner and operator of the specified transmission paths to perform maintenance and inspection on those paths as described by its transmission maintenance and inspection plan. The regional Reliability Standard identifies specific contents that each applicable transmission owner and transmission operator must include in its transmission maintenance and inspection plan. For example, a plan must include the scheduled interval for time-based maintenance, describe maintenance and inspection methods, provide relevant checklists or forms, and provide criteria for assessing the condition of a facility. Each applicable entity must retain all pertinent maintenance and inspection records for at least five years. Further each applicable entity must annually certify to WECC staff that it has developed, documented, and implemented a transmission maintenance and inspection plan.

[15] *North American Electric Reliability Corp.,* 119 FERC ¶ 61,260 at P 95.

WECC and NERC Proposal

13. NERC states that proposed FAC–501–WECC–1 is intended to replace approved WECC PRC–STD–005–1. The proposed regional Reliability Standard would apply to transmission owners that maintain transmission paths listed in the WECC Transfer Path Table, which is no longer an attachment to the Reliability Standard but is maintained on the WECC Web site. Proposed FAC–501–WECC–1 contains three main provisions. Requirement R1 provides that each transmission owner must have a transmission, maintenance, and inspection plan, and each transmission owner must annually review and update as required their transmission maintenance and inspection plan. Requirement R2 states that each transmission owner must include specified maintenance categories [16] when developing their transmission maintenance and inspection plan. Requirement 3 states that each transmission owner must implement and follow their transmission maintenance and inspection plan.

14. NERC recommends approval of FAC–501–WECC–1, stating that the proposed regional Reliability Standard addresses matters that the NERC Reliability Standard does not. Specifically, according to NERC, FAC–501–WECC–1 requires, for specified transmission paths, a highly detailed maintenance and inspection plan for all transmission and substation equipment components, beyond the relay and communication system maintenance and testing required by the corresponding NERC Reliability Standard.[17]

NOPR Proposal

15. The Commission proposes to approve FAC–501–WECC–1 as just, reasonable, not unduly discriminatory or preferential, and in the public interest. As explained by NERC, proposed FAC–501–WECC–1 appears to be more stringent, by virtue of its requirement for a highly detailed maintenance and inspection plan, compared to the corresponding NERC Reliability Standard.

16. Further, in approving the currently-effective WECC PRC–STD–005–1, the Commission directed WECC to make certain modifications to the regional Reliability Standard. To address these directives, the proposed regional Reliability Standard no longer references any WECC Forms, and text regarding the Compliance Monitoring Period has been removed. The proposed regional Reliability Standard no longer refers to a regional definition of Disturbance, which conflicted with the definition of Disturbance in the NERC Glossary. Since the term is not included in any of the proposed regional Reliability Standards, the Commission proposes to direct the ERO to remove this regional definition from the NERC Glossary of terms upon Commission approval of FAC–501–WECC–1. The proposed regional Reliability Standard also removes the Sanctions Table and includes Violation Risk Factors, Violation Severity Levels, Measures, and Time Horizons, as directed by the Commission. These revisions appear generally consistent with the Commission's directives, and signify meaningful improvement. Accordingly, we propose to approve FAC–501–WECC–1. We also propose to approve NERC's petition to retire currently-effective WECC PRC–STD–005–1.

17. While we propose to approve FAC–501–WECC–1, we have several concerns regarding the requirements of the proposed regional Reliability Standard that were not adequately addressed in the NERC petition. Below, we discuss our concerns and, in the absence of a satisfactory explanation from WECC, NERC and other commenters, under section 215(d)(5) of the FPA and section 39.5(f) of our regulations, we propose to direct that the Regional Entity develop modifications to the regional Reliability Standard, as discussed below.

WECC Transfer Path Table

18. First, we have a concern regarding the applicability of the proposed regional Reliability Standard. As mentioned above, WECC PRC–STD–005–1 is applicable to transmission owners or operators that maintain transmission paths listed in the WECC Transfer Path Table, which is attached to the regional Reliability Standard. The attachment identifies 40 major transmission paths in the Western Interconnection. By contrast, FAC–501–WECC–1 removes the attachment and, instead, directs transmission owners to the most current WECC Transfer Path Table, which is available on the WECC Web site. The table currently posted on the WECC Web site identifies the same 40 major paths as the attachment to the approved regional Reliability

[16] The maintenance categories to be included in the transmission maintenance and inspection plan are included in Attachment 1 of FAC–501–WECC–1—"Transmission Line and Station Maintenance Details."

[17] NERC Petition at 11, 14.

Standard.[18] However, the Commission is concerned that, by referencing the WECC Transfer Path Table posted on the WECC Web site, the applicability of FAC–501–WECC–1 could change without review and approval by the ERO and the Commission, as required to make effective a modification to a Reliability Standard.

19. The possibility for the applicability of the Reliability Standard to change at any time could create confusion for entities that need to comply as well as any compliance enforcement staff trying to determine which entities are responsible for complying with the Reliability Standard. Under section 215(d)(5) of the FPA, we propose to direct that WECC develop a modification to the Reliability Standard to address our concern. For example, WECC could include its criterion for identifying and modifying major transmission paths listed in the WECC Transfer Path Table and make an informational filing each time it makes a modification to the table. Another option would be for WECC to file its criterion with the Commission and post revised transfer path tables and referenced catalogs on its Web site before they become effective with concurrent notification to NERC and the Commission. Alternatively, the Regional Entity could include the WECC Transfer Path Table as an attachment to the modified Reliability Standard. In this way, the Commission would be able to verify that the Regional Entity is applying the requirements of the regional Reliability Standard in a just and reasonable manner.

System Operating Limits (SOL)

20. Second, the Commission is concerned about WECC's use of the term System Operating limit, as it is defined in the NERC Glossary.[19] Currently, WECC determines transfer capability based on a "rated system path" methodology and the table of Major WECC Transfer Paths and associated catalog identify the facilities that make up each rated system path. For at least ten years, WECC has used the defined term Operating Transfer Capability limits, and not System Operating Limit, to describe transmission limitations. WECC TOP–STD–007–0 defines Operating Transfer Capability limits as:

> * * * the maximum amount of actual power that can be transferred over direct or parallel transmission elements comprising:
> • An interconnection from one Transmission Operator area to another Transmission Operator area; or
> • A transfer path within a Transmission Operator area.
> The net schedule over an interconnection or transfer path within a Transmission Operator area shall not exceed the [operating transfer capability], regardless of the prevailing actual power flow on the interconnection or transfer path.

Unlike a System Operating Limit, the definition of Operating Transfer Capability limits is limited to direct or parallel transmission elements between or within specific transmission operators. Moreover, the rating of a System Operating Limit, which is based on an operating criteria that is either thermally (based on facility ratings) or stability-based (based on transient stability, voltage stability, or system voltage limits) is the first element to calculate in order to determine the Operating Transfer Capability limit rating.

21. Based on the above, it appears that a System Operating Limit is not the same as an Operating Transfer Capability limit. Yet, WECC and NERC believe that the terms can be used interchangeably and that WECC revised the regional Reliability Standard to refer to System Operating Limits to conform its terminology to the NERC Glossary. While we believe using NERC Glossary terminology is generally preferable,[20] we are concerned that, in this instance, the use of a regional definition might be most appropriate.

22. Specifically, the Commission is concerned that the introduction of the NERC Glossary definition of System Operating Limit in Requirement R1 of the proposed regional Reliability Standard could create confusion regarding which transmission owners are required to maintain a transmission maintenance and inspection plan. Requirement R1 of the approved WECC Reliability Standard requires transmission owners to inspect and maintain "all bulk power transmission elements (i.e., lines, stations and rights of way) included as part of the transmission facilities (or required to maintain transfer capability) impacting each of the transmission paths listed * * *."[21] By contrast, Requirement R1 of WECC's proposed regional Reliability Standard would require transmission owners to maintain a transmission maintenance and inspection plan detailing their inspection and maintenance requirements that "*apply to all transmission facilities necessary for System Operating Limits associated with each of the transmission paths* identified in the WECC Transfer Path Table."[22] Facilities that are System Operating Limits associated with transmission paths identified in the WECC Transfer Path Table are not necessarily on paths identified in the WECC Transfer Path Table.

23. Thus, under the proposed language, Requirement R1 could apply to more transmission facilities than identified in the WECC Transfer Path Table. For example, a System Operating Limit for a rated path in the WECC Transfer Path Table could be defined by a facility on a path that is not identified in the WECC Transfer Path Table but which is associated with an identified path. Under these circumstances, it is unclear whether Requirement R1 would require maintenance on these facilities that are not identified in the WECC Transfer Path Table. If so, the requirement might need to apply to transmission owners that do not own any paths identified in the WECC Transfer Path Table. Accordingly, the Commission seeks comment as to whether, under Requirement R1, a transmission owner that owns a major path would be responsible for maintaining and inspecting transmission facilities owned by another entity if such facilities are "necessary for [System Operating Limits] associated with" the major path.

Summary

24. In summary, the Commission proposes to approve FAC–501–WECC–1. The Commission also proposes to approve NERC's petition to retire currently-effective WECC PRC–STD–005–1. In addition, the Commission requests comment on two issues discussed above regarding the (1) Major WECC Transfer Path table, and (2) use of the term System Operating Limits.

[18] *See* Major WECC Transfer Paths table *available at http://www.wecc.biz/Standards/Approved%20Standards/Supporting%20Tables/Table%20Major%20Paths%204-28-08.pdf.* It appears that the list of major transfer paths is relatively stable as the list has not changed for at least the past three years.

[19] A System Operating Limit is defined in the NERC Glossary as "the value (such as MW, MVar, Amperes, Frequency or Volts) that satisfies the most limiting of the prescribed operating criteria for a specified system configuration to ensure operation within acceptable reliability criteria." *See* NERC Glossary, *available at http://www.nerc.com/docs/standards/rs/Glossary_of_Terms_2010April20.pdf.*

[20] *See W. Elec. Coordinating Council Reg'l Reliability Standard Regarding Automatic Time Error Corr.,* Order No. 723, 74 FR 25442 (May 28, 2009), 127 FERC ¶ 61,176, at P 38–40 (2009).

[21] WECC Reliability Standard PRC–STD–005–1, Requirement R1.

[22] Proposed WECC Reliability Standard, FAC–501–WECC–1, Requirement R1, *emphasis added.*

B. PRC–004–WECC–1—Protection System and Remedial Action Scheme Misoperation

Background—Currently-Effective PRC–STD–001–1 and PRC–STD–003–1

25. Currently-effective WECC PRC–STD–001–1 applies to transmission operators or transmission owners of 40 specified transmission paths. The regional Reliability Standard requires these entities to certify to WECC that all (1) protective relay applications and (2) protective relay settings and logic are appropriate for the specified transmission paths. It also requires that these entities, once every three years, certify that information is updated and accurate.

26. WECC PRC–STD–001–1 corresponds with NERC PRC–001–1, which addresses protection systems, requires transmission operators and generator operators to notify appropriate entities of relay or equipment failures and to coordinate when installing new or modified protection systems.

27. Currently-effective WECC PRC–STD–003–1 applies to transmission operators and owners of the same 40 specified transmission paths as Reliability Standard PRC–STD–001–1. WECC PRC–STD–003–1 requires applicable transmission operators and owners to ensure all transmission and generation protection system misoperations affecting the reliability of the bulk electric system are analyzed and mitigated.

28. WECC PRC–STD–003–1 corresponds to NERC PRC–003–1, which also relates to protection system misoperations.

WECC and NERC Proposal

29. NERC states that proposed PRC–004–WECC–1 is intended to replace two currently-effective WECC Reliability Standards, PRC–STD–001–1 and PRC–STD–003–1. NERC recommends approval of PRC–004–WECC–1, explaining that it is more stringent than the corresponding NERC PRC–004–1. Specifically, NERC explains that PRC–004–WECC–1 requires that all transmission and generation protection system and remedial action scheme misoperations on major WECC transfer paths be analyzed and mitigated within a specific timeframe. In contrast, NERC PRC–003–1 requires Regional Entities to establish procedures for review, analysis, reporting, and mitigation of transmission and generation Protection System Misoperations, but it does not specifically address the owners of the transmission and generation facilities. NERC also explains that NERC PRC–004–1 has requirements for protection system misoperations, but does not provide for the additional requirements included in PRC–004–WECC–1.[23]

30. Proposed PRC–004–WECC–1 contains three main provisions. Requirement R1 provides that "System Operators and System Protection Personnel" of transmission owners and generator owners must analyze all protection system and remedial action scheme operations. Requirements R1.1 and R1.2 identify time limits for the review and analysis of transmission element tripping, remedial action scheme operations and protection systems. Requirement R2 and the associated sub-requirements identify actions expected to be performed by transmission owners and generator owners for each protection system or remedial action scheme misoperation, including identifying timelines for removing the equipment that failed from service. Requirement R3 states that transmission owners and generator owners are to submit incident reports for any misoperation or repair of equipment that misoperated.

31. Like the approved regional Reliability Standard, the proposed regional Reliability Standard is applicable to transmission owners and transmission operators, but it also is applicable to the generator owners that own facilities listed in the WECC Transfer Path Table and the WECC Remedial Action Schemes Table, which are available on WECC's Web site.[24] In addition, WECC proposes four new regional definitions for Functionally Equivalent Protection System, Functionally Equivalent Remedial Action Scheme, Security-Based Misoperation and Dependability Based Misoperation.

NOPR Proposal

32. The Commission proposes to approve PRC–004–WECC–1 as just, reasonable, not unduly discriminatory or preferential, and in the public interest. The Commission also proposes to approve NERC's petition to withdraw currently-effective WECC PRC–STD–001–1 and WECC PRC–STD–003–1. As NERC explains above, it appears that the proposed PRC–004–WECC–1 is more stringent than the corresponding NERC PRC–004–1. Moreover, the proposed PRC–004–WECC–1 addresses Commission directives to develop modifications to the currently-effective regional Reliability Standards.

33. Specifically, in approving the currently-effective WECC PRC–STD–001–1 and WECC PRC–STD–003–1, the Commission directed WECC to make certain modifications in developing replacement Reliability Standards. To address these directives, in the proposed Standard, WECC no longer references any WECC forms, and the text regarding the compliance monitoring period has been removed from the proposed Standard. In addition, the proposed regional Reliability Standard no longer references the regional definition of Disturbance, which did not match the NERC definition of Disturbance in the NERC Glossary. The proposed regional Reliability Standard also would remove the definition for Business Day. Since these terms are not included in any of the existing or proposed regional Reliability Standards, the Commission proposes to direct the ERO to remove these regional definitions from the NERC Glossary, upon approval of the PRC–004–WECC–1. The proposed regional Reliability Standard also removes the sanctions table and includes violation risk factors, violation severity levels, measures and time horizons. The Commission commends WECC for addressing these directives.

34. Nevertheless, the Commission has concerns regarding several provisions of the proposed regional Reliability Standard, and seeks additional comments, as discussed below.

WECC Transfer Path Table

35. Similar to the discussion above regarding proposed FAC–501–WECC–1, we are concerned regarding the removal of the list of major transmission paths from proposed PRC–004–WECC–1 and the replacement with a link to the WECC Web site. Currently-effective WECC PRC–STD–003–1 is applicable to transmission owners or operators that maintain transmission paths listed in an attachment to the Reliability Standard. The attachment identifies 40 major transmission paths in the Western Interconnection. By contrast, the proposed PRC–004–WECC–1 removes attachment A and, instead, directs transmission owners to the most current WECC Transfer Path Table, which is available on the WECC Web site. Although the table posted on the WECC Web site lists the same 40 major paths as the attachment to the approved regional Reliability Standard, the Commission is concerned that by referencing the WECC Transfer Path Table posted on the WECC Web site, WECC could modify the document without Commission and industry notice and opportunity to respond.

36. The possibility for the applicability of the Reliability Standard

[23] *See* NERC Petition at 11, 19–20.

[24] *See* proposed regional Reliability Standard PRC–004–WECC–1, Section 4 (Applicability).

to change at any time could create confusion for entities that need to comply as well as any compliance enforcement staff trying to determine which entities are responsible for complying with the Reliability Standard. Accordingly, the Commission seeks comment on how NERC and WECC intend to develop and provide notice of proposed changes to the WECC Transfer Path Table. We also seek comment on how NERC and WECC will ensure that changes to the applicability of the Reliability Standard will not undermine its effectiveness. We propose to direct WECC to develop a modification to the Reliability Standard to address our concern. For example, WECC could include its criterion for identifying and modifying major transmission paths listed in the WECC Transfer Path Table and make an informational filing each time it makes a modification to the table. Another option would be for WECC to file its criterion with the Commission and post revised transfer path tables and referenced catalogs on its Web site before they become effective with concurrent notification to NERC and the Commission. Alternatively, the Regional Entity could include the WECC Transfer Path Table as an attachment to the modified Reliability Standard. In this way, the Commission would be able to verify that the Regional Entity is applying the requirements of the regional Reliability Standard in a just and reasonable manner.

Proposed Regional Definitions

37. The proposed regional Reliability Standard includes four new regional definitions meant to apply only in WECC. Two of the proposed definitions (Functionally Equivalent Protection System and Functionally Equivalent Remedial Action Scheme) have added "functionally equivalent" to terms that already exist in the NERC Glossary.[25] The NERC Glossary definition of Protection System lists the types of equipment that can be used as protection systems (i.e. protective relays, associated communication systems, voltage and current sensing devices, station batteries and DC control circuitry). By contrast, the proposed WECC definition of Functionally Equivalent Protection System is not limited to any specific components or operating characteristics but, instead, defines Functionally Equivalent Protection Systems based on what they can do: "[e]ach Protection System can detect the same faults within the zone of protection and provide the clearing times and coordination needed to comply with all Reliability Standards." In addition, the NERC Glossary defines Remedial Action Scheme, or Special Protection System, as "[a]n automatic protection system designed to detect abnormal or predetermined system conditions, and take corrective actions other than and/or in addition to the isolation of faulted components to maintain system reliability."[26] By contrast, WECC proposes to define Functionally Equivalent RAS as "[a] Remedial Action Scheme that provides the same performance as follows: Each [Remedial Action Scheme] can detect the same conditions and provide mitigation to comply with all Reliability Standards. Each [Remedial Action Scheme] may have different components and operating characteristics."

38. The Commission has expressed concern about the unnecessary proliferation of glossary terms and has directed the ERO to be vigilant in assuring that a regional definition is consistent with both NERC Glossary terms and other approved Regional Entity glossary terms.[27] In the instant proceeding, we are concerned that the proposed definitions of Functionally Equivalent Protection System and Functionally Equivalent RAS do not add any further clarity to the NERC Glossary terms. Accordingly, we seek an explanation from WECC and other interested commenters regarding whether these new terms are more inclusive than the corresponding NERC Glossary definitions and, if so, how.

39. WECC proposes to define Functionally Equivalent Protection System as "[a] Protection System that provides performance as follows: Each Protection System can detect the same faults within the zone of protection * * *."[28] It is unclear what the phrase "detect the same faults" means within this definition. For example, this phrase could refer to the ability of one protection system to act as a back-up for another protection system. Alternatively, this phrase could imply that a protection system should be able to detect a fault within in a different sub-area of the same zone of protection. Accordingly, we seek comment on the meaning of the phrase "the same faults" within the definition.

40. In addition, the current NERC Glossary definition of Misoperation includes: (1) Failure of a protection system to operate; (2) protection system operation for a fault outside of the planned zone of protection; and (3) unintentional operation of a protection system. Instead of using this NERC Glossary definition, WECC has developed two new terms: Security-Based Misoperations and Dependability-Based Misoperations. The proposed WECC definitions address: (1) Incorrect operation of a protection system (Security-Based Misoperation); and (2) absence of a protection system to operate (Dependability-Based Misoperation). The bifurcation of the term Misoperation may be confusing because at least some of the requirements for each type of misoperation appear to overlap. We seek an explanation from WECC and other interested commenters regarding why these two new regional terms are necessary or desirable within the context of the proposed regional Reliability Standard, and how they will enhance reliability.

Summary

41. The Commission proposes to approve PRC–004–WECC–1 as just, reasonable, not unduly discriminatory or preferential, and in the public interest. The Commission also proposes to approve NERC's petition to withdraw currently-effective WECC PRC–STD–001–1 and WECC PRC–STD–003–1. In addition, the Commission requests comment on three issues discussed above regarding (1) the Major WECC Transfer Path table; (2) whether the proposed regional terms, Functionally Equivalent Protection System and Functionally Equivalent RAS, are more inclusive than the corresponding NERC Glossary definitions; and, (3) the necessity of the proposed regional terms, Security-Based Misoperations and Dependability-Based Misoperations.

C. VAR–002–WECC–1—Automatic Voltage Regulators

Background

42. Applicable to all generator operators and generator owners, NERC VAR–002–1.1b is meant to ensure that generators provide reactive and voltage control necessary to ensure voltage levels, reactive flows, and reactive resources are maintained within applicable facility ratings to protect equipment and the reliable operation of the Interconnection. Unless exempted by the transmission operator, each

[25] *See* NERC Glossary definitions for Protection System and Remedial Action Scheme.

[26] NERC Glossary definition of Special Protection System (Remedial Action Scheme), *available at http://www.nerc.com/docs/standards/rs/Glossary_of_Terms_2010April20.pdf.*

[27] Order No. 723, 74 FR 25,442 at P 37–40.

[28] *See* Proposed Reliability Standard PRC–004–WECC–1, proposed definition of Functionally Equivalent Protection System.

generator operator must maintain the generator voltage or reactive power output (within applicable facility ratings) [29] as directed by the transmission operator. Thus, the NERC Reliability Standard does not require generator operators to operate in automatic voltage control mode when they are operating outside of their facility rating, e.g., generators that are starting-up or generators used to serve peak load that typically run at low megawatt levels.

43. On June 8, 2007, the Commission approved WECC VAR–STD–002a-1, which applies to generator operators of synchronous generating units equipped with automatic voltage regulators in the Western Interconnection. The stated purpose of the regional Reliability Standard is to ensure that automatic voltage control equipment on synchronous generators shall be kept in service at all times, except in specified circumstances, and that outages of such equipment must be coordinated. It requires that generator operators must normally operate automatic voltage control equipment in voltage control mode and set to respond effectively to voltage deviations. Nevertheless, the levels of non-compliance associated with the approved regional Reliability Standard permit generator operators to operate without automatic voltage control equipment for two percent of the operating hours in a calendar year without penalty. The Commission approved the current regional Reliability Standard as more stringent than the NERC Reliability Standard because the WECC regional Reliability Standard requires synchronous generators to have their automatic voltage regulators in service at all times with exceptions limited to specific circumstances. In contrast, the NERC Reliability Standard does not specify a list of exceptions, which could mean that transmission operators may, upon request of the generator operators, permit outages of automatic voltage regulators for a broader range of reasons.[30]

WECC and NERC Proposal

44. NERC requests approval of VAR–002–WECC–1 (Automatic Voltage Regulators) and requests the concurrent retirement of WECC VAR–STD–002a–1. Proposed VAR–002–WECC–1 would be applicable to all generator operators and transmission operators that operate synchronous condensers. It would only apply to synchronous generators and synchronous condensers that are connected to the bulk electric system.

45. Proposed VAR–002–WECC–1 contains two requirements. Requirement R1 provides that each generator operator and transmission operator shall have automatic voltage regulators in service and in automatic voltage control mode for synchronous generators and synchronous condensers during 98 percent of all operating hours unless exempted by the transmission operator. Sub-requirements R1.1 through R1.10 detail the type of exemptions that the transmission operator may grant to the generator operator to excuse the generator from operating the automatic voltage regulator in automatic voltage control mode. Requirement R2 states that each generator operator and transmission operator must have documentation identifying the number of hours excluded for each sub-requirement R1.1 through R1.10.

46. WECC also proposes to replace the sanctions table with violation risk factors, violation severity levels, measures and time horizons. Finally, WECC proposes a new glossary term, Commercial Operation, to be applicable only in the Western Interconnection.

47. During the standards development process, NERC expressed concern that proposed Requirement R1 was less stringent than the current NERC Reliability Standard.[31] WECC responded that, although Requirement R1 appears to decrease the number of operating hours that a generator operator and transmission operator must keep automatic voltage regulators in service and in automatic voltage control mode from 100 percent to 98 percent, the 98 percent requirement is a translation of the limits set in the levels of non-compliance associated with the current regional Reliability Standard.[32] In addition, WECC explained that the two percent allowance provides more time to start up generating facilities when the automatic voltage regulators are not yet in voltage control mode and allows for evaluation when a generator operator responds to an unforeseen event.[33] WECC also pointed out that NERC VAR–002–1a does not place any restrictions on the length of time or range of acceptable reasons for operating in modes other than automatic voltage control mode. By contrast, WECC pointed out that the proposed VAR–002–WECC–1 limits the range of acceptable reasons and time for operating a generator without the automatic voltage regulator in service and controlling voltage.[34]

48. NERC also notes that, during the Reliability Standards development process, it expressed concern regarding sub-requirement R1.1, which includes an exemption for units operating less than five percent of all hours during a calendar quarter. NERC explains that it raised a concern that the proposed sub-requirement "excludes the hours attributed to the synchronous generator or condenser that operates for less than five percent of all hours during any calendar quarter." [35] WECC responded by explaining that there is no change in the basic five percent threshold between the existing regional Reliability Standard and the proposed regional Reliability Standard. WECC further explained that peaking units often operate, for short periods, at low megawatt levels (below where manufacturers recommend placing the automatic voltage regulators in-service). WECC states that the exclusion below the five percent threshold during a calendar quarter permits the continued practice of allowing the operation of peaking units without penalty for having an out-of-service automatic voltage regulator per the manufacturer's recommendations.[36]

49. NERC states that, whereas NERC VAR–002–1a requires only that a generator operator notify its transmission operator when it either removes or operates the automatic voltage regulator in a condition other than automatic voltage control mode and does not limit the amount of time for such operations, the proposed WECC regional Reliability Standard sets only very limited circumstances for when a generator's automatic voltage regulator should be operated in a mode other than

[29] NERC defines "facility rating" as the maximum or minimum voltage, current, frequency, or real or reactive power flow through a facility that does not violate the applicable equipment rating of any equipment comprising the facility.

[30] *North American Electric Reliability Corp.,* 119 FERC ¶ 61,260 at P 116.

[31] NERC Petition at 34.

[32] The levels of non-compliance assigned to the currently-effective regional Reliability Standard specify that there shall be a level 1 non-compliance if automatic voltage regulators are in service less than 98 percent but at least 96 percent or more of all hours during which the synchronous generating unit is on line for each calendar quarter.

[33] Specifically, WECC explains "[t]he two percent allowance provides for time to start up generating facilities when the [automatic voltage regulators] are not yet in voltage control mode. It also allows for evaluation when the Generator Operators respond to unforeseen events." WECC further explains "[p]eaking units often operate, for short periods, at low megawatt levels (below where manufactures recommend placing the [automatic voltage regulators] in-service). The exclusion below the five percent threshold during a calendar quarter permits the continued practice of allowing the operation of peaking units without penalty for having an out-of-service [automatic voltage control regulators] per the manufacturer recommendations." NERC Petition at 34–35.

[34] *Id.*

[35] *Id.* at 34–35.

[36] *Id.* at 35.

the automatic voltage control mode and further limits the cumulative timeframe for doing so. Thus, NERC represents that the proposed regional Reliability Standard is more stringent than the NERC Reliability Standard.[37]

NOPR Proposal

50. The Commission proposes to approve VAR–002–WECC–1 as just, reasonable, not unduly discriminatory or preferential, and in the public interest. Further, the Commission proposes the concurrent retirement of currently-effective WECC VAR–STD–002a–1. As represented by NERC, it appears that proposed VAR–002–WECC–1 is more stringent than the corresponding NERC Reliability Standard.

51. Moreover, in approving the currently-effective WECC VAR–STD–002a–1, the Commission directed WECC to make certain modifications in developing a replacement Reliability Standard. To address these directives, WECC has added violation risk factors, violation severity levels, measures and time horizons, and has removed the sanctions table. WECC also has re-written Requirement WR1 so that it does not include more than one main topic, removed language suggested to move to the Additional Compliance Information section, and removed the reference to Form A.5 to address recommendations made by NERC to modify WECC VAR–STD–002a–1.[38] Thus, it appears that proposed VAR–002–WECC–1 maintains stringencies above the corresponding NERC Reliability Standard while providing additional clarity and conformity. Thus, the Commission proposes to approve the regional Reliability Standard.

52. In addition, the Commission seeks comments on several issues posed by the WECC proposal, as discussed below.

Automatic Voltage Regulators

53. Requirement R1 of proposed VAR–002–WECC–1 provides that "Generator Operators and Transmission Operators shall have [automatic voltage regulators] in service and in automatic voltage control mode 98% of all operating hours for synchronous generators or synchronous condensers."[39] Requirement R1 then identifies ten circumstances in which a generator operator or transmission operator is excused from this requirement. By specifying the circumstances in which a generator operator or transmission operator is excused from operating in automatic voltage regulator mode, the proposed requirement appears to be more stringent than the requirement in NERC VAR–002–1.1b.

54. The Commission believes that, where installed, automatic voltage regulators should be in-service at all times except in circumstances when the generator is operating at an output level that is not within the design parameters of the automatic voltage regulator or operations of the automatic voltage regulator would result in instability. Automatic voltage regulators are intended to assist in maintaining the reliability of the Bulk-Power System by controlling system voltages. In addition, System Operating Limits for transmission paths in the bulk electric system in the Western Interconnection assume that automatic voltage regulators are in service to control voltage to support the transfer capability.[40] When automatic voltage regulators are out of service, the time required to appropriately respond to disturbances that cause voltage deviations would increase due to the time required to take manual action. If not corrected in sufficient time, these voltage deviations could lead to instability, uncontrolled separation and cascading outages.

55. Although the proposed regional Reliability Standard would limit the circumstances in which a transmission operator or generator operator is excused from keeping automatic voltage regulators in automatic voltage control mode, it also provides a blanket exemption for two percent of all operating hours. In its petition, NERC explains that this exemption would accommodate generating facilities when they are starting up and when the automatic voltage regulators are not yet in voltage control mode. NERC also explains that this exemption allows for evaluation when the generator operators respond to unforeseen events.[41] These limitations identified by NERC in its petition are not explicit in the requirements of the proposed regional Reliability Standard.

56. We are concerned that the proposed provision is written more broadly than necessary. We believe it is appropriate to exempt automatic voltage regulators from being in-service during times when the generator is operating outside of applicable facility ratings. However, as proposed, Requirement R1 would provide generators with a blanket exemption—equal to two percent of all operating hours—from the requirement to maintain automatic voltage regulators in-service. We seek comment on whether the Commission should direct WECC to develop a modification to the proposed regional Reliability Standard to address our concern. For example, consistent with NERC's explanation, NERC could develop a modification replacing the blanket two percent exemption with a list of specific exemptions that would accommodate generating units that are starting up or responding to unforeseen events and are operating outside of applicable facility ratings.

57. The purpose of NERC VAR–002–1.1b is to ensure appropriate reactive and voltage control are provided to maintain voltage levels, reactive flows, and reactive resources are within applicable facility ratings for Reliable Operation. Requirement R1 of VAR–002–1.1b states that the "Generator Operator shall operate each generator connected to the interconnected transmission system in the automatic voltage control mode (automatic voltage regulator in service and controlling voltage) unless the Generator Operator has notified the Transmission Operator." Requirement R2 continues that "[u]nless exempted by the Transmission Operator, each Generator Operator shall maintain the generator voltage or Reactive Power output (within applicable Facility Ratings) as directed by the Transmission Operator." Based on the same rationale articulated regarding the two percent exemption in the regional Reliability Standard, we have a concern regarding the corresponding NERC Reliability Standard. In particular, we seek comment on whether it would provide additional support for Bulk-Power System reliability to propose to direct the ERO to develop a modification to NERC VAR–002–1.1b. Specifically to clarify that, if a generator has an automatic voltage regulator installed, it must be in-service and controlling voltage at all times, equipment and facility ratings permitting, unless exempted by the transmission operator. We believe that such a modification could be consistent with Commission precedent.[42] The Commission's concerns regarding the NERC Reliability Standard are introduced here as they correspond with certain elements of the WECC standards that are the subject of the immediate proceeding. However, any proposal to direct the development of modifications to the NERC Reliability

[37] *Id.* at 29.

[38] *See id.* at 31.

[39] Proposed regional Reliability Standard VAR–002–WECC–1, Requirement R1.

[40] *See* NERC Petition at 29.

[41] NERC Petition at 34–35.

[42] *Order on Reliability Standard Interpretation,* 132 FERC ¶ 61,220, at P 27 (2010) (VAR Interpretation Order).

Standards would be addressed in a separate proceeding.

Exclusion of Synchronous Generators that Operate for Less Than Five Percent of All Hours During a Calendar Quarter

58. Requirement R1.1 of proposed VAR–002–WECC–1 would allow exclusion of any synchronous generator or synchronous condenser that "operates for less than five percent of all hours during any calendar quarter" from operating with automatic voltage regulator in service and in automatic voltage control mode. During the Reliability Standard development process of the proposed regional Reliability Standard, NERC expressed concern regarding the exclusion of these hours.[43] WECC responded by explaining that the "exclusion below the five percent threshold during a calendar quarter permits the continued practice of allowing the operation of peaking units without penalty for having an out-of-service [automatic voltage regulator] per the manufacturer recommendations" since "[p]eaking units often operate, for short periods, at low megawatt levels (below where manufacture[r]s recommend placing the [automatic voltage regulators] in-service)."[44] Thus, it appears that WECC developed the five percent threshold provision to account for out-of-service automatic voltage regulators per the manufacturer recommendations regarding automatic voltage regulator design limitations.

59. We are concerned, however, that the provision is written more broadly than necessary. It appears inefficient to allow an exemption for any synchronous generator or synchronous condenser that "operates for less than five percent of all hours during any calendar quarter" in order to address concerns about operation limits based on manufacture recommendations, and could potentially exempt other generator operators and transmission operators. The Commission seeks comment on whether it is necessary or desirable to direct WECC to develop a modification through its Reliability Standards development process that addresses this concern. For example, one reasonable solution would be to develop a replacement requirement that directly addresses the need for an exemption for peaking units operating automatic voltage regulators when necessary to satisfy manufacturer recommendations regarding the operation of an automatic voltage regulator.

[43] NERC Petition at 34–35.

[44] *Id.* at 35.

Automatic Voltage Regulator Replacement

60. Proposed sub-requirement R1.6 lengthens the automatic voltage regulator replacement timeline due to component failure from 15 months to 24 months "to accommodate design and procurement especially for nuclear units."[45] The ERO supported the extension of the outage time frame for the automatic voltage regulators. The Commission, giving due weight to WECC and the ERO, proposes to accept the Reliability Standard with the modification to this provision.

61. We are concerned that allowing an additional nine months of non-operation of automatic voltage regulator is not necessary for many, if not most, units. The additional replacement time could lead to a decrease in generation that can react in automatic voltage regulator mode. In the event of a contingency, this could have an impact on bulk electric system reliability. We believe that it may be appropriate to direct WECC to develop a modification to this provision to address our concern. For example, WECC could allow fifteen months for replacement with an opportunity to seek an extension up to nine months where justified. Alternatively, WECC could retain a fifteen month replacement period for non-nuclear generator units, and a twenty-four month replacement period for nuclear generator units. The Commission seeks comment from WECC, NERC and other interested commenters regarding the historical replacement period for nuclear and non-nuclear units, and the appropriateness of the Commission proposal. For example, comments could include documentation and timeline summary of previous "design and procurement" for automatic voltage regulator component failures demonstrating that automatic voltage regulator outages frequently last more than 15 months in order to support extending the replacement period.

Responding to Voltage Deviations

62. The current regional Reliability Standard provides that "[a]ll synchronous generators with automatic voltage control equipment shall normally be operated in voltage control mode and set to respond effectively to voltage deviations." The proposed regional Reliability Standard removes this requirement but the NERC Petition does not provide any explanation why, or potential impact of, removing the provision.

63. We seek further explanation from WECC, NERC, and public comment, on the impact of removing this provision from the currently-effective WECC regional Reliability Standard. We are concerned that, by removing the requirement for automatic voltage regulators to respond effectively to voltage deviations, the proposed regional Reliability Standard would not require entities to assess the performance of the automatic voltage regulators to ensure they are appropriately responding to voltage deviations to support reliability of the Bulk-Power System.

Summary

64. The Commission proposes to approve VAR–002–WECC–1 as just, reasonable, not unduly discriminatory or preferential, and in the public interest. Further, the Commission proposes the concurrent retirement of currently-effective WECC VAR–STD–002a–1. In addition, the Commission requests comment on issues discussed above regarding whether the Commission should direct WECC to develop modifications to the proposed regional Reliability Standard that would: (1) Replace the blanket two percent exemption with a list of specific exemptions; and (2) more narrowly tailor the exemption for any synchronous generator or synchronous conductor that operates less than five percent of all operating hours during any calendar quarter. The Commission also seeks comment on the historical replacement period for nuclear and non-nuclear units and whether the Commission should direct WECC to modify the regional Reliability Standard to limit the acceptable duration of automatic voltage regulator outages. Finally, the Commission seeks comment on the impact of removing the requirement that all generators with automatic voltage control equipment be operated in automatic voltage control mode and set to respond to voltage deviations.

D. VAR–501–WECC–1—Power System Stabilizer

Background

65. Currently-effective WECC VAR–STD–002b–1 applies to generator operators with generators equipped with power system stabilizers. The current regional Reliability Standard requires that generator operators keep power system stabilizers in service at all times, except in specified circumstances. Further, currently-effective WECC VAR–

[45] NERC Petition at Exhibit C, "Consideration of Comments for VAR–002–WECC–1—Automatic Voltage Regulator Comments were due January 2, 2008."

STD–002b–1 requires that power system stabilizers are properly tuned in accordance with WECC Criterion, referenced in the standard. This regional Reliability Standard does not have a corresponding NERC Reliability Standard. The Commission approved the current regional Reliability Standard because it addresses matters that are not addressed by a NERC Reliability Standard.[46]

WECC and NERC Proposal

66. NERC requests approval of VAR–501–WECC–1 and asks for the concurrent retirement of the current WECC VAR–STD–002b–1. Proposed VAR–501–WECC–1 would apply to generator operators. Its purpose is to ensure that power system stabilizer on synchronous generators are kept in service.

67. Proposed VAR–501–WECC–1 contains two requirements. Requirement R1 provides that each generator operator with a synchronous generator equipped with a power system stabilizer must have the power system stabilizer in service during 98 percent of all operating hours. NERC explains that a power system stabilizer is part of the excitation control system of a generator used to increase power transfer levels by improving power system dynamic performance. Sub-requirements R1.1 through R1.12 set forth exceptions to the operating requirement in Requirement R1. Requirement R2 states that each generator operator must have documentation identifying the number of hours excluded for each sub-requirement R1.1 through R1.12.

68. In the Petition, NERC and WECC explain that the purpose of VAR–501–WECC–1 is to ensure that power system stabilizers on synchronous generators are kept in service. NERC and WECC state that the corresponding NERC VAR–002–1.1b requires only that a generator operator notify its transmission operator when it removes the power system stabilizer from service and does not limit the amount of time for operating generators without power system stabilizers in service.[47] NERC and WECC explain that, in contrast, proposed VAR–501–WECC–1 requires power system stabilizers to be in service except for specific conditions and for a cumulative time limit per quarter. Thus, according to NERC and WECC, the proposed regional Reliability Standard is more stringent than the corresponding NERC Reliability Standard.

69. In addition, the Petition explains that the proposed regional Reliability Standard includes modifications to address the Commission's directives in the June 2007 order that accepted WECC's currently-effective standards.[48] In particular, WECC proposes to replace the current sanctions table with violation risk factors, violation severity levels, measures and time horizons. Proposed VAR–501–WECC–1 removes the definition of "disturbance" and makes certain directed formatting revisions. WECC also proposes a new glossary term, Commercial Operation, to be applicable only in the Western Interconnection.[49]

70. In the Petition, NERC notes that, during the Reliability Standards development process, NERC expressed concern that the proposed regional Reliability Standard appears less stringent than the current regional Reliability Standard because it would reduce the number of hours that generator operators must keep power system stabilizers in service from 100 percent to 98 percent of all operating hours.[50] WECC responded to NERC's concerns by explaining that the requirement had not been modified but rather was a translation of the existing levels of non-compliance into the requirements of the proposed regional Reliability Standard.[51] WECC further explained that the levels of non-compliance for the current regional Reliability Standard allow generator operators to operate without power system stabilizers in service for two percent of all operating hours without penalty.[52]

71. NERC also notes that, during the regional Reliability Standards development process, NERC expressed concern that sub-requirement R1.1 of the proposed regional Reliability Standard excludes the hours for power system stabilizer operation attributed to the synchronous generator that operates for less than five percent of all hours during any calendar quarter. WECC responded that there is no change in the basic five percent threshold between the current and the proposed regional Reliability Standards. WECC further explained that peaking units often operate, for short periods, at low megawatt levels where manufacturers do not recommend using a power system stabilizer. WECC stated that the exclusion below the five percent threshold during a calendar quarter permits the continued practice of allowing the operation of peaking units without penalty for having an out-of-service power system stabilizer per the manufacturer recommendations.

NOPR Proposal

72. The Commission proposes to approve VAR–501–WECC–1 as just, reasonable, not unduly discriminatory or preferential, and in the public interest. The Commission also proposes to approve NERC's proposed retirement of currently-effective WECC VAR–STD–002b–1.

73. As explained by NERC and WECC, proposed VAR–501–WECC–1 is more stringent than the corresponding NERC VAR–002–1.1b. Unlike the NERC Reliability Standard, proposed VAR–501–WECC–1 requires power system stabilizers to be in service except for specific conditions and for a cumulative time limit per quarter. Further, the proposed regional Reliability Standard reflects modifications to address the Commission's concerns in the June 2007 order.[53] As discussed above, WECC has added violation risk factors, violation severity levels, measures and time horizons and has removed the reliability management system sanctions table. WECC also made formatting changes, removed the definition for "Disturbance," and included a definition of "Commercial Operation." Accordingly, the Commission proposes to approve proposed VAR–501–WECC–1 because it appears to be more stringent than the requirements of the applicable NERC Reliability Standards while providing additional clarity and conformity over the current regional Reliability Standard.

74. In addition to the modifications that address the Commission's earlier directives, WECC's proposal includes further modifications about which the Commission seeks comment.

75. The language of proposed VAR–501–WECC–1 is similar to the proposed VAR–002–WECC–1, addressed above. As a result, the Commission discusses below several similar issues as discussed above regarding VAR–002–WECC–1. In particular, the same items

[46] *See North American Electric Reliability Corp.,* 119 FERC ¶ 61,260 at P 122.

[47] NERC Petition at 36.

[48] *North American Electric Reliability Corp.,* 119 FERC ¶ 61,260 at P 123.

[49] Pursuant to WECC's proposal, "Commercial Operation" is defined as "* * * receiving all approvals necessary for operation after completion of initial start-up testing." Requirement R1.1 of VAR–501–WECC–1 excludes a unit from compliance when "the synchronous generator has not achieved Commercial Operation."

[50] NERC Petition at 40.

[51] *Id.*

[52] The levels of non-compliance assigned to the currently-effective regional Reliability Standard specify that there shall be a level 1 non-compliance if power system stabilizers are in service less than 98 percent but at least 96 percent or more of all hours during which the synchronous generating unit is on line for each calendar quarter.

[53] *See North American Electric Reliability Corp.,* 119 FERC ¶ 61,260 at P 123.

discussed above regarding the requirement that generator operators meet the requirements of the proposed regional Reliability Standard only 98 percent of the time, and the exclusion of hours for generators that operate less than five percent of all hours during a calendar quarter, apply to this proposed regional Reliability Standard as well.

In-Service Requirement

76. As proposed, Requirement R1 of VAR–501–WECC–1 provides that "Generator Operators shall have [power system stabilizers] in service 98 [percent] of all operating hours for synchronous generators equipped with [power system stabilizers]." [54] Requirement R1 also sets forth twelve circumstances in which a generator operator is excused from this requirement. By specifying the circumstances in which a generator operator is excused from keeping its power system stabilizer in service, the proposed requirement appears to be more stringent than the currently-effective requirement in NERC VAR–002–1.1b, which requires only that a generator operator notify its transmission operator when there is a change in status of its power system stabilizer.

77. The Commission believes that, where installed, power system stabilizers should be in-service at all times, equipment and facility ratings permitting, unless exempted by the transmission operator. Power system stabilizers are designed to ensure that the generator provides the proper damping to maintain system stability when generation and transmission outages occur.[55] As NERC explains, in the Western Interconnection System, Operating Limits for transmission paths in the bulk electric system assume that power system stabilizers are in service to enhance system damping. When power system stabilizers are out of service, generators may not be able to dampen oscillations occurring on the system, which could lead to instability, uncontrolled separation and cascading outages.

78. Although the proposed regional Reliability Standard would limit the circumstances in which a generator operator is excused from keeping power system stabilizers in-service, it also provides a blanket exemption for two percent of all operating hours. Similar to our discussion above on VAR–002–WECC–1, we believe that an exemption might be appropriate to accommodate generating facilities when they are starting up or operating outside of their facility ratings. However, proposed regional Reliability Standard provides no limitation as to when generating units may use the two percent exemption.

79. We are concerned that the proposed provision is written more broadly than necessary. We believe it is appropriate to exempt power system stabilizers from being in-service during times when the generator is operating outside of applicable facility ratings. However, as proposed, Requirement R1 would provide a blanket exemption for generators to maintain power system stabilizers in-service for two percent of all operating hours without qualification. We seek comment on whether the Commission should direct WECC to develop a modification to the proposed regional Reliability Standard that would address our concern. For example, WECC could develop a modification to replace the blanket two percent exemption with a more specific exemption that would accommodate generating units that are starting up or are operating outside of applicable facility ratings.

80. Requirement R3 and R3.1 of VAR–002–1.1b require a generator operator to inform the transmission operator as soon as possible, but within 30 minutes, whenever there is a change in status or capability, and the expected duration of this change, of any reactive power resource including power system stabilizers. Based on similar concerns articulated above regarding the regional Reliability Standard, we have concerns about the NERC Reliability Standard and whether it adequately addresses power system stabilizer in-service obligations. In particular, we seek comment on whether it would be appropriate to propose to direct the ERO to develop a modification to NERC VAR–002–1.1b to clarify that, if a generator has a power system stabilizer installed, it must be in-service at all times, equipment and facility ratings permitting, unless exempted by the transmission operator. The Commission's concerns regarding the NERC Reliability Standard are introduced here as they correspond with certain elements of the WECC standards that are the subject of the immediate proceeding. However, any proposal to direct the development of modifications to the NERC Reliability Standards would be addressed in a separate proceeding.

Exclusion of Synchronous Generators That Operate for Less Than Five Percent of All Hours During a Calendar Quarter

81. Requirement R1.1 of proposed VAR–501–WECC–1 would allow exclusion of any synchronous generator that operates for less than five percent of all hours during any calendar quarter from operating with power system stabilizer in service. During the Reliability Standard development process of the proposed regional Reliability Standard, NERC expressed concern regarding the exclusion of these hours.[56] WECC responded by explaining that the "exclusion below the five percent threshold during a calendar quarter permits the continued practice of allowing the operation of peaking units without penalty for having an out-of-service power system stabilizer per the manufacturer recommendations" since "[p]eaking units often operate, for short periods, at low megawatt levels (below where manufacture[r]s recommend placing the [power system stabilizer] in-service)." [57] Thus, it appears that WECC developed the five percent threshold provision to account for out-of-service power system stabilizer per the manufacturer recommendations.

82. We seek comment on whether the proposed provision is written more broadly than necessary. Comments should address why it is appropriate to allow an exemption for any synchronous generator that "operates for less than five percent of all hours during any calendar quarter" to address concerns about limitations based on manufacturer recommendations, and could potentially exempt other generator operators. Based on the comments received, the Commission may propose to direct WECC to develop a modification through its Reliability Standards development process that addresses this concern. It appears that one reasonable solution would be to develop a replacement requirement that directly addresses the need for an exemption for peaking units that may not operate with power system stabilizers to satisfy manufacturer recommendations.

Power System Stabilizer Replacement

83. Proposed sub-requirement R1.10 lengthens the power system stabilizer replacement timeline due to component failure from 15 months to 24 months "to accommodate design and procurement

[54] Proposed regional Reliability Standard VAR–501–WECC–1, Requirement R1.

[55] *Id.* at 35.

[56] *Id.* at 40.

[57] *Id.*

especially for nuclear units." [58] The Commission notes that no other evidence was provided in the record to support the extension of the outage time frame for the power system stabilizers from 15 months to 24 months. The Commission proposes to accept the Reliability Standard with this modification.

84. However, since the rationale provided for the increased replacement period is based on the needs of nuclear power generators, we are concerned whether the additional nine months is necessary for many, if not most, units. The additional replacement time could lead to a decrease in generation units operating with the power system stabilizers. In the event of a contingency, this could have an impact on bulk electric system reliability. Accordingly, the Commission seeks comment from WECC, NERC and other interested commenters regarding the historical replacement period for nuclear and non-nuclear units, and the appropriateness of the Commission proposal. For example, comments could include documentation and timeline summary of previous "design and procurement" for power system stabilizer component failures demonstrating that power system stabilizer outages frequently last more than 15 months in order to support extending the replacement period.

Power System Stabilizer Tuning

85. The current regional Reliability Standard requires all generators with power system stabilizers to be properly tuned in accordance with the WECC requirements.[59] The proposed regional Reliability Standard removes the tuning requirement without explanation or analysis of the potential impact of removing the provision. The Commission believes that, if the power system stabilizer is in service, it must be properly tuned to enhance system damping and maintain system stability. The Commission, therefore, seeks further explanation from WECC and NERC, and public comment on, the impact of removing the tuning requirement.

86. This highlights another concern. Currently, no NERC Reliability Standard addresses power system stabilizer tuning. As explained above, a properly tuned power system stabilizer is necessary to enhance system damping. If a power system stabilizer is installed, periodic review of the power system stabilizer tuning is a significant component of maintaining system stability to ensure that system changes have not impacted the performance of the power system stabilizer in supporting system stability. Accordingly, the Commission seeks comment on whether it should propose to direct the ERO to develop a continent-wide Reliability Standard to address this concern. In particular, we seek comment on directing the ERO to develop a Reliability Standard with the purpose of ensuring that, if a power system stabilizer is installed, the power system stabilizer must be properly tuned for operation. Such a Reliability Standard would not require installation of a power system stabilizer, but would ensure that power system stabilizer that are in service would need to be tuned prior to service and the settings must be reviewed periodically to ensure the power system stabilizer operates properly to support the reliability of the Bulk-Power System. The Commission's concerns regarding the NERC Reliability Standard are introduced here as they correspond with certain elements of the WECC standards that are the subject of the immediate proceeding. However, any proposal to direct the development of modifications to the NERC Reliability Standards would be addressed in a separate proceeding.

Summary

87. The Commission proposes to approve VAR–501–WECC–1 as just, reasonable, not unduly discriminatory or preferential, and in the public interest. Further, the Commission proposes the concurrent retirement of currently-effective WECC VAR–STD–002b–1. In addition, the Commission requests comment on issues discussed above regarding whether the Commission should direct WECC to develop modifications to the proposed regional Reliability Standard that would: (1) Replace the blanket two percent exemption with a list of specific exemptions; and (2) more narrowly tailor the exemption for any synchronous generator or synchronous conductor that operates less than five percent of all operating hours during any calendar quarter. The Commission also seeks comment on the historical replacement period for nuclear and non-nuclear units and whether the Commission should direct WECC to modify the regional Reliability Standard to limit the acceptable duration of power system stabilizer outages. Finally, the Commission seeks comment on whether it should propose to direct the ERO to develop a continent-wide Reliability Standard that ensures that, if a power system stabilizer is installed, the power system stabilizer must be properly tuned for operation.

IV. Information Collection Statement

88. The Office of Management and Budget (OMB) regulations require that OMB approve certain reporting and recordkeeping (collections of information) imposed by an agency. The information contained here is also subject to review under section 3507(d) of the Paperwork Reduction Act of 1995. As stated above, the Commission previously approved the current regional Reliability Standards that are proposed for replacement in this rulemaking. In the event that the Commission, after receiving comments, determines to adopt the four proposed Reliability Standards, they would not substantially change the entities' current reporting burdens under the five currently effective, approved Reliability Standards.

89. The four proposed WECC regional Reliability Standards (and the five currently approved regional Reliability Standards they are intended to replace) are designated as: FAC–501–WECC–1 (Transmission Maintenance; to replace approved PRC–STD–005–1); PRC–004–WECC–1 (Protection System and Remedial Action Scheme Misoperation; to replace approved WECC PRC–STD–001–1 and PRC–STD–003–1); VAR–002–WECC–1 (Automatic Voltage Regulators; to replace approved WECC VAR–STD–002a–1); and VAR–501–WECC–1 (Power System Stabilizer; to replace approved WECC VAR–STD–002b–1). The proposed standards do not modify or otherwise affect the burdens related to the collection of information already in place. Thus, the proposed replacement Reliability Standards will neither increase the reporting burden nor impose any additional information collection requirements.

Burden Estimate: The Commission does not foresee any additional impact on the reporting burden for small businesses, because the proposed modifications do not increase the existing burdens. However, we will submit this proposed rule to OMB for review.

Title: Version One Regional Reliability Standard for Facilities Design, Connections, and Maintenance; Protection and Control; and Voltage and Reactive.

Action: Proposed Collection FERC–725E.

OMB Control No.: 1902–0246.

[58] NERC Petition at Exhibit C, "Consideration of Comments for VAR–501–WECC–1—Power System Stabilizer Comments were due January 2, 2008."

[59] *Id.* Requirement WR1 of the currently-effective regional Reliability Standard provides: "Power System Stabilizers on generators shall be kept in service at all times, unless one of the exemptions listed in Section C (Measures) applies, and shall be properly tuned in accordance with WECC requirements."

Respondents: Businesses or other for-profit institutions; not-for-profit institutions.

Frequency of Responses: On occasion.

Necessity of the Information: This proposed rule proposes to approve four requested replacements (to five existing approved regional Reliability Standards). The proposed regional Reliability Standards help ensure the reliable operation of the Western Interconnection.

Internal Review: The Commission proposes to approve FAC–501–WECC–1, PRC–004–WECC–1, VAR–002–WECC–1, and VAR–501–WECC–1 as just, reasonable, not unduly discriminatory or preferential, and in the public interest. In addition, under section 215(d)(5) of the FPA and section 39.5(f) of our regulations, the Commission proposes to direct the ERO to develop certain modifications to further clarify the requirements of the proposed WECC regional Reliability Standards.

90. Interested persons may obtain information on the reporting requirements by contacting the following: Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426 [Attention: Ellen Brown, Office of the Executive Director, e-mail: *DataClearance@ferc.gov,* Phone: (202) 502–8663, fax: (202) 273–0873].

91. For submitting comments concerning the collection(s) of information and the associated burden estimate(s), please send your comments to the Commission and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission, phone (202) 395–4638, fax: (202) 395–7285]. For security reasons, comments to OMB should be submitted by e-mail to: *oira_submission@omb.eop.gov.* Comments submitted to OMB should include Docket Number RM09–14 and OMB Control Number 1902–0246.

V. Environmental Analysis

92. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[60] The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment. Included in the exclusion are rules that are clarifying, corrective, or procedural or that do not substantially change the effect of the regulations being amended.[61] The actions proposed herein fall within this categorical exclusion in the Commission's regulations.

VI. Regulatory Flexibility Act Certification

93. The Regulatory Flexibility Act of 1980 (RFA)[62] generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. The RFA mandates consideration of regulatory alternatives that accomplish the stated objectives of a proposed rule and that minimize any significant economic impact on a substantial number of small entities. The Small Business Administration's (SBA) Office of Size Standards develops the numerical definition of a small business.[63] The SBA has established a size standard for electric utilities, stating that a firm is small if, including its affiliates, it is primarily engaged in the transmission, generation and/or distribution of electric energy for sale and its total electric output for the preceding twelve months did not exceed four million megawatt hours.[64] The RFA is not implicated by this proposed rule because the modification discussed herein will not have a significant economic impact on a substantial number of small entities. Moreover, the proposed Reliability Standards reflect a continuation of existing requirements for these reliability entities. Accordingly, no regulatory flexibility analysis is required.

VII. Comment Procedures

94. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due February 22, 2011. Comments must refer to Docket No. RM09–9–000, and must include the commenter's name, the organization they represent, if applicable, and their address in their comments.

95. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's Web site at *http://www.ferc.gov.* The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

96. Commenters unable to file comments electronically must mail or hand-deliver an original copy of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426. These requirements can be found on the Commission's Web site, see, *e.g.,* the "Quick Reference Guide for Paper Submissions," available at *http://www.ferc.gov/docs-filing/efiling.asp* or via phone from FERC Online Support at (202) 502–6652 or toll-free at 1–866–208–3676.

97. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

VIII. Document Availability

98. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (*http://www.ferc.gov*) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5 p.m. Eastern time) at 888 First Street, NE., Room 2A, Washington, DC 20426.

99. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

100. User assistance is available for eLibrary and the FERC's Web site during normal business hours from FERC Online Support at (202) 502–6652 (toll free at 1–866–208–3676) or e-mail at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. E-mail the Public Reference Room at *public.referenceroom@ferc.gov.*

By direction of the Commission.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32157 Filed 12–21–10; 8:45 am]

BILLING CODE 6717–01–P

[60] *Regulations Implementing the National Environmental Policy Act of 1969,* Order No. 486, FERC Stats. & Regs. ¶ 30,783 (1987).

[61] 18 CFR 380.4(a)(2)(ii).

[62] 5 U.S.C. 601–612.

[63] 13 CFR 121.101.

[64] 13 CFR 121.201, Sector 22, Utilities & n. 1.

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 104

RIN 3142—AA07

Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act

AGENCY: National Labor Relations Board.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: This Notice of Proposed Rulemaking (NPRM) proposes a regulation requiring employers, including labor organizations in their capacity as employers, subject to the National Labor Relations Act (NLRA) to post notices informing their employees of their rights as employees under the NLRA. The National Labor Relations Board (Board) believes that many employees protected by the NLRA are unaware of their rights under the statute. The intended effects of this action are to increase knowledge of the NLRA among employees, to better enable the exercise of rights under the statute, and to promote statutory compliance by employers and unions.

The proposed rule establishes the size, form, and content of the notice, and sets forth provisions regarding sanctions and remedies that may be imposed if an employer fails to comply with its obligations under the rule.

DATES: Comments regarding this proposed rule must be received by the Board on or before February 22, 2011. Any comments received after the comment period closes will be considered only to the extent feasible.

ADDRESSES: You may submit comments, identified by 3142–AA07, only by the following methods:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through *http://www.regulations.gov.* To locate the proposed rule, search "documents open for comment" and use key words such as "National Labor Relations Board" or "Notification of Employee Rights under the National Labor Relations Act" to find documents accepting comments. Follow the instructions for submitting comments.

Delivery—Comments should be sent to: Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street, NW., Washington, DC 20570. Because of security precautions, the Board continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments. The Board encourages electronic filing. The Board recommends that you confirm receipt of your delivered comments by contacting (202) 273–1067 (this is not a toll-free number). Individuals with hearing impairments may call 1–866–315–6572 (TTY/TDD).

Only comments submitted through *http://www.regulations.gov,* hand delivered, or mailed will be accepted; ex parte communications received by the Board will be made part of the rulemaking record and will be treated as comments only insofar as appropriate. Comments will be available for public inspection at *http://www.regulations.gov* and during normal business hours (8:30 a.m. to 5 p.m. EST) at the above address.

The Board will post all comments received on *http://www.regulations.gov* without making any change to the comments, including any personal information provided. The *http://www.regulations.gov* Web site is the Federal eRulemaking portal, and all comments posted there are available and accessible to the public. The Board cautions commenters not to include their personal information such as Social Security numbers, personal addresses, telephone numbers, and e-mail addresses in their comments, as such submitted information will become viewable by the public via the *http://www.regulations.gov* Web site. It is the commenter's responsibility to safeguard his or her information. Comments submitted through *http://www.regulations.gov* will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

FOR FURTHER INFORMATION CONTACT: Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street, NW., Washington, DC 20570, (202) 273–1067 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION: The Proposed Rule is organized as follows:

I. Background—briefly describes the development of the Proposed Rule
II. Authority—cites the legal authority supporting the Proposed Rule
III. Overview of the Rule—outlines the proposed regulatory text
IV. Dissenting View of Member Brian E. Hayes
V. Regulatory Procedures—sets forth the applicable regulatory requirements and requests comments on specific issues

I. Background

The NLRA, enacted in 1935, is the Federal statute that regulates most private sector labor-management relations in the United States.[1] Section 7 of the NLRA, 29 U.S.C 157, guarantees that

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities[.]

In Section 1, 29 U.S.C. 151, Congress explained why it was necessary for those rights to be protected:

> The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce[.] * * *
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> * * * * *
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> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
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> * * * * *
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> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Thus, Congress plainly stated that, in its judgment, protecting the rights of employees to form and join unions and to engage in collective bargaining would benefit not only the employees themselves, but the nation as a whole. The Board was established to ensure that employers and, later, unions respect the exercise of employees' rights under the NLRA.[2]

For employees to exercise their NLRA rights, however, they must know that

[1] Labor-management relations in the railroad and airline industries are governed by the Railway Labor Act, 45 U.S.C. 151 *et seq.*

[2] The original NLRA did not include restrictions on the actions of unions; those were added in the Labor-Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. 141 *et seq.,* Title I.

those rights exist. There is reason to think that most do not. As one commentator put it,

> American workers are largely ignorant of their rights under the NLRA, and this ignorance stands as an obstacle to the effective exercise of such rights. For example, during union organizing campaigns, employees' ignorance of the law hinders their ability to assess employer anti-union propaganda, thus diluting their right to organize. In the non-union setting, employees' ignorance leads to the underutilization of legitimate workplace protests, of the voicing of group grievances, and of requests for outside help from government agencies or other third parties. In sum, lack of notice of their rights disempowers employees.

Peter D. DeChiara, "*The Right to Know: An Argument for Informing Employees of Their Rights under the National Labor Relations Act,*" 32 Harv. J. on Legis. 431, 433–434 (1995) (footnotes omitted).[3]

There are any number of reasons why such a knowledge gap could exist. The overwhelming majority of private sector employees are not represented by unions, and thus lack an important source of information about NLRA rights.[4] Immigrants, who comprise an increasing proportion of the nation's work force, are unlikely to be familiar with their workplace rights, including their rights under the NLRA. Several studies have suggested that high school students, many of whom are about to enter the labor force, are uninformed about labor law and labor relations. *See* DeChiara, above, at 436 and fn. 28 (citing studies).

If employees are largely unaware of their NLRA rights, however, one reason surely is that, except in very limited circumstances, no one is required to inform them of those rights.[5] The NLRA is almost unique among major Federal labor laws in not including an express statutory provision requiring employers routinely to post notices at their workplaces informing employees of their statutory rights. Such postings are required under the Fair Labor Standards Act,[6] Title VII of the Civil Rights Act of 1964,[7] the Age Discrimination in Employment Act,[8] the Occupational Safety and Health Act,[9] the Americans with Disabilities Act,[10] the Family Medical Leave Act,[11] the Uniformed Service Employment and Reemployment Rights Act,[12] the Railway Labor Act,[13] the Employee Polygraph Protection Act,[14] the Migrant and Seasonal Agricultural Workers Protection Act,[15] and other Federal statutes.

Thus, the NLRA stands out as an exception to the widespread notice-posting practice that has long been common in the workplace, even though it is the basic Federal labor law protecting private-sector employees who act together to address terms and conditions of employment. "This absence of a general notice requirement under the NLRA is remarkable given the significance of the Act as the cornerstone of private-sector labor law in this country." *See* DeChiara, "*The Right to Know,*" above at 433.

Several efforts have been made to address this anomaly. In 1993, Charles J. Morris [16] petitioned the Board to issue a broad rule requiring employers and unions to post notices advising employees of their rights and duties under the NLRA and of addresses and telephone numbers where employees can contact the Board for information and assistance. In 1998, then-California Governor Pete Wilson petitioned the Board to require employers to inform employees, by either mailed or posted notices, of the rights of nonmembers under *Communications Workers* v. *Beck.*[17] Most recently, on January 30, 2009, President Obama issued Executive Order 13496, requiring Federal contractors and subcontractors to include in their Government contracts specific provisions requiring them to post notices of employees' NLRA rights. On May 20, 2010, the Department of Labor issued a Final Rule implementing the order effective June 21, 2010. 75 FR 28368, 29 CFR part 471. Both of the petitions and President Obama's order stressed the need for employees to be informed of their NLRA rights.

After due consideration, the Board now proposes to require that employees of all employers subject to the NLRA be informed of their NLRA rights, as they are of other rights at the workplace. Informing employees of their statutory rights is central to advancing the NLRA's promise of "full freedom of association, self-organization, and designation of representatives of their own choosing." NLRA Section 1, 29 U.S.C. 151. It is fundamental to employees' exercise of their rights that the employees know both their basic rights and where they can go to seek help in understanding those rights. Notice of the right of self-organization, to form, join, or assist labor organizations, to bargain collectively, to engage in other concerted activities, and to refrain from such activities, and information pertaining to the Board's role in protecting statutory rights serves the public interest.

The workplace itself is the most appropriate place for communicating with employees about their basic statutory rights as employees. *See Eastex, Inc* v. *NLRB,* 437 U.S. 556, 574 (1978). Workplace posting informs

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[3] *See also* Charles J. Morris, "*Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board,*" 23 Stetson L. Rev. 101, 107 (1993) ("Most American employees either have never heard of the NLRB or they do not know what it does, and very few know how to initiate Board action."); Morris, "*NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct,* 137 U. Pa. L. Rev. 1673, 1675–1676 (1989) (commenting on the widespread ignorance of NLRA rights on the part of nonunion employees).

[4] In 2009, only 8 percent of non-agricultural private sector employees were represented by unions. U.S. Department of Labor, Bureau of Labor Statistics, News Release USDL–10–0069, Table 3 (January 22, 2010). *Source:* Department of Commerce, Bureau of the Census, Current Population Survey.

[5] The Board requires that employees be notified of their NLRA rights in only the following narrow circumstances: (1) For the three working days before a Board-conducted representation election, the employer is required to post a notice of election including a brief description of employee rights; *see* 29 CFR 103.20. (2) When an employer or a union has been found to have violated employee rights under the NLRA, it is required to post a notice containing a brief summary of those rights. (3) Before a union may seek to obligate newly hired nonmember employees to pay dues and fees under a union-security clause, it must inform them of their right under *NLRB* v. *General Motors,* 373 U.S. 734 (1963), and *Communications Workers* v. *Beck,* 487 U.S. 735 (1988), to be or remain nonmembers and that nonmembers have the right to object to paying for union activities unrelated to the union's duties as the bargaining representative and to obtain a reduction in dues and fees for such activities. *California Saw & Knife Works,* 320 NLRB 224, 233 (1995), enfd. sub nom. *Machinists* v. *NLRB,* 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang* v. *NLRB,* 525 U.S. 813 (1998). The same notice must also be given to union members if they did not receive it when they entered the bargaining unit. *Paperworkers Local 1033 (Weyerhaeuser Paper Co.),* 320 NLRB 349, 350 (1995), rev'd. on other grounds sub nom. *Buzenius* v. *NLRB,* 124 F.3d 788 (6th Cir. 1997), vacated sub nom. *United Paperworkers Intern. Union* v. *Buzenius,* 525 U.S. 979 (1998).

[6] 29 U.S.C. 211 (implementing regulation 29 CFR 516.4).

[7] 42 U.S.C. 2000e–10(a).

[8] 29 U.S.C. 627.

[9] 29 U.S.C. 651, 657(c).

[10] 42 U.S.C. 12101, 12115.

[11] 29 U.S.C. 2601, 2619(a).

[12] 38 U.S.C. 4334.

[13] 45 U.S.C. 152, Eighth.

[14] 29 U.S.C. 2003.

[15] 29 U.S.C. 1821

[16] Professor Emeritus of Law, Southern Methodist University.

[17] *See* fn. 5 above. In 1992, President George H.W. Bush issued Executive Order 12800, requiring unionized Federal contractors to post notices informing employees of their rights under *General Motors* and *Beck.* In 1993, President Clinton revoked that order. *See* E.O.12836. In 2001 President George W. Bush issued Executive Order 13201 containing requirements similar to those in Executive Order 12800. On January 30, 2009, President Obama revoked that order. See E.O. 13496, Section 13.

employers, as well as employees, of the employees' rights. Thus, some employers may be less likely to violate their employees' NLRA rights once they know what those rights are; others may be dissuaded from violations by the knowledge that employees know their rights and may be less likely to acquiesce if their rights are violated. In any event, it seems plausible that "employees who see the notice, instead of quitting or suffering in silence, would be more likely to exercise their right to act together to improve conditions such as low pay, undesirable work schedules, or uncomfortable or dangerous conditions in the workplace." DeChiara, *The Right to Know,* above, at 462 (footnotes omitted). Indeed, as the New York Times reported with respect to a successful Supreme Court litigant:

> One thing that inspired Ms. White in her struggle, curiously, was the bland, government-mandated flier posted by every employer, the one that promises a workplace free of discrimination on the basis of race, creed or sex. "I can always visualize that," she said. "But I never thought it would happen to me."

Shaila Dewan, *Forklift Driver's Stand Leads to Broad Rule Protecting Workers Who Fear Retaliation,* New York Times (June 24, 2006) (quoting plaintiff in *Burlington Northern & Santa Fe Ry.* v. *White,* 548 U.S. 53 (2006)).

For the foregoing reasons, the Board proposes a new rule requiring all employers subject to the NLRA to post a copy of a notice advising employees of their rights under the NLRA and providing information pertaining to the enforcement of those rights. As explained below, the burden of compliance will be minimal—the notices will be made available by the Board (both electronically and in hard copy), and employers need only post the notices in places where they customarily post notices to employees; there are no reporting or recordkeeping requirements.

II. Authority

Section 6 of the NLRA, 29 U.S.C. 156, provides that "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [5 U.S.C. 553], such rules and regulations as may be necessary to carry out the provisions of this Act." The Board interprets Section 6 as authorizing the proposed rule, and specifically invites comments on this issue.

III. Overview of the Rule

If adopted, the Board's proposed rule, which requires employers subject to the NLRA to post notices of employee rights under the NLRA, will be set forth in Chapter 1, Part 104 of Volume 29 of the Code of Federal Regulations (CFR). Subpart A of the proposed rule sets out definitions; prescribes the size, form, and content of the employee notice; and lists the categories of employers that are not covered by the proposed rule. Subpart B sets out standards and procedures related to allegations of noncompliance and enforcement of the proposed rule. The discussion below is organized in the same manner and explains the Board's reasoning in adopting the standards and procedures contained in the regulatory text, which follows. The Board invites comments on any issues addressed by the proposals in this rulemaking.

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions From Coverage Definitions

For the most part, the definitions proposed in this rule are taken from those appearing in Section 2 of the NLRA, 29 U.S.C. 152. The Board invites comments regarding the definitions proposed in § 104.201 below.

Requirements for Employee Notice

Content requirements. The proposed notice contains a summary of employee rights established under the NLRA. The Board believes that requiring notice of employee rights effectuates the purposes of the NLRA. Section 104.202 of the proposed rule requires employers subject to the NLRA to post and maintain the notice in conspicuous places, including all places where notices to employees are customarily posted, and to take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

In arriving at the content of the notice of employee rights, the Board is proposing to adopt the language of the Department of Labor's final rule requiring Federal contractors to post notices of employees' NLRA rights. 29 CFR part 471. The Board tentatively agrees with the Department of Labor that neither quoting the statement of employee rights contained in Section 7 of the NLRA nor briefly summarizing those rights in the notice would be likely to effectively inform employees of their rights.[18] Rather, the language of the notice should include a more detailed description of employee rights derived from Board and court decisions implementing those rights.[19] The Board also sees merit in the Department of Labor's judgment that including in the notice examples, again derived from Board and court decisions, of conduct that violates the NLRA will assist employees in understanding their rights. The Board has carefully reviewed the content of the notice required under the Department of Labor's final rule, which was modified in response to comments from numerous sources,[20] and has tentatively concluded that that notice explains employee rights accurately and effectively without going into excessive or confusing detail. The Board therefore finds it unnecessary, for purposes of this proposed rulemaking, to modify the language of the notice in the Department of Labor's final rule. Because the notice of employee rights would be the same under the Board's proposed rule as under the Department of Labor's rule, Federal contractors that have posted the Department of Labor's required notice would have complied with the Board's rule and, so long as that notice is posted, would not have to post a second notice.

The Board also tentatively agrees with the Department of Labor that it is unnecessary for the notice to include specifically the right of employees who are not union members and who are covered by a contractual union-security clause to refuse to pay union dues and fees for any purpose other than collective bargaining, contract administration, or grievance adjustment. *See Communications Workers* v. *Beck,* 487 U.S. 735 (1988).[21] In the relatively small number of workplaces where union-security provisions exist, unions that seek to obligate employees to pay dues and fees under those provisions are already required to inform those employees of their *Beck* rights. *See* footnote 5 above. In other words, existing law already requires notice of this particular set of rights to all

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[18] Section 7 of the NLRA states, very generally, that

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining of other mutual aid or protection, and shall also have the right to refrain from any or all such activities[.]

29 U.S.C. 157.

[19] The pre-election notices and remedial notices that the Board requires to be posted in other contexts contain only summary descriptions of employee rights. In the pre-election context, however, at least one union is on the scene and presumably will enlighten employees about their NLRA rights to some extent. And the purpose of remedial notices is chiefly to inform employees of what employers and/or unions have done to violate their NLRA rights, and less to inform them of their rights in general.

[20] *See* 75 FR 28372–28381.

[21] This issue is the subject of the petition filed by former Governor Pete Wilson; see earlier discussion, above.

employees who may exercise them. Moreover, there are too few employees who might benefit from such specific notice of this one set of rights to warrant its inclusion in the general notice. Only about 8 percent of all private sector employees are currently represented by unions,[22] and by no means are all of them subject to union-security clauses. Indeed, in the 22 so-called "right to work" states that prohibit union-security arrangements, *no* employees are covered by union-security clauses. Because *Beck* does not even apply to the overwhelming majority of employees in today's private sector workplace, and because unions already are obliged to inform the employees to whom it does apply of their *Beck* rights, the Board does not propose to include this notification in the notice of employee rights.

The Board invites comment on all of the issues raised by the statement of NLRA rights proposed for inclusion in the required notice to employees. In particular, the Board requests comments on whether the notice contains sufficient information about employee rights, whether it effectively conveys that information to employees, and whether it achieves the desired balance between providing an overview of employee rights and limiting unnecessary and distracting information.

The proposed Appendix to Subpart A includes Board contact information and basic enforcement procedures to enable employees to learn more about their NLRA rights and how to enforce them. Thus, the required notice confirms that unlawful conduct will not be permitted, provides information about the Board and about filing a charge with the Board, and states that the Board will prosecute violators of the NLRA. The notice also indicates that there is a 6-month statute of limitations for filing charges with the Board alleging violations and provides Board contact information. The Board invites suggested additions or deletions to these provisions that would improve the content of the notice of employee rights.

Size and form requirements. The Board proposes that the notice to employees shall be at least 11 inches by 17 inches in size, and in such colors and type size and style as the Board shall prescribe. Employers that choose to print the notice after downloading it from the Board's Web site must print in color, and the printed notice shall be at least 11 inches by 17 inches in size.

Posting requirements. Proposed § 104.202(d) requires all covered employers to post the employee notice physically "in conspicuous places, including all places where notices to employees are customarily posted." Employers must take steps to ensure that the notice is not altered, defaced, or covered with other material. Proposed § 104.202(e) states that the Board will print the notice poster and provide copies to employers on request. It also states that employers may download copies of the poster from the Board's Web site, *www.nlrb.gov,* for their use. It further provides that employers may reproduce exact duplicates of the poster supplied by the Board, and that they may also use commercial poster services to provide the employee notice consolidated onto one poster with other Federally mandated labor and employment notices, as long as consolidation does not alter the size, color, or content of the poster provided by the Board. Finally, employers that have significant numbers of employees who are not proficient in English will be required to post notices of employee rights in the language or languages spoken by significant numbers of those employees. The Board will make available posters containing the necessary translations.

In addition to requiring physical posting of paper notices, proposed § 104.202(f) requires that notices be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the employer customarily communicates with its employees by such means.[23] An employer that customarily posts notices to its employees on an intranet or internet site must display the required employee notice on such a site prominently—i.e., no less prominently than other notices to employees. The Board proposes to give employers two options to satisfy this requirement. An employer may either download the notice itself and post it in the manner described above, or post, in the same manner, a link to the Board's Web site that contains the full text of the required employee notice. In the latter case, the link must contain the prescribed introductory language from the poster, which appears in proposed Appendix to Subpart A, below. An employer that customarily communicates with its employees by e-mail will satisfy the electronic posting requirement by sending its employees an e-mail message containing the link described above.

Where a significant number of an employer's employees are not proficient in English, the employer must provide the required electronic notice in the language the employees speak. This requirement can be met either by downloading and posting, as required in § 104.202(f), the translated version of the notice supplied by the Board, or by prominently displaying, as required in § 104.202(f), a link to the Board's Web site that contains the full text of the poster in the language the employees speak. The Board will provide translations of that link.

The Board seeks comments on its proposed requirements for both physical and electronic notice posting. In addition, the Board solicits comments on whether it should prescribe standards regarding the size, clarity, location, and brightness of the electronic link, including how to prescribe electronic postings that are at least as large, clear, and conspicuous as the employer's other postings.

Exceptions. The proposed rule applies only to employers that are subject to the NLRA. Under NLRA Section 2(2), "employer" excludes the United States government, any wholly owned government corporation, any Federal Reserve Bank, any State or political subdivision, and any person subject to the Railway Labor Act, 45 U.S.C. 151 *et seq*. 29 U.S.C. 152(2). Thus, under the proposed rule, those excluded entities are not required to post the notice of employee rights. The proposed rule also does not apply to entities that employ only individuals who are not considered "employees" under the NLRA. *See* Subpart A, below; 29 U.S.C. 152(3). Finally, the proposed rule does not apply to entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.[24]

Subpart B—Enforcement and Complaint Procedures

Subpart B of the proposed rule contains procedures for enforcement of the employee notice-posting requirement and sanctions for noncompliance. In crafting Subpart B, the Board was mindful of the need to identify effective incentives for compliance. The Board gave careful consideration to several alternative approaches to achieving the highest degree of compliance with the rule's

[22] *See* fn. 4, above.

[23] *See J. Picini Flooring,* 356 NLRB No. 9, slip op. at 6 (2010).

[24] The proposed rule excludes small businesses whose impact on interstate commerce is de minimis or so slight that they do not meet the Board's discretionary jurisdiction requirements. *See* generally An Outline of Law and Procedure in Representation Cases, Chapter 1, found on the Board's Web site, *http://www.nlrb.gov,* and cases cited therein.

notice-posting requirements. Those alternatives, not all of which are mutually exclusive, are (1) finding the failure to post the required notices to be an unfair labor practice; (2) tolling the statute of limitations for filing unfair labor practice charges against employers that fail to post the notices; (3) considering the willful failure to post the notices as evidence of unlawful motive in unfair labor practice cases; (4) voluntary compliance.

The Board has considered but tentatively rejected relying solely on voluntary compliance. This option logically would appear to be the least likely to be effective, and the Board's limited experience with voluntary posting of notices of employee rights seems to confirm this. When an election petition is filed, the Board's Regional Office sends the employer Form NLRB–5492, Notice to Employees, together with a leaflet containing significant "Rights of Employees." *See* the Board's Casehandling Manual, Part Two—Representation Proceedings, Section 11008.5, found on the Board's Web site, *http://www.nlrb.gov.* The Regional Office also asks employers to post the notice of employee rights in the workplace; however, the Board's experience suggests that the notices are seldom posted. Therefore, the Board does not propose to rely on voluntary compliance alone; but voluntary compliance, in combination with either tolling the statute of limitations or finding a knowing failure to post employee notices to be evidence of unlawful motive, or both, may be a workable approach. (The Board did not consider imposing monetary fines for noncompliance, because the Board lacks the statutory authority to impose punitive remedies. *See, e.g., Republic Steel Corp.* v. *NLRB,* 311 U.S. 7, 10–12 (1940).)

Accordingly, the Board proposes the following sanctions for failure or refusal to post the required employee notices: (1) Finding the failure to post the required notices to be an unfair labor practice; (2) tolling the statute of limitations for filing unfair labor practice charges against employers that fail to post the notices; and (3) considering the knowing failure to post the notices as evidence of unlawful motive in unfair labor practice cases. The Board invites comments on any of the enforcement and procedural matters proposed in Subpart B.

Noncompliance as an unfair labor practice. The proposed rule requires employers to inform employees of their NLRA rights because the Board believes that employees must know their rights in order to exercise them effectively. Accordingly, the Board proposes to find that an employer that fails or refuses to post the required notice of employee rights violates Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1) by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in Section 7 (29 U.S.C. 157)."

The Board expects that most employers that fail to post the required notice will do so simply because they are unaware of the rule, and that when it is called to their attention, they will comply without the need for formal administrative action or litigation. When that is not the case, the Board's customary procedures for investigating and adjudicating alleged unfair labor practices may be invoked. *See* NLRA Sections 10 and 11, 29 U.S.C. 160, 161; 29 CFR part 102, subpart B.[25] When the Board finds a violation, it will customarily order the employer to cease and desist and to post the notice of employee rights as well as a remedial notice.

Consistent with precedent, it will be unlawful for an employer to threaten or retaliate against an employee for filing charges or testifying in a Board proceeding involving an alleged violation of the notice-posting requirement. NLRA Sections 8(a)(1), 8(a)(4), 29 U.S.C. 158(a)(1), (4); *Romar Refuse Removal,* 314 NLRB 658 (1994).

The Board also proposes the following options intended to induce compliance with the notice-posting requirement, either in addition to or instead of finding the failure to post to be an unfair labor practice:

Tolling statute of limitations. Failure to post the notice of employee rights may warrant tolling the 6-month statute of limitations for filing unfair labor practice charges. NLRA Section 10(b) provides in part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board[.]" 29 U.S.C. 160(b). However, the 6-month period does not begin to run until the charging party has actual or constructive notice of the allegedly unlawful conduct. *See, e.g., John Morrell & Co.,* 304 NLRB 896, 899 (1991), review denied 998 F.2d 7 (DC Cir. 1993) (table).

The same should be true when an employee, although aware of the conduct in question, is excusably unaware that the conduct is unlawful. As the U.S. Court of Appeals for the Third Circuit has observed in another context, "The [ADEA] posting requirement was undoubtedly created because Congress recognized that the very persons protected by the Act might be unaware of its existence." *Bonham* v. *Dresser Industries,* 569 F.2d 187, 193 (1977), cert. denied 439 U.S. 821 (1978). Because notices of employee rights are intended, in part, to advise employees of the kinds of conduct that may violate their rights, courts have repeatedly found in cases arising under other Federal employment laws that the statutes of limitation for filing actions should be tolled when employers fail to post required notices informing employees of their rights, unless the employee has obtained knowledge of those rights or is represented by counsel. *See, e.g., Mercado* v. *Ritz-Carlton San Juan Hotel,* 410 F.3d 41, 47–48, 95 FEP Cases 1464 (1st Cir. 2005) (Title VII); *EEOC* v. *Kentucky State Police Dept.,* 80 F.3d 1086, 1096 (6th Cir. 1996), cert. denied 519 U.S. 963 (1996); *Bonham,* above, 569 F.2d at 93 (ADEA); *Hammer* v. *Cardio Medical Products, Inc.,* 131 Fed. Appx. 829, 831–832 (3d Cir. 2005) (Title VII and ADEA); *Henchy* v. *City of Absecon,* 148 F. Supp. 2d 435, 439 (D. N.J. 2001); *Kamens* v. *Summit Stainless, Inc.,* 586 F. Supp. 324, 328 (E.D. Pa. 1984) (FLSA). (But *see Wilkerson* v. *Siegfried Ins. Agency, Inc.,* 683 F.2d 344, 347 (10th Cir. 1982) ("the simple failure to post [Title VII and ADEA] notices, without intent to actively mislead the plaintiff respecting the cause of action, does not extend the time within which a claimant must file his or her discrimination charge.")) The same reasoning would appear applicable to unfair labor practice allegations under the NLRA. Accordingly, if an employer fails to post the required notice of employee rights, the Board may find that the 6-month period for filing charges does not begin to run until the notice is posted or the employee filing the charge otherwise acquires actual or constructive notice that the conduct in question may be unlawful. The Board invites comments as to whether unions filing charges should be deemed to have constructive knowledge of illegality.

Knowing noncompliance as evidence of unlawful motive. An employer that is aware, or should be aware, of the requirement to post the notice of employee rights and fails to do so is knowingly preventing employees from learning of their NLRA rights. Therefore, when it is adjudicating cases in which unlawful motive is an element of one or more alleged violations, the Board may

[25] The Board's General Counsel has unreviewable discretion as to whether to issue a complaint in an unfair labor practice proceeding. This discretion includes dismissing any charge filed against an employer who is not covered by the Board's jurisdictional requirements.

consider knowing noncompliance with the posting requirement in determining whether unlawful motive has been established.

Subpart C—Ancillary Matters

Several technical issues unrelated to those discussed in the two previous subparts are set out in this subpart.

IV. Dissenting View of Member Brian E. Hayes

A majority of the current Board had decided to grant the rule-making petitions herein prior to my confirmation as a Board Member. As a consequence of this timing I did not participate in the decision to grant the instant petitions, nor did I participate in the drafting of the proposed rule. Had I done so, my decision would have been to deny the instant petitions as I believe the Board lacks the statutory authority to promulgate or enforce the type of rule which the petitions contemplated and which the proposed rule makes explicit. Accordingly, I dissent from the Board's actions today.

The instant proposed rule would impose a requirement that all employers subject to the Board's jurisdiction post a notice of employees' rights identical to that which the Department of Labor, acting pursuant to clear authority under an Executive Order, has recently required federal contractors to post. Going well beyond that requirement, however, the proposed rule here would further impose unfair labor practice liability for any failure to post a notice and would also suspend the Section 10(b) limitations period for any unfair labor practice charge against a noncompliant employer.

Public comment is invited on all aspects of the proposed rule and its proposed enforcement. I believe such comment is plainly warranted and should address the Board's authority to impose or enforce such a rule. In my view, it is essential to have a broader basis for enacting such a rule than the opinions of my colleagues and the treatises of the party requesting rulemaking, Professor Charles Morris.

My colleagues acknowledge that the Act differs from several more recent statutes that expressly require the posting of individual rights notices. The absence of such express language in our Act is a strong indicator, if not dispositive, that the Board lacks the authority to impose such a requirement. In particular, I do not believe that the language of Section 6 of the Act is sufficient statutory authority for imposing such a notice requirement and sanctions for noncompliance. To the contrary, Section 10 of the Act indicates to me that the Board clearly lacks the authority to order affirmative notice-posting action in the absence of an unfair labor practice charge filed by an outside party. For that reason, without regard for whether a notice-posting requirement would further the purposes of the Act if the Board had the authority to impose it, I would have denied the petitions for rulemaking.

Brian E. Hayes, Member

V. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 ("RFA"), 5 U.S.C. 601 *et seq.,* requires agencies promulgating proposed rules to prepare an initial regulatory flexibility analysis and to develop alternatives wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. The focus of the RFA is to ensure that agencies "review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA]." E.O. 13272, Sec. 1, 67 FR 53461 ("Proper Consideration of Small Entities in Agency Rulemaking"). However, an agency is not required to prepare an initial regulatory flexibility analysis for a proposed rule if the Agency head certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C 605(b). Based on the analysis below, in which the Board has estimated the financial burdens to employers subject to the NLRA associated with complying with the requirements contained in this final rule, the Board has certified to the Chief Counsel for Advocacy of the Small Business Administration ("SBA") that this rule will not have a significant economic impact on a substantial number of small entities.

The primary goal of the proposed rule is the notification to employees of their rights with respect to collective bargaining and other concerted activities protected by Section 7 of the NLRA. This goal is achieved through the posting of notices by employers subject to the NLRA of the rights of employees under the NLRA. The Board will make the notices available at no cost to employers; there are no information collection or reporting requirements.

The Board estimates that in order to comply with this rule, each employer subject to the NLRA will spend a total of 2 hours during the first year in which the rule is in effect. This includes 30 minutes for the employer to learn where and how to post the required notices, 30 minutes to acquire the notices from the Board or its Web site, and 60 minutes to post them physically and electronically, depending on where and how the employer customarily posts notices to employees. The Board assumes that these activities will be performed by a professional or business worker, who, according to Bureau of Labor Statistics data, earned a total hourly wage of $31.02 in January 2009, including fringe benefits. The Board then multiplied this figure by 2 hours to estimate the average costs for employers to comply with this rule during the first year in which the rule is in effect. Accordingly, this rule is estimated to impose average costs of $62.04 per employer subject to the NLRA (2 hours × $31.02) during the first year. These costs will decrease dramatically in subsequent years because the only employers affected will be those that have did not previously satisfy their posting requirements or that have since expanded their facilities or established new ones.

According to the United States Census Bureau, there were approximately 6 million businesses with employees in 2007. Of those, the SBA estimates that all but about 18,300 were small businesses with fewer than 500 employees.[26] This rule does not apply to employers who do not meet the Board's jurisdictional requirements, but the Board does not have the means to calculate the number of small businesses within the Board's jurisdiction. Accordingly, the Board assumes for purposes of this analysis that the great majority of the nearly 6 million small businesses will be affected.

Based on the foregoing, the Board concludes that that the proposed rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act does not define either "significant economic impact" or "substantial" as it relates to the number of regulated entities. 5 U.S.C. 601. In the absence of specific definitions, "what is 'significant' or 'substantial' will vary depending on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's impact." *See A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act,* Office of Advocacy, U.S. Small Business Administration at 17 (available at *http://*

[26] *Source:* SBA Office of Advocacy estimates based on data from the U.S. Department of Commerce, Bureau of the Census, and trends from the U.S. Department of Labor, Bureau of Labor Statistics, Business Employment Dynamics.

www.sba.gov) ("SBA Guide"). As to economic impact, one important indicator is the cost of compliance in relation to revenue of the entity or the percentage of profits affected. SBA Guide, above, at 17. Here, the Board has determined that the average cost of complying with the notice-posting rule in the first year for all employers subject to the NLRA will be $62.04. The Board concludes that this economic impact on small employers is not significant.[27] The Board assumes that the number of small employers that will be affected by the proposed rule is a substantial number within the meaning of 5 U.S.C. 601. However, because the economic impact on those employers is minimal, the Board concludes that, under 5 U.S.C. 605, the proposed rule will not have a significant economic impact on any small employers.

As stated above, the Board assumes that a substantial number of small businesses will be required to comply with this proposed rule. The Board has preliminarily considered and rejected alternatives that would minimize the impact of the proposed rule, including a tiered approach for small entities with only a few employees, concluding that a tiered approach or an exemption for some small entities would substantially undermine the purpose of the proposed rule because so many employers would be exempt under the SBA definitions. Given the very small estimated cost of compliance, it is possible that the burden on a small business of determining whether it fell into a particular tier might exceed the burden of compliance. Congress gave the Board very broad jurisdiction, with no suggestion that it wanted to limit coverage of any part of the Act to only larger employers. The Board also believes that employees of small employers may well be those workers most in need of a Board notice. Finally, the Board's jurisdictional standards mean that very small employers will not be covered by the proposed rule in any case. A summary of the Board's discretionary jurisdictional standards appears in § 104.204, below.

The Board invites the public to comment on the above certification.

Paperwork Reduction Act (PRA)[28]

The proposed rule imposes certain minimal burdens associated with the posting of the employee notice required by § 104.202. As noted in § 104.202(e), the Board will make the notice available, and employers will be permitted to post exact duplicate copies of the notice. Under the regulations implementing the PRA, "[t]he public disclosure of information originally supplied by the Federal government to [a] recipient for the purpose of disclosure to the public" is not considered a "collection of information" under the Act. *See* 5 CFR 1320.3(c)(2). Therefore, the posting requirement is not subject to the PRA.

The PRA does not cover the costs to the Federal government of administering the regulations established by the proposed rule. The regulations implementing the PRA define "burden," in pertinent part, as "the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency." 5 CFR 1320.3(b)(1). The definition of "person" in the same regulations includes "an individual, partnership, association, corporation (including operations of government-owned contractor-operated facilities), business trust, or legal representative, an organized group of individuals, a State, territorial, tribal, or local government or branch thereof, or a political subdivision of a State, territory, tribal, or local government or a branch of a political subdivision." 5 CFR 1320.3(k). It does not include the Federal government or any branch, political subdivision, or employee thereof. Therefore, the cost to the Federal government of administering the proposed rule need not be considered.

Accordingly, this rule does not contain information collection requirements that require approval by the Office of Management and Budget under the PRA (44 U.S.C. 3507 *et seq.*). The Board invites the public to comment on whether the proposed rule otherwise implicates the PRA.

Request for Comments

The Board invites comments about the NPRM from interested parties, including, employers, employees, employer organizations, unions, public interest groups, and the public. Only comments submitted through *http://www.regulations.gov*, hand delivered, or mailed will be accepted. These methods for submitting comments are intended to be exclusive. Any ex parte communications received by the Board will be added to the public rulemaking record.

List of Subjects in 29 CFR Part 104

Administrative practice and procedure, Employee rights, Labor unions.

Text of Proposed Rule

A new part 104 is proposed to be added to 29 CFR chapter I to read as follows:

PART 104—NOTIFICATION OF EMPLOYEE RIGHTS; OBLIGATIONS OF EMPLOYERS

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

Sec.

104.201 What definitions apply to this part?
104.202 What employee notice must employers subject to the NLRA post in the workplace?
104.203 Are Federal contractors covered under this part?
104.204 What entities are not subject to this part?

Appendix to Subpart A—Text of Employee Notice

Subpart B—General Enforcement and Complaint Procedures

104.210 How will the Board determine whether an employer is in compliance with this part?
104.211 What are the procedures for filing a charge?
104.212 What are the procedures to be followed when a charge is filed alleging that an employer has failed to post the required employee notice?
104.213 What sanctions can be imposed for failure to post the employee notice?
104.214 What other sanctions may be imposed for noncompliance?

Subpart C—Ancillary Matters

104.220 What other provisions apply to this part?

Authority: National Labor Relations Act (NLRA), Section 6, 29 U.S.C. 156; Administrative Procedure Act, 5 U.S.C. 553.

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

§ 104.201 What definitions apply to this part?

Employee includes any employee, and is not limited to the employees of a particular employer, unless the NLRA explicitly states otherwise. The term includes anyone whose work has ceased because of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. However, it does not include agricultural laborers, supervisors, or independent contractors, or anyone employed in the domestic service of any

[27] In reaching this conclusion, the Board considered the likelihood that employers who might otherwise be significantly affected even by the low cost of compliance under this rule will not meet the Board's jurisdictional requirements. Thus, those employers will not be subject to this rule.

[28] 44 U.S.C. 3501 *et seq.*

family or person at his home, or by his parent or spouse, or by an employer subject to the Railway Labor Act (45 U.S.C. 151 *et seq.*), or by any other person who is not an employer as defined in the NLRA. 29 U.S.C. 152(3).

Employee notice means the notice set forth in the Appendix to Subpart A of this part that employers subject to the NLRA must post pursuant to this part.

Employer includes any person acting as an agent of an employer, directly or indirectly. The term does not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. 29 U.S.C. 152(2). Further, the term "employer" does not include entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.

Labor organization means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. 152(5).

National Labor Relations Board (Board) means the National Labor Relations Board provided for in section 3 of the National Labor Relations Act, 29 U.S.C. 153. 29 U.S.C. 152(10).

Person includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code, or receivers. 29 U.S.C. 152(1).

Related rules, regulations, and orders, as used in § 104.202, means rules, regulations, and relevant orders issued by the Board pursuant to this part.

Supervisor means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. 152(11).

Unfair labor practice means any unfair labor practice listed in section 8 of the National Labor Relations Act, 29 U.S.C. 158. 29 U.S.C. 152(8).

Union means a labor organization as defined above.

§ 104.202 What employee notice must employers subject to the NLRA post in the workplace?

(a) *Posting of employee notice.* All employers subject to the NLRA must post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information concerning basic enforcement procedures, in the language set forth in the Appendix to Subpart A of this part.

(b) *Size and form requirements.* The notice to employees shall be at least 11 inches by 17 inches in size, and in such colors and type size and style as the Board shall prescribe. Employers that choose to print the notice after downloading it from the Board's Web site must print in color, and the printed notice shall be at least 11 inches by 17 inches in size.

(c) *Adaptation of language.* The National Labor Relations Board may find that an Act of Congress, clarification of existing law by the courts or the Board, or other circumstances make modification of the employee notice necessary to achieve the purposes of this part. In such circumstances, the Board will promptly issue rules, regulations, or orders as are needed to ensure that all future employee notices contain appropriate language to achieve the purposes of this part.

(d) *Physical posting of employee notice.* The employee notice must be posted in conspicuous places, including all places where notices to employees are customarily posted. Where a significant portion of an employer's workforce is not proficient in English, the employer must provide the notice in the language employees speak. An employer must take reasonable steps to ensure that the notice is not altered, defaced, covered by any other material, or otherwise rendered unreadable.

(e) *Obtaining a poster with the employee notice.* A poster with the required employee notice, including a poster with the employee notice translated into languages other than English, will be printed by the Board, and may be obtained from the Board's office, 1099 14th Street, NW., Washington, DC 20570, or from any of the Board's regional, subregional, or resident offices. Addresses and telephone numbers of those offices may be found on the Board's Web site at *http://www.nlrb.gov.* A copy of the poster in English and in languages other than English may also be downloaded from the Board's Web site at *http://www.nlrb.gov*. Employers also may reproduce and use exact duplicate copies of the Board's official poster. In addition, employers may use commercial services to provide the employee notice poster consolidated onto one poster with other Federally mandated labor and employment notices, so long as the consolidation does not alter the size, color, or content of the poster provided by the Board.

(f) *Electronic posting of employee notice.* (1) In addition to posting the required notice physically, an employer must also distribute the required notice electronically, such as by e-mail, posting on an intranet or an internet site, and/or by any other electronic means, if the employer customarily communicates with its employees by such means. An employer that customarily posts notices to employees on an intranet or internet site will satisfy the electronic posting requirement by displaying prominently—i.e., no less prominently than other notices to employees—on such a site either an exact copy of the poster, downloaded from the Board's Web site, or a link to the Board's Web site that contains the poster. The link to the Board's Web site must read, "Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers," and must contain the prescribed introductory language from the poster, which appears in the Appendix to Subpart A of this part. An employer that customarily communicates with its employees by e-mail will satisfy the electronic notice posting requirement by sending employees an e-mail message containing the link described above.

(2) Where a significant portion of an employer's workforce is not proficient in English, the employer must provide the notice required in paragraph (f)(1) of this section in the language the employees speak, in the manner set forth in that paragraph. The Board will provide translations of the link to the Board's Web site for any employer that wishes to display the link on its Web site.

104.203 Are Federal contractors covered under this part?

Yes, Federal contractors are covered. However, contractors may comply with the provisions of this part by posting the notices to employees required under the Department of Labor's notice-posting rule, 29 CFR Part 471.

§ 104.204 What entities are not subject to this part?

(a) The following entities are excluded from the definition of "employer" under the National Labor Relations Act and are not subject to the requirements of this part:

(1) The United States or any wholly owned Government corporation;

(2) Any Federal Reserve Bank;

(3) Any State or political subdivision thereof;

(4) Any person subject to the Railway Labor Act;

(5) Any labor organization (other than when acting as an employer); or

(6) Anyone acting in the capacity of officer or agent of such labor organization.

(b) In addition, employers employing exclusively workers who are excluded from the definition of "employee" under § 104.201 are not covered by the requirements of this part.

(c) This part does not apply to entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.

(d)(1) Finally, this part does not apply to entities whose impact on interstate commerce, although more than de minimis, is so slight that they do not meet the Board's discretionary jurisdiction standards. The most commonly applicable standards are:

(i) The retail standard, which applies to employers in retail businesses, including home construction. The Board will take jurisdiction over any such employer that has a gross annual volume of business of $500,000 or more.

(ii) The nonretail standard, which applies to most other employers. It is based either on the amount of goods sold or services provided by the employer out of state (called "outflow") or goods or services purchased by the employer from out of state (called "inflow"). The Board will take jurisdiction over any employer with an annual inflow or outflow of at least $50,000. Outflow can be either direct—to out-of-state purchasers—or indirect—to purchasers that meet other jurisdictional standards. Inflow can also be direct—purchased directly from out of state—or indirect—purchased from sellers within the state that purchased them from out-of-state sellers.

(2) There are other standards for miscellaneous categories of employers. These standards are based on the employer's gross annual volume of business unless stated otherwise. These standards are listed in the Table to this section.

TABLE TO § 104.204

Employer category	Jurisdictional standard
Amusement industry	$500,000.
Apartment houses, condominiums, cooperatives	$500,000.
Architects	Nonretail standard.
Art museums, cultural centers, libraries	$1 million.
Bandleaders	Retail/nonretail (depends on customer).
Cemeteries	$500,000.
Colleges, universities, other private schools	$1 million.
Communications (radio, TV, cable, telephone, telegraph)	$100,000.
Credit unions	Either retail or nonretail standard.
Day care centers	$250,000.
Gaming industry	$500,000.
Health care institutions:	
Nursing homes, visiting nurses associations	$100,000.
Hospitals, blood banks, other health care facilities (including doctors' and dentists' offices)	$250,000.
Hotels and motels	$500,000.
Instrumentalities of interstate commerce	$50,000.
Labor organizations (as employers)	Nonretail standard.
Law firms; legal service organizations	$250,000.
Newspapers (with interstate contacts)	$200,000.
Nonprofit charitable institutions	Depends on the entity's substantive purpose.
Office buildings; shopping centers	$100,000.
Private clubs	$500,000.
Public utilities	$250,000 or nonretail standard.
Restaurants	$500,000.
Social services organizations	$250,000.
Symphony orchestras	$1 million.
Taxicabs	$500,000.
Transit systems	$250,000.

(3) If an employer can be classified under more than one category, the Board will assert jurisdiction if the employer meets the jurisdictional standard of any of those categories.

(4) There are a few employer categories without specific jurisdictional standards:

(i) Enterprises whose operations have a substantial effect on national defense or that receive large amounts of Federal funds.

(ii) Enterprises in the District of Columbia.

(iii) Financial information organizations and accounting firms.

(iv) Professional sports.

(v) Stock brokerage firms.

(vi) U.S. Postal Service.

(5) A more complete discussion of the Board's jurisdictional standards may be found in *An Outline of Law and Procedure in Representation Cases,* Chapter 1, found on the Board's Web site, *www.nlrb.gov.*

Appendix to Subpart A—Text of Employee Notice

"EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT

"The National Labor Relations Act (NLRA) guarantees the right of employees to organize

and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

"Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

"Under the NLRA, it is illegal for your employer to:

- Prohibit you from soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

"Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten you that you will lose your job unless you support the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take other adverse action against you based on whether you have joined or support the union.

"If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

"Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: *http://www.nlrb.gov.*

You can also contact the NLRB by calling toll-free: 1–866–667–NLRB (6572) or (TTY) 1–866–315–NLRB (1–866–315–6572) for hearing impaired.

"* The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

"This is an official Government Notice and must not be defaced by anyone."

Subpart B—General Enforcement and Complaint Procedures

§ 104.210 How will the Board determine whether an employer is in compliance with this part?

Normally, the Board will determine whether an employer is in compliance when a person files an unfair labor practice charge alleging that the employer has failed to post the employee notice required under this part. Filing a charge sets in motion the Board's procedures for investigating and adjudicating alleged unfair labor practices, and for remedying conduct that the Board finds to be unlawful. *See* NLRA Section 10–11, 29 U.S.C. 160–61, and 29 CFR Part 102, Subpart B.

§ 104.211 What are the procedures for filing a charge?

(a) Filing charges. Any person (other than Board personnel) may file a charge with the Board alleging that an employer has failed to post the employee notice as required by this part. A charge should be filed with the Regional Director of the Region in which the alleged failure to post the required notice is occurring.

(b) Contents of charges. The charge must be in writing and signed, and must be sworn to before a Board agent, notary public, or other person authorized to administer oaths or take acknowledgements, or contain a declaration by the person signing it, under penalty of perjury, that its contents are true and correct. The charge must include:

(1) The charging party's full name and address;

(2) If the charge is filed by a union, the full name and address of any national or international union of which it is an affiliate or constituent unit;

(3) The full name and address of the employer alleged to have violated this part; and

(4) A clear and concise statement of the facts constituting the alleged unfair labor practice.

§ 104.212 What are the procedures to be followed when a charge is filed alleging that an employer has failed to post the required employee notice?

(a) When a charge is filed with the Board under this section, the Regional Director will investigate the allegations of the charge. If it appears that the allegations are true, the Regional Director will make reasonable efforts to persuade the respondent employer to post the required employee notice expeditiously. If the employer does so, the Board expects that there will rarely be a need for further administrative proceedings.

(b) If an alleged violation cannot be resolved informally, the Regional Director may issue a formal complaint against the respondent employer, alleging a violation of the notice-posting requirement and scheduling a hearing before an administrative law judge. After a complaint issues, the matter will be adjudicated in keeping with the Board's customary procedures. *See* NLRA Sections 10 and 11, 29 U.S.C. 160, 161; 29 CFR Part 102, Subpart B.

§ 104.213 What sanctions can be imposed for failure to post the employee notice?

(a) If the Board finds that the respondent employer has failed to post the required employee notices as alleged, the respondent will be ordered

to cease and desist from the unlawful conduct and post the required employee notice, as well as a remedial notice. In some instances additional remedies may be appropriately invoked in keeping with the Board's remedial authority.

(b) Any employer that threatens or retaliates against an employee for filing charges or testifying at a hearing concerning alleged violations of the notice-posting requirement may be found to have committed an unfair labor practice. *See* NLRA Section 8(a)(1) and 8(a)(4), 29 U.S.C. 158(a)(1), (4).

§ 104.214 What other sanctions may be imposed for noncompliance?

(a) Tolling of statute of limitations. When an employee files an unfair labor practice charge, the Board may find it appropriate to excuse the employee from the requirement that charges be filed within six months after the occurrence of the allegedly unlawful conduct, if the employer has failed to post the required employee notice, unless the employee has received actual or constructive notice that the conduct complained of is unlawful. *See* NLRA Section 10(b), 29 U.S.C. 160(b).

(b) Knowing noncompliance as evidence of unlawful motive. If an employer has actual or constructive knowledge of the requirement to post the employee notice and fails or refuses to do so, the Board may consider such a willful refusal as evidence of unlawful motive in a case in which motive is an issue.

Subpart C—Ancillary Matters

§ 104.220 What other provisions apply to this part?

(a) The regulations in this part do not modify or affect the interpretation of any other NLRB regulations or policy.

(b)(1) This subpart does not impair or otherwise affect:

(i) Authority granted by law to a department, agency, or the head thereof; or

(ii) Functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(2) This subpart must be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This part creates no right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Signed in Washington, DC, December 16, 2010.

Wilma B. Liebman,

Chairman.

[FR Doc. 2010–32019 Filed 12–21–10; 8:45 am]

BILLING CODE 7545–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 50 and 51

[EPA–HQ–OAR–2010–0891, FRL–9241–9]

RIN 2060–AQ65

Reasonable Further Progress Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rulemaking.

SUMMARY: The EPA is proposing to revise the Agency's earlier interpretation of its rule regarding requirements for Reasonable Further Progress (RFP) that allowed certain emissions reductions from outside the nonattainment area to be credited toward meeting the RFP requirements for the 1997 8-hour ozone national ambient air quality standards (NAAQS). Specifically, EPA is proposing that States may not take credit for emission reductions from outside the nonattainment area to meet the area's RFP obligations. EPA is also taking comment on whether it would be appropriate for States to rely on emission reductions credit from outside the nonattainment area for RFP obligations.

DATES: *Comments.* Comments must be received on or before February 7, 2011.

Public Hearings. If anyone contacts us requesting a public hearing on or before January 6, 2011, we will hold a public hearing. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on the comment period and the public hearing.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–0891, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Mail:* Air and Radiation Docket and Information Center, Attention Docket ID No. EPA–HQ–OAR–2010–0891, Environmental Protection Agency, 1301 Constitution Ave., NW., Washington, DC 20460. Mail Code: 2822T. Please include two copies if possible.
- *Hand Delivery:* Air and Radiation Docket and Information Center, Attention Docket ID No. EPA–HQ–OAR–2010–0891, Environmental Protection Agency in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation will be 8:30 a.m. to 4:30 p.m. Eastern Standard Time (EST), Monday through Friday, Air and Radiation Docket and Information Center.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2010–0891. The EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to the **SUPPLEMENTARY INFORMATION** section of this document.

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

copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air and Radiation Docket and Information Center is in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744.

FOR FURTHER INFORMATION CONTACT: For further general information on this rulemaking, contact Mr. H. Lynn Dail, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, (C539–01), Research Triangle Park, NC 27711, phone number (919) 541–2363, fax number (919) 541–0824 or by e-mail at *dail.lynn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected directly by this action include State, local, and Tribal governments. Entities potentially affected indirectly by this rule include owners and operators of sources of emissions [volatile organic compounds (VOCs) and nitrogen oxides (NO_X)] that contribute to ground-level ozone concentrations.

B. What should I consider as I prepare my comments for EPA?

1. Submitting CBI. Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed to be CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments. When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this notice will be posted at *http://www.epa.gov/air/ozonepollution/actions.html#impl* under "recent actions."

D. What information should I know about possible public hearing?

EPA will hold a public hearing only if a party notifies EPA by January 3, 2011. Further details concerning a public hearing for this proposed rule will be published in a separate **Federal Register** notice. For updates and additional information on a public hearing, please check EPA's Web site for this rulemaking at *http://www.epa.gov/ozonepollution/actions.html#impl.*

E. How is this notice organized?

The information presented in this notice is organized as follows:

I. General Information
A. Does this action apply to me?
B. What should I consider as I prepare my comments for EPA?
C. Where can I get a copy of this document and other related information?
D. What information should I know about possible public hearings?
E. How is this notice organized?
II. Can emissions reductions from sources located outside the nonattainment area boundary be used to meet RFP requirements?
A. Background
B. NRDC's Petition for Reconsideration of the August 2009 RFP Rule on Credits for Outside Reductions
C. EPA's Proposed Approach to Relying on Credits From Outside the Nonattainment Area to Meet the RFP Obligations and Response to the Request for Reconsideration
III. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132—Federalism
F. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Determination Under Section 307(d)
IV. Statutory Authority
List of Subjects

II. Can emissions reductions from sources located outside the nonattainment area boundary be used to meet RFP requirements?

A. Background

Under EPA's Phase 2 [1] Rule, certain emission reductions from sources located outside a nonattainment area could be credited toward meeting the 1997 ozone NAAQS RFP requirement. In the preamble to that rule, EPA stated that credit could be taken for VOC and NO_X emission reductions within 100 kilometers (km) and 200 km, respectively, outside the nonattainment area under certain circumstances. In addition, if a regional NO_X control strategy were in place in a State, NO_X reductions within that State beyond 200 km could be credited toward meeting the RFP target. In all cases, areas had to include a demonstration that the emissions from outside the nonattainment area had an impact on ozone air quality levels within the nonattainment area. EPA explained that where data indicated that emissions reductions from sources outside a nonattainment area improved ozone air quality within the nonattainment area, it was appropriate to allow States to take RFP credit for such reductions from outside the nonattainment area. This interpretation was consistent with the policy EPA had established under the 1-hour ozone standard "Guidance for Implementing the 1-Hour Ozone and Pre-Existing PM_{10} NAAQS," December

[1] *See* Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2 (70 FR 71612, November 29, 2005).

29, 1997.[2] For a more complete discussion of EPA's rationale for applying this interpretation in the Phase 2 Rule, *see* 70 FR at 71647–49.

On January 27, 2006, the Natural Resources Defense Council (NRDC) filed a petition for review of EPA's Phase 2 Ozone Implementation Rule in the U.S. Court of Appeals for the District of Columbia Circuit (the Court). NRDC challenged several aspects of the Phase 2 Rule including EPA's interpretation that formed the basis of its policy for allowing credit for reductions outside the nonattainment area, namely EPA's interpretation that the intent of section 182(c)(2)(C) is to reduce ambient ozone concentrations within an area rather than to reduce emissions within the nonattainment area. NRDC claimed that EPA's interpretation and implementation of these provisions were both unlawful and arbitrary. NRDC also argued that the rule was arbitrary because it allowed the State to claim credit for emission reductions from selected outside-the-nonattainment-area sources without also adding emissions from other outside sources to the RFP baseline, even where those other sources impact air quality in the nonattainment area.

Following the conclusion of briefing in this case, EPA published a final rule implementing the NAAQS for fine particulate matter (the $PM_{2.5}$ Implementation Rule) where we adopted a different approach for crediting reductions from outside nonattainment areas ("outside" reductions). *See* 72 FR 20586 (April 25, 2007). The $PM_{2.5}$ Rule allows States to take credit for "outside" reductions of NO_X and sulfur dioxide (SO_2) emissions up to 200 km from the nonattainment area (and potentially VOC or ammonia as well) provided certain conditions are met, including that when taking RFP credit for emissions reductions achieved in "outside" areas, the baseline emissions inventory for the nonattainment area contain all, rather than a select few, sources in the outside area.[3] The primary objective of this policy was to reflect the net emission reductions in the "outside" area that could affect the nonattainment area rather than crediting only reductions from selected sources.

Following publication of the $PM_{2.5}$ Implementation Rule, EPA requested from the Court on July 17, 2007, a partial voluntary remand of the Phase 2 Rule to reevaluate and consider whether to revise the RFP interpretation for ozone to assure consistency with the provisions in the $PM_{2.5}$ Implementation Rule. In response to EPA's motion for a partial voluntary remand of the ozone RFP policy, NRDC asked the Court to also vacate this provision. On November 2, 2007, the Court issued an order that vacated and remanded the portion of the Phase 2 Rule that permitted credit for reductions of VOC and NO_X from outside nonattainment areas. On August 11, 2009 (74 FR 40074), EPA issued a final rule to revise the RFP policy in the Phase 2 Rule to be consistent with the interpretation in the $PM_{2.5}$ Implementation rule.

Meanwhile on July 10, 2009, the Court issued its decision on the other issues in the Phase 2 Ozone Implementation Rule case. *NRDC* v. *EPA,* 571 F.3d 1245 (DC Cir. 2009). The Court examined the phrase "in the area" included in separate provisions relating to reductions from the application of Reasonably Available Control Technology (RACT) (CAA sections 172 (1) and 182(b)(2)). In the Phase 2 Rule, EPA had explained that because an interstate emissions trading program [the NO_X State implementation plan (SIP) call's NO_X budget program] would achieve beyond RACT-level NO_X reductions regionally, areas did not have to meet the RACT-level reductions required under CAA section 172(c)(1) solely from within the nonattainment area. The Court, however, concluded that the phrase "in the area" means that reductions must occur within the area and "reductions from outside the nonattainment area do not satisfy the requirement." 571 F.3d at 1256. Although such region-wide reductions could potentially satisfy the statutory requirement that the reductions must be from sources within the nonattainment area, the Court found that EPA had not made a demonstration for all nonattainment areas within the SIP Call area showing that the regional emissions trading program did in fact produce sufficient reductions from inside each nonattainment area to represent RACT-level reductions. *Id.*

B. NRDC's Petition for Reconsideration of the August 2009 RFP Rule on Credits for Outside Reductions

Following the Court's decision, on October 9, 2009, NRDC filed a petition with EPA for administrative reconsideration of the August 2009 final rule revising EPA's interpretation in the Phase 2 Ozone Implementation Rule on allowing credit toward meeting the RFP requirements using emissions reductions from outside of ozone nonattainment areas. In its petition, NRDC based its objections to the rule on the following grounds: (1) The Court's decision on the RACT provisions in the Phase 2 Rule and its interpretation of the phrase "sources in the area" requires that RFP emission reductions also be achieved only from sources within the nonattainment area; (2) EPA presented a new rationale, *i.e.*, there is some ambiguity in the statutory provisions because they do not prohibit credits for reductions from outside the nonattainment area, for which it did not provide an opportunity for comment; (3) EPA offered a new and arbitrary rationale for its choice of the 100 and 200 km distances for "outside" reductions; (4) EPA stated a new and arbitrary rationale, *i.e.*, creditable "outside" reductions must be reasonably expected to provide ozone air quality benefits comparable to those from reductions in the area, for evaluating "outside" reductions; and (5) EPA relied on a new rationale when it explained that sources that are outside the nonattainment area are not necessarily "nearby" for designations purposes and certain factors would need to be considered for judging whether an area is "nearby."

On May 13, 2010, EPA granted reconsideration of the rule based on NRDC's petition and stated it would initiate rulemaking to address the reconsideration. EPA is addressing the reconsideration through this proposed rulemaking. NRDC's first objection is addressed in the following section and EPA believes that the proposed action makes NRDC's other objections moot. Therefore, EPA is not addressing any of those subsequent points here.

C. EPA's Proposed Approach to Relying on Credits From Outside the Nonattainment Area to Meet the RFP Obligations and Response to the Request for Reconsideration

EPA is proposing to set aside its earlier interpretation of the RFP provisions in the August 2009 final rule and no longer permit States to rely on credit for emission reductions from outside the ozone nonattainment area to meet such an area's RFP obligations. In light of the Court's decision in *NRDC* discussed previously, and upon consideration of NRDC's petition for reconsideration, EPA believes that the language in the baseline emissions

[2] The memorandum is available on the EPA Technology and Transfer Network (TTN) Policy and Guidance page for Title I at this Web site: *http://www.epa.gov/ttn/oarpg/t1pgm.html.*

[3] In addition, where State RFP plans rely on "outside" reductions to meet the RFP obligations, such plans must include a technical demonstration showing that such outside emissions significantly affected the $PM_{2.5}$ concentrations within the nonattainment area. And, the area outside the nonattainment area from which creditable reductions are taken must be within the State; areas outside the State but within 200 km would not be eligible for credit for RFP purposes.

provision for determining the emissions reductions required for RFP purposes (CAA sections 182(b)(1)(B) and 182(c)(2)(B)) is almost identical to the language in the RACT provision (section 172(c)(1)) addressed by the Court, and thus compels a similar interpretation. All three sections contain the phrase "in the area" and in examining the RACT provision the Court found that language compelled that the reductions must come from within the nonattainment area, and that reductions from outside the nonattainment area would not satisfy the statutory requirement for reductions "in the area." We see no basis for interpreting that same clause in the RFP provisions in a different manner in light of the Court's decision.

EPA is therefore proposing that for the 1997 ozone NAAQS States may not take credit for VOC or NO_X reductions occurring outside the nonattainment area for purposes of meeting the section 182(b) and (c) RFP requirements. This includes the 15 percent VOC plan requirement for Moderate and above ozone nonattainment areas in section 182(b)(1) and the additional 3 percent per year requirement for Serious and above ozone nonattainment areas in section 182(c)(2)(B).

EPA recognizes that not allowing credit for emissions reductions outside the nonattainment area will make it more challenging for some areas, such as nonattainment areas adjacent to the South Coast Air Quality Management District, namely, Coachella Valley, West Mojave Desert and Ventura County in California, to meet the RFP requirements, and may limit the extent to which regional programs can be creditable toward RFP. For ozone nonattainment areas that are not able to meet the 182(b)(1) and 182(c)(2)(B)(i) RFP requirements, the CAA allows for a lesser amount of RFP if certain conditions are met. For an area to qualify for a less than the required 15 percent emissions reduction, that State must demonstrate that, in the area, New Source Review (NSR) provisions are applicable in the same manner and to the same extent as in an Extreme area, RACT is required for all existing major sources, and the RFP plan includes all feasible measures that can be implemented in light of technological achievability. For purposes of applying this provision, a major source is defined as a source that emits or has the potential to emit at least 5 tons per year of VOC. Similarly, for Serious and above areas to qualify for less than the required 3 percent each year of reductions in emissions to meet their RFP obligations, a State must show that the SIP includes all feasible measures that can be implemented in the area in light of technological achievability. In both instances, the State must also demonstrate that the SIP for the area includes measures that are achieved in practice by sources in the same source category in nonattainment areas of the next higher classification. *See* 182(b)(1)(A)(ii) and 182(c)(2)(B)(ii).

Despite the Court's opinion in *NRDC,* there may remain valid policy reasons for giving States incentive to focus on obtaining emission reductions that are the most beneficial and cost effective for attaining the ozone standards. Also, there may be cases where the most beneficial and cost-effective reductions are from sources located outside the nonattainment area boundaries. In these cases, there may be good reason to credit the emission reductions toward meeting RFP requirements. To this end, EPA is also taking comment on allowing credit for reductions outside the nonattainment area to satisfy the RFP requirements for the 1997 and 2010 ozone NAAQS. If EPA finalizes this proposal to provide that credit cannot be taken for emission reductions from outside the nonattainment area, States that previously submitted plans that relied on such credit will need to submit new RFP demonstrations for those areas.

EPA requests comments on the proposal and the implications for the 1997 ozone NAAQS.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "non-significant regulatory action" because it does not raise novel legal or policy issues arising out of legal mandates.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The CAA imposes the obligation for States to submit SIPs, including RFP, to implement the ozone NAAQS. In this proposal, EPA is merely providing an interpretation of those requirements; thus there is no information collection burden. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations 40 CFR parts 50 and 51 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0594. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an Agency to prepare a regulatory flexibility analysis of any regulation subject to notice and comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the Agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of these proposed regulations on small entities, small entity is defined as: (1) A small business as defined in the Small Business Administration's (SBA) regulations at 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impact of these proposed revisions to the regulations on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This proposal will not impose any requirements on small entities.

We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This action contains no Federal mandate under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (URMA), 2 U.S.C. 1531–1538 for State, local, and Tribal governments, in the aggregate, or the private sector. This action imposes no enforceable duty on any State, local or Tribal governments or the private sector. Therefore, this action is not subject to the requirements of section 202 and 205 of the UMRA.

This action is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism.

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State

and local officials in the development of regulator policies that have Federalism implications." Policies that have "Federalism implications" are defined in the Executive Order to include regulations that 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." This action does not have Federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This proposed rule, if made final, would modify the rules for implementing the 1997 8-hour ozone NAAQS. Thus, Executive Order 13132 does not apply to these proposed regulation revisions.

In the spirit of Executive Order 13121 and consistent with EPA policy to promote communications between EPA and State and local governments, EPA is soliciting comments on this proposal from State and local officials.

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

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications."

This action does not have Tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). They do not have a substantial direct effect on one or more Indian Tribes, since no Tribe has to develop a SIP under these proposed regulatory revisions. Furthermore, these proposed regulation revisions do not affect the relationship or distribution of power and responsibilities between the Federal government and Indian Tribes. The CAA and the Tribal Air Rule establish the relationship of the Federal government and Tribes in developing plans to attain the NAAQS, and these revisions to the regulations do nothing to modify that relationship. This proposed regulation revision does not have Tribal implications. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because this proposed revision addresses whether allowing outside the nonattainment area emission reduction credits for purposes of RFP obligations will adequately ensure attainment and maintenance of the 1997 ozone NAAQS and meet the obligations of the CAA. The NAAQS are promulgated to protect the health and welfare of sensitive population, including children.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

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

This proposed revision to the regulations does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The CAA imposes the obligation for States to submit SIPs, including RFP, to implement the ozone NAAQS. In this proposal, EPA is merely providing an interpretation of those requirements. The proposed interpretation, if promulgated, would no longer permit States to rely on credit for emission reductions from outside a nonattainment area to meet such an area's RFP obligations, which are designed to protect all segments of the general population. As such, they do not adversely affect the health or safety of minority or low-income populations and are designed to protect and enhance the health and safety of these and other populations.

K. Determination Under Section 307(d)

Pursuant to sections 307(d)(1)(E) and 307(d)(1)(V) of the CAA, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to "such other actions as the Administrator may determine."

VII. Statutory Authority

The statutory authority for this action is provided by sections 109; 110; 172; 181 through 185B; and 301(a)(1) of the CAA, as amended (42 U.S.C. 7409; 42 U.S.C. 7410; 42 U.S.C. 7502; 42 U.S.C. 7511–7511f; 42 U.S.C. 7601(a)(1)). This notice is also subject to section 307(d) of the CAA (42 U.S.C. 7407(d)).

List of Subjects

40 CFR Part 50

Environmental protection, Air pollution control, Ozone, Particulate.

40 CFR Part 51

Air pollution control, Intergovernmental relations, Ozone, Nitrogen oxides, Volatile organic compounds.

Dated: December 15, 2010.

Lisa P. Jackson,

Administrator.

[FR Doc. 2010–32139 Filed 12–21–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[ET Docket No. 10—152; FCC 10–194]

Satellite Television Extension and Localism Act of 2010 and Satellite Home Viewer Extension and Reauthorization Act of 2004

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document invites comment the submission of additional information concerning the methodological changes for the digital ILLR model with respect to the calculation of diffraction loss close to an obstacle or leading up to and following a pair of obstacles; and a factual or scientific basis for explaining the additional losses in the line of sight range above and beyond the free space loss and two-ray-loss. The Commission is particularly interested in information on any other techniques for improving the degree to which the model accurately represents the propagation of a digital television signal from a transmitter to a specific receive site and any new data that may be available for improving the model's predictions.

DATES: Comments must be filed on or before January 21, 2011, and reply comments must be filed on or before February 7, 2011.

FOR FURTHER INFORMATION CONTACT: Alan Stillwell, Office of Engineering and Technology, (202) 418–2925, e-mail: *Alan.Stillwell@fcc.gov* or Robert Weller, Office of Engineering and Technology, (202) 418–7397, TTY (202) 418–2989.

ADDRESSES: You may submit comments, identified by ET Docket No. 10–97, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *E-mail:* [Optional: Include the e-mail address only if you plan to accept comments from the general public]. Include the docket number(s) in the subject line of the message.
- *Mail:* [Optional: Include the mailing address for paper, disk or CD–ROM submissions needed/requested by your Bureau or Office. Do not include the Office of the Secretary's mailing address here.]
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, *etc.*) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, *see* the **SUPPLEMENTARY INFORMATION** of this document.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Further Notice of Proposed Rule Making,* ET Docket No. 10–152, FCC 10–194, adopted November 22, 2010, and released November 23, 2010. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: www.fcc.gov.

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121, May 1, 1998.

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/* or the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington DC 20554.

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

Summary of Further Notice of Proposed Rulemaking

1. In the Report and Order, FCC 10–194, adopted November 22, 2010 and released November 23, 2010, in this proceeding, the Commission adopted a new digital TV ILLR model that complies with the requirements and provisions of the Satellite Television Extension and Localism Act of 2010 (STELA). This model will provide a method for accurately, reliably and presumptively estimating the signal strength of digital television stations at individual locations for purposes of determining whether a subscriber to a satellite television service is eligible for delivery of distant network signals from that service. With this model in place, the Commission seeks to further investigate and consider the suggestions in the comments for possible modifications to the digital ILLR model that would further improve the accuracy and improve the accuracy and reliability of its predictions. The Commission would adopt such modifications in a subsequent Report and Order in this proceeding.

2. In this regard, the Commission invites the submission of additional information concerning the methodological changes suggested in the comments by Mr. Shumate for the digital ILLR model with respect to (1) calculation of diffraction loss close to an obstacle or leading up to and following a pair of obstacles and (2) a factual or

scientific basis for explaining the additional losses in the line of sight range above and beyond the free space loss and two-ray-loss. The Commission is requesting a detailed description of the methodological changes that would be offered for addressing these aspects of the model and how they would improve the model to better estimate digital television signal strengths at individual locations. Such additional submissions should also include computer software that implements these methodological changes, to the extent that it is available, for evaluation by our engineering staff. The Commission also requests comment and technical evaluations from interested parties on the changes Mr. Shumate proposes. In his submission in this proceeding, Mr. Shumate provides a brief description of a comparison of estimates generated using the current ILLR model and the "ITWOM" with the improvements he suggests. The Commission now requests additional information on this comparison and also the submission of additional data and information that provides comparative analysis of the two methods. Interested parties are also invited to submit additional proposals and suggestions for improving the digital ILLR model. The Commission is particularly interested in information on any other techniques for improving the degree to which the model accurately represents the propagation of a digital television signal from a transmitter to a specific receive site and any new data that may be available for improving the model's predictions.

A. Initial Regulatory Flexibility Certification.

3. The Regulatory Flexibility Act of 1980, as amended (RFA),[1] requires that an initial regulatory flexibility analysis be prepared for notice and comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." [2] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." [3] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[4] A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[5]

4. The Commission is providing a plan for the model's continued refinement by use of additional data as it may become available. Under that plan, refinements based on additional data may be proposed by referencing the docket of this proceeding, which will be held open indefinitely for this purpose. Consistent with this intention to refine the model as new information becomes available, the Commission is initiating this *Further Notice of Proposed Rulemaking* herein to request comment on possible modifications to the methodology in the digital Individual Location Longley-Rice (ILLR) model to improve its predictive accuracy as suggested by one of the parties responding to the *Notice of Proposed Rulemaking,* 75 FR 46885, August 4, 2010, in this proceeding. The methodological changes to be addressed in the Further NPRM would change the manner in which our predictions are calculated but would not alter the administrative burden on any of the small business entities that would use or be affected by the predictive model. Therefore, the Commission does not expect these changes to have any economic impact on small entities.

5. Therefore, we certify that the proposals in this *Notice of Proposed Rulemaking,* if adopted, will not have a significant economic impact on a substantial number of small entities. If commenters believe that the proposals discussed in the NPRM require additional RFA analysis, they should include a discussion of these issues in their comments and additionally label them as RFA comments. The Commission will send a copy of the NPRM, including a copy of this initial certification, to the Chief Counsel for Advocacy of the SBA.[6]

B. Paperwork Reduction Act Analysis:

6. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4).

Ordering Clauses

7. Pursuant to sections 1, 4, 301, and 339(c)(3) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, 301, 339(c)(3), and section 119(d)(10)(a) of the Copyright Act, 17 U.S.C. 119(d)(10)(a), this *further notice of proposed rulemaking is hereby adopted.*

8. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *further notice of proposed rulemaking,* including the Initial Regulatory Flexibility Certification, and IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

9. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of the Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).[7]

10. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.

Marlene H. Dortch,

Secretary, Federal Communications Commission.

[FR Doc. 2010–32039 Filed 12–21–10; 8:45 am]

BILLING CODE 6712–01–P

[1] The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996).

[2] 5 U.S.C. 605(b).

[3] 5 U.S.C. 601(6).

[4] 5 U.S.C. 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**."

[5] 15 U.S.C. 632. **Federal Register**.

[6] *See* 5 U.S.C. 605(b).

[7] *See* 5 U.S.C. 603(a).

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 211, 212, and 252

[DFARS Case 2009–D043]

Defense Federal Acquisition Regulation Supplement; Reporting of Government-Furnished Property

AGENCY: Defense Acquisition Regulations System; Department of Defense (DoD).

ACTION: Proposed rule with request for comments.

SUMMARY: DoD proposes to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to revise and expand reporting requirements for Government-furnished property to include items uniquely and non-uniquely identified, and to clarify policy for contractor access to Government supply sources.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before February 22, 2011, to be considered in the formation of the final rule.

ADDRESSES: You may submit comments, identified by DFARS Case 2009–D043, using any of the following methods:

o *Regulations.gov: http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by inputting "DFARS Case 2009–D043" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2009–D043." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2009–D043" on your attached document.

E-mail: dfars@osd.mil. Include DFARS Case 2009–D043 in the subject line of the message.

Fax: 703–602–0350.

Mail: Defense Acquisition Regulations System, Attn: Ms. Mary Overstreet, OUSD(AT&L)DPAP/DARS, 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *http://www.regulations.gov* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Mary Overstreet, OUSD (AT&L) DPAP/DARS, 3060 Defense Pentagon, Room 3B855, Washington, DC 20301–3060. Telephone 703–602–0311; facsimile 703–602–0350. Please cite DFARS Case 2009–D043.

SUPPLEMENTARY INFORMATION:

A. Background

Current DFARS policy requires contractors to report to the DoD Item Unique Identification (IUID) Registry property that is classified as equipment, special tooling, and special test equipment items valued at $5,000 or more, and items valued at less than $5,000 when required in accordance with contract terms and conditions. In lieu of these dollar thresholds, reporting requirements are being revised and expanded to require contractors to report Government-furnished property (GFP) with existing unique item identification to the DoD IUID Registry; and all GFP without an existing unique item identification shall be reported to the DoD GFP Hub.

The clause at 252.211–7007, Reporting of Government-Furnished Equipment in the DoD Item Unique Identification (IUID) Registry, is being renamed as "Reporting of Government-Furnished Property," revised to expand definitions, and provide guidance on reporting of GFP to the DoD IUID Registry or the GFP Hub. This clause applies to commercial contracts that have GFP and reporting applicability, and is added to the list of solicitation provisions and contract clauses applicable to the acquisition of commercial items at 212.301.

Additionally, the clause at 252.251–7000 is revised to require electronic receipts of property obtained from a Government supply source.

B. Regulatory Flexibility Act

DoD has prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 603. A copy of the analysis may be obtained from the point of contact specified herein. The analysis is summarized as follows:

The objective of the rule is to improve the accountability and control of DoD assets. This rule proposes to amend the Defense Federal Acquisition Regulation Supplement to revise and expand reporting requirements for Government-furnished equipment to include GFP that is both uniquely and non-uniquely identified, and clarifies policy for contractor access to Government supply sources. The proposed clause requires contractors to identify and report Government-furnished property with existing unique item identification to the DoD IUID Registry; and all GFP without an existing unique item identification shall be reported to the DoD GFP Hub. At this time, DoD is unable to estimate the number of small entities to which this rule will apply. Therefore, DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2009–D043) in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96–511) applies because the rule imposes information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* The information collection requirements under this proposed rule were formerly approved by the Office of Management and Budget, under clearance number 0704–0246. The requirements of this proposed rule are expected to have only a marginal impact, and are not expected to change the overall burden hours approved under clearance number 0704–0246. The rule removes the mandatory $5,000 unit acquisition cost dollar threshold for reporting. This does not significantly impact items valued at less than $5,000 in unit acquisition cost as they were also previously required to be reported if they were serially managed, mission essential, sensitive, or controlled inventory. While the proposed rule adds reporting of Government-furnished material and reparables, this additional requirement is expected to be offset by removal of the $5,000 mandatory reporting threshold. Interested parties are invited to provide comments on the potential impact.

List of Subjects in 48 CFR Parts 211, 212, and 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, DoD proposes to amend 48 CFR parts 211, 212, and 252 as follows:

1. The authority citation for 48 CFR parts 211, 212, and 252, continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 211—DESCRIBING AGENCY NEEDS

2. Amend section 211.274–2, by revising paragraph (b)(2)(ii) to read as follows:

211.274–2 Policy for unique item identification.

* * * * *

(b)(2)(ii) The DoD Unique Identification Policy Office must receive a copy of the determination and findings required by paragraph (b)(2)(i) of this subsection. Send the copy to DPAP/Program Development and Implementation, Deputy Director, 3060

Defense Pentagon, 3B855, Washington, DC 20301–3060; or by facsimile to 703–602–6047.

3. Revise section 211.274–4 to read as follows:

211.274–4 Policy for reporting of Government-furnished property.

(a) It is DoD policy that all Government-furnished property be recorded in the DoD Item Unique Identification (IUID) Registry or GFP Hub, as defined in the clause at 252.211–7007, Reporting of Government-Furnished Property, as follows:

(1) All property with an existing assigned Unique Item Identifier (UII) shall be reported to the DoD IUID Registry.

(2) All property without an existing assigned UII shall be reported to the GFP Hub.

(b) The following items are not required to be reported:

(1) Contractor-acquired property as defined in FAR part 45;

(2) Property under any statutory leasing authority;

(3) Property to which the Government has acquired a lien or title solely because of partial, advance, progress, or performance-based payments;

(4) Intellectual property or software; and

(5) Real property.

4. Revise section 211.274–6 to read as follows:

211.274–6 Contract clauses.

(a)(1) Use the clause at 252.211–7003, Item Identification and Valuation, in solicitations and contracts that—

(i) Require item identification or valuation, or both, in accordance with 211.274–2 and 211.274–3; or

(ii) Are cost-reimbursement contracts that may result in the acquisition of contractor-acquired property (*see* FAR 45.101).

(2) Complete paragraph (c)(1)(ii) of the clause with the contract line, subline, or exhibit line item number and description of any item(s) below $5,000 in unit acquisition cost for which DoD unique item identification or a DoD-recognized unique identification equivalent is required in accordance with 211.274–2(a)(2) or (3).

(3) Complete paragraph (c)(1)(iii) of the clause with the applicable attachment number, when DoD unique item identification or a DoD-recognized unique identification equivalent is required in accordance with 211.274–2(a)(4) for DoD serially managed subassemblies, components, or parts embedded within deliverable items.

(4) Use the clause with its Alternate I if—

(i) An exception in 211.274–2(b) applies; or

(ii) Items are to be delivered to the Government and none of the criteria for placing a unique item identification mark applies.

(b) Use the clause at 252.211–7007, Reporting of Government-Furnished Property, in solicitations and contracts that contain the clause at—

(1) FAR 52.245–1, Government Property; or

(2) FAR 52.245–2, Government Property Installation Operation Services.

(c) Use the clause at 252.211–7008, Use of Government-Assigned Serial Numbers, in solicitations and contracts that—

(1) Contain the clause at 252.211–7003, Item Identification and Valuation; and

(2) Require the contractor to mark major end items under the terms and conditions of the contract.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

5. Revise section 212.301 to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f) The following additional provisions and clauses apply to DoD solicitations and contracts for the acquisition of commercial items. If the offeror has completed the provisions listed in paragraph (f)(i) or (ii) of this section electronically as part of its annual representations and certifications at *https://orca.bpn.gov,* the contracting officer may consider this information instead of requiring the offeror to complete these provisions for a particular solicitation.

(i) Use one of the following provisions as prescribed in part 225:

(A) 252.225–7000, Buy American Act—Balance of Payments Program Certificate.

(B) 252.225–7020, Trade Agreements Certificate.

(C) 252.225–7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate.

(ii) Use the provision at 252.212–7000, Offeror Representations and Certifications—Commercial Items, in all solicitations for commercial items exceeding the simplified acquisition threshold. If an exception to 10 U.S.C. 2410i applies to a solicitation exceeding the simplified acquisition threshold (*see* 225.7603), indicate on an addendum that "The certification in paragraph (b) of the provision at 252.212–7000 does not apply to this solicitation."

(iii) Use the clause at 252.212–7001, Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items, in all solicitations and contracts for commercial items, completing paragraphs (a) and (b), as appropriate.

(iv) Provisions and clauses prescribed elsewhere in DFARS as follows:

(A) Use the provision at 252.209–7001, Disclosure of Ownership or Control by the Government of a Terrorist Country, as prescribed in 209.104–70(a).

(B) Use the clause at 252.211–7003, Item Identification and Valuation, as prescribed in 211.274–6.

(C) Use the clause at 252.211–7006, Radio Frequency Identification, as prescribed in 211.275–3.

(D) Use the clause at 252.211–7007, Reporting of Government-Furnished Property, as prescribed in DFARS 211.274–6.

(E) Use the provision at 252.225–7010, Commercial Derivative Military Article—Specialty Metals Compliance Certificate, as prescribed in 225.7003–5(b).

(F) Use the clause at 252.225–7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, as prescribed in 225.7402–4.

(G) Use the clause at 252.225–7043, Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States, in solicitations and contracts that include the clause at 252.225–7040.

(H) Use the clause at 252.232–7009, Mandatory Payment by Governmentwide Commercial Purchase Card, as prescribed in 232.1110.

(I) Use the clause at 252.232–7010, Levies on Contract Payments, as prescribed in 232.7102.

(J) Use the clause at 252.232–7011, Payments in Support of Emergencies and Contingency Operations, as prescribed in 232.908.

(K) Use the clause at 252.246–7003, Notification of Potential Safety Issues, as prescribed in 246.371.

(L) Use the provision at 252.247–7026, Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade, as prescribed in 247.574(e).

(M) Use the clause at 252.247–7027, Riding Gang Member Requirements, as prescribed in 247.574(f).

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Revise section 252.211–7007 to read as follows:

252.211–7007 Reporting of Government-Furnished Property.

As prescribed in 211.274–6(b), use the following clause:

Reporting of Government-Furnished Property (Date)

(a) *Definitions.* As used in this clause—

Acquisition cost, for Government-furnished property, means the amount identified in the contract, or in the absence of such identification, the item's fair market value.

Commercial and Government entity (CAGE) code means—

(1) A code assigned by the Defense Logistics Information Service (DLIS) to identify a commercial or Government entity; or

(2) A code assigned by a member of the North Atlantic Treaty Organization that DLIS records and maintains in the CAGE master file. This type of code is known as an "NCAGE code."

Government-furnished property (GFP) means property in the possession of, or directly acquired by, the Government and subsequently furnished to the contractor for performance of a contract, including performance by subcontractors and at prime contractor alternate locations. Government-furnished property includes reparables, *e.g.,* spares and property furnished for repair, maintenance, overhaul, or modification; and Government-furnished material that is requisitioned from Government supply sources without reimbursement by the contractor.

GFP Hub means an automated data base for capturing records of Government-furnished property sent on a non-reimbursable basis to a contractor without a unique item identifier assigned.

Item means a single hardware article or a single unit formed by a grouping of subassemblies, components, or constituent parts.

IUID Registry means—

(1) The authoritative source of Government unit acquisition cost for items with unique item identifiers acquired after January 1, 2004, for unique item identifier pedigree data established at delivery, as defined by DFARS 252.211–7003;

(2) The master data source for Government-furnished property; and

(3) An authoritative source for establishing the full cost of end-item equipment.

National stock number (NSN) means a 13-digit stock number used to identify items of supply. It consists of a 4-digit Federal Supply Code and a 9-digit National Item Identification Number.

Nomenclature means—

(1) The combination of a Government-assigned type designation and an approved item name;

(2) Names assigned to kinds and groups of products; or

(3) Formal designations assigned to products by customer or supplier (such as model number, or model type, design differentiation, specific design series or configuration).

Part or identifying number (PIN) means the identifier assigned by the original design activity, or by the controlling nationally recognized standard, that uniquely identifies (relative to that design activity) a specific item.

Serial number means an assigned designation that provides a means of identifying a specific individual item.

Special test equipment means either single or multipurpose integrated test units engineered, designed, fabricated, or modified to accomplish special purpose testing in performing a contract. It consists of items or assemblies of equipment including foundations and similar improvements necessary for installing special test equipment, and standard or general purpose items or components that are interconnected and interdependent so as to become a new functional entity for special testing purposes. Special test equipment does not include material, special tooling, real property, or equipment items used for general testing purposes, or property that with relatively minor expense can be made suitable for general purpose use.

Special tooling means jigs, dies, fixtures, molds, patterns, taps, gauges, and all components of these items, including foundations and similar improvements necessary for installing special tooling, and which are of such a specialized nature that without substantial modification or alteration their use is limited to the development or production of particular supplies or parts thereof or to the performance of particular services. Special tooling does not include material, special test equipment, real property, equipment, machine tools, or similar capital items.

Supply condition code means a classification of materiel in terms of readiness for issue and use or to identify action underway to change the status of materiel.

Supply condition code A—serviceable means new, used, repaired, or reconditioned materiel which is serviceable and issuable to all customers without limitation or restriction; includes materiel with more than 6 months shelf life remaining.

Supply condition code F—unserviceable (repairable) means economically reparable materiel which requires repair, overhaul, or reconditioning; includes reparable items which are radioactively contaminated.

Supply condition code G—unserviceable (incomplete) means materiel requiring additional parts or components to complete the end item prior to issue.

Supply condition code H—unserviceable (beyond repair) means materiel which has been determined to be unserviceable and does not meet repair criteria; includes condemned items which are radioactively contaminated.

Supply condition code J—suspended (misidentified or misdirected to the facility) means materiel in stock which has been suspended from issue pending condition classification or analysis, where the true condition is not known.

Type designation means a combination of letters and numbers arranged in a specific sequence to provide a short significant method of identification.

Unique item identifier (UII) means a set of data elements permanently marked on an item that is globally unique and unambiguous and never changes, in order to provide traceability of the item throughout its total life cycle. The term includes a concatenated UII or a DoD recognized unique identification equivalent.

Unit of issue means the physical measurement of count or quantity (such as each, dozen, gallon, or kilogram) in which an item is procured, stored, and released.

(b) *Requirement for reporting of Government-furnished property (GFP) to the DoD Item Unique Identification (IUID) Registry or GFP Hub.* Except as provided in paragraph (c) of this clause, the contractor shall report to the DoD IUID Registry or the GFP Hub, as appropriate—

(1) All GFP with an existing Unique Item Identifier (UII) assigned shall be reported to the DoD IUID Registry.

(2) All GFP without an existing UII assigned shall be reported to the GFP Hub.

(c) *Exceptions.* Paragraph (b) of this clause does not apply to—

(1) Contractor-acquired property that has not been delivered to, and accepted by, the Government;

(2) Property under any statutory leasing authority;

(3) Property to which the Government has acquired a lien or title solely because of partial, advance, progress, or performance-based payments;

(4) Intellectual property or software; or

(5) Real property.

(d) When required by contract terms and conditions, the contractor shall assign a UII to each item of GFP, including those items previously reported to the GFP Hub. Upon UII assignment and reporting, the contractor shall debit the property record from the GFP Hub.

(e) *Procedures for establishing UIIs.* To permit reporting of virtual UIIs to the DoD IUID Registry, the Contractor's property management system shall enable the following data elements in addition to those required by paragraphs (f)(1)(iii)(A)(1) through (3), (5), (7), (8), and (10) of the Government Property clause of this contract (FAR 52.245–1):

(1) Parent UII.

(2) UII as required by FAR 52.245–1(f)(1)(iii)(A)(4).

(3) Received/sent (shipped) date as required by FAR 52.245–1(f)(1)(iii)(A)(9).

(4) Category code, if applicable ("ST" for special tooling, "STE" for special test equipment).

(5) Supply condition code ("A" for serviceable, "F" for unserviceable (repairable), "G" for unserviceable (incomplete), "H" for unserviceable (beyond repair), "J" suspended (misidentified or misdirected to the facility).

(6) Accountable contract number (as required by FAR 52.245–1(f)(1)(iii)(A)(6)).

(7) Commercial and Government Entity (CAGE) code on the accountable contract.

(8) Mark record.

(i) Bagged or tagged code (for items too small to individually tag or mark).

(ii) Contents (the type of information recorded on the item, *e.g.,* item internal control number).

(iii) Effective date (date the mark is applied).

(iv) Added or removed code/flag.

(v) Marker code (designates which code is used in the marker identifier, *e.g.,* D=CAGE, UN=DUNS, LD=DODAAC).

(vi) Marker identifier, *e.g.,* Contractor's CAGE code or DUNS number.

(vii) Medium code; how the data is recorded, *e.g.,* barcode, contact memory button.

(viii) Value, *e.g.,* actual text or data string that is recorded in its human-readable form.

(ix) Set (used to group marks when multiple sets exist).

(f) *Procedures for reporting of Government-furnished property to the IUID Registry or the GFP Hub.* Except as provided in paragraph (c) of this clause—

(1) GFP with a UII assigned—The Contractor shall establish and report to the IUID Registry the information required by FAR clause 52.245–1, paragraphs (e) and (f)(1)(iii), in accordance with the data submission procedures at *http://www.acq.osd.mil/dpap/pdi/uid/data_submission_information.html.*

(2) GFP without a UII assigned—The Contractor shall submit the following information in accordance with the instructions at *http://www.acq.osd.mil/dpap/pdi/uid/data_submission_information.html.* Common data elements include the following:

(i) Description/nomenclature.

(ii) Type designation, if assigned.

(iii) NSN.

(iv) PIN.

(v) CAGE code of reporting contractor.

(vi) Supply condition code per paragraph (e)(5) of this clause.

(vii) Unit acquisition cost.

(viii) Contract number.

(ix) Quantity.

(x) Unit of issue.

(xi) Serial number, if assigned.

(g) *Procedures for updating the DoD IUID Registry.* The Contractor shall update the DoD IUID Registry at *https://www.bpn.gov/iuid* for changes in status, mark, custody, condition code, or disposition of items—

(1) Delivered or shipped from the Contractor's plant, under Government instructions, except when shipment is to a subcontractor or other location of the Contractor;

(2) Consumed or expended, reasonably and properly, or otherwise accounted for, in the performance of the contract as determined by the Government property administrator, including reasonable inventory adjustments;

(3) Disposed of; or

(4) Transferred to a follow-on or other contract. (End of clause)

7. Amend section 252.251–7000 by removing "(NOV 2004)" and adding in its place "(XXX–XXXX)", revising introductory paragraph (c), and revising paragraphs (d) through (f) to read as follows:

252.251–7000 Ordering From Government Supply Sources.

* * * * *

(c) When placing orders for Government stock [on a reimbursable basis], the Contractor shall—

* * *

(d) When placing orders for Government stock on a non-reimbursable basis, the Contractor shall—

(1) Comply with the requirements of the Contracting Officer's authorization.

(2) When using electronic transactions to submit requisitions on a non-reimbursable basis only, orders shall be placed by authorizing contract number using the Defense Logistics Management System (DLMS) Supplement to Federal Implementation Convention 511R, Requisition; and receipts shall be acknowledged by authorizing contract number using the DLMS Supplement 527R, Receipt, Inquiry, Response and Material Receipt Acknowledgement.

(e) Only the Contractor may request authorization for subcontractor use of Government supply sources. The Contracting Officer will not grant authorizations for subcontractor use without approval of the Contractor.

(f) Government invoices shall be submitted to the Contractor's billing address, and Contractor payments shall be sent to the Government remittance address specified below:

Contractor's Billing Address (include point of contact and telephone number):

Government Remittance Address (include point of contact and telephone number):

(End of clause)

[FR Doc. 2010–32099 Filed 12–21–10; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 531 and 533

[Docket No. NHTSA–2010–0175]

Passenger Car and Light Truck Average Fuel Economy Standards Request for Product Plan Information—Model Years 2010–2025

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

ACTION: Request for comments.

SUMMARY: The purpose of this request for comments is to acquire updated information regarding vehicle manufacturers' future product plans to assist the agency in assessing what corporate average fuel economy (CAFE) standards should be established for passenger cars and light trucks manufactured in model years 2017 and beyond. NHTSA must establish CAFE standards pursuant to the Energy Policy and Conservation Act, Public Law 94–163, as amended by the Energy Independence and Security Act (EISA) of 2007, Public Law 110–140. This request is being issued in preparation for an upcoming Joint Notice of Proposed Rulemaking being undertaken by NHTSA and EPA regarding future CAFE and greenhouse gas (GHG) standards currently anticipated to be released by September 30, 2011.

DATES: Comments must be received on or before February 22, 2011.

ADDRESSES: You may submit comments [identified by Docket No. NHTSA–2010–0175] by any of the following methods:

- Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- Hand Delivery or Courier: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. Telephone: 1–800–647–5527.
- Fax: 202–493–2251

Instructions: All submissions must include the agency name and docket number for this proposed collection of information. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://www.dot.gov/privacy.html.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and follow the online instructions, or visit the Docket Management Facility at the street address listed above.

FOR FURTHER INFORMATION CONTACT: Mr. Ken Katz, Fuel Economy Division, Office of International Policy, Fuel Economy and Consumer Programs, at (202) 366–0846, facsimile (202) 493–2290, electronic mail *ken.katz@dot.gov.*

For legal issues, call Ms. Rebecca Yoon, Office of the Chief Counsel, at (202) 366–2992.

SUPPLEMENTARY INFORMATION:

I. Introduction

NHTSA has been issuing Corporate Average Fuel Economy (CAFE) standards for the last 30 years under the Energy Policy and Conservation Act (EPCA). The CAFE program requires manufacturers to improve the fuel economy of vehicles sold in the United States which helps the Nation conserve petroleum, saves consumers money at the pump, and promotes energy independence and security by reducing dependence on foreign oil. Additionally, since higher fuel economy means that less fuel needs to be combusted to move a vehicle down the road, and since the by-product of fuel consumption is carbon dioxide (CO_2) emissions, the CAFE program also reduces the effects of climate change by reducing those emissions from the tailpipes of new motor vehicles.

Congress amended EPCA in 2007 through the Energy Independence and Security Act (EISA). EISA added several requirements for NHTSA to fulfill in developing passenger car and light truck CAFE standards for each model year (MY). For example, besides the requirement to set standards at the maximum feasible level for each model year, EISA added a requirement that MYs 2011–2020 standards must be set to ensure that the industry-wide average of all new passenger cars and light trucks, combined, is at least 35 miles per gallon (mpg) by MY 2020. EISA also required the CAFE standards to be based on one or more vehicle attributes related to fuel economy and to be expressed in the form of a mathematical function. The attribute that NHTSA chose for the MYs 2011–2016 standards was vehicle footprint (which is defined as a vehicle's wheelbase times its average track width), and the mathematical function defining those standards is a "target curve" which is more stringent for smaller vehicles and less stringent for larger vehicles. The fleet wide average fuel economy that a particular manufacturer must achieve thus depends on the size mix of its fleet. This approach ensures that all manufacturers will be required to incorporate fuel-saving technologies across a broad range of their passenger car and light truck fleets.

Also in 2007, the Supreme Court ruled in *Massachusetts* v. *EPA* that the Clean Air Act allows EPA to regulate emissions of greenhouse gas (GHG) emissions if the agency determines that these gases endanger public health and welfare. In 2009, EPA issued the requisite endangerment finding,[1] and began working toward the regulation of motor vehicle GHG emissions.

Since 2008, NHTSA has been working closely with EPA to develop harmonized CAFE and GHG standards for passenger cars and light trucks, in order to ensure coordinated federal policy and reduce the burden on manufacturers. Following the success of the joint MYs 2012–2016 CAFE and GHG standards,[2] on May 21, 2010, President Obama requested that the two agencies begin evaluating potential standards for MYs 2017–2025.[3] NHTSA and EPA released a Notice of Intent regarding such standards on September 30, 2010,[4] along with an Interim Technical Assessment Report developed jointly by NHTSA, EPA, and the California Air Resources Board (CARB).[5] The agencies subsequently issued a Supplemental Notice of Intent on November 30, 2010,[6] and expect to release a Notice of Proposed Rulemaking (NPRM) by September 30, 2011.

To assist the agency in analyzing potential CAFE standards for MYs 2017 and beyond, NHTSA is requesting any updates to product plans previously provided by vehicle manufacturers, as well as production data through the recent past, including data about engines, transmissions, vehicle mass reduction technologies, and hybrid technologies for MY 2010 through MY 2025 passenger cars and light trucks and the assumptions underlying those plans. If manufacturers have not previously submitted product plan information to NHTSA and wish to do so (especially those who previously had their plans submitted as part of another manufacturer's submission), NHTSA also requests such information from them. NHTSA requests information for MYs 2010–2025 primarily as a basis for subsequent discussions with individual manufacturers regarding their capabilities for the MYs 2017–2025 time frame as we develop the upcoming NPRM. The information received will also supplement other information that will be used by NHTSA to develop a realistic forecast of the vehicle market in MY 2017 and beyond, and to evaluate what technologies may feasibly be applied by manufacturers to achieve compliance with potential future standards. Information regarding earlier model years may help the agency to better account for cumulative effects such as cost reductions due to learning. This information will help the agencies check the estimates they employed for rulemaking against manufacturer-reported technology costs and effectiveness, and also to help the agencies understand product mix and technology application trends during model years for which the agency is currently receiving CAFE compliance data. Information regarding later model years may help the agency gain a better understanding of how manufacturers' plans through MY 2025 relate to their longer-term expectations regarding foreseeable regulatory requirements, market trends, and prospects for more advanced technologies (such as HCCI engines, dual loop cooled EGR, plug-in hybrid, electric, and fuel cell vehicles, among others).

NHTSA will also consider information regarding the model years requested when considering manufacturers' planned schedules for redesigning and freshening their products, in order to examine how manufacturers anticipate tying technology introduction to product design schedules. In addition, the agency is requesting information regarding manufacturers' estimates of the future vehicle population, and fuel economy improvements and incremental costs attributed to technologies reflected in those plans. The request for information is detailed in appendices to this notice. NHTSA has also included a number of questions directed primarily toward vehicle manufacturers, whereas others may also be applicable for suppliers that are interested in supplying independent responses. They can be found in Appendix A to this notice. Answers to those questions will assist the agency in its analysis.

Given the importance that responses to this request for comment may have in informing NHTSA's proposed CAFE rulemaking, either as part of the basis for the standards or as an independent check on them, NHTSA intends to review carefully and critically all data provided by commenters. It is therefore important that commenters fully respond to each question, particularly by providing information regarding the

[1] Information about EPA's endangerment finding is available at *http://www.epa.gov/climatechange/endangerment.html* (last accessed November 22, 2010).

[2] Final rule establishing the MYs 2012–2016 CAFE and GHG standards, 75 Fed. Reg. 25324 (May 7, 2010).

[3] The Presidential Memorandum is available at *http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-fuel-efficiency-standards* (last accessed November 22, 2010).

[4] Notice of Intent, 75 FR 62739 (Oct. 13, 2010).

[5] Available at *http://www.nhtsa.gov/fuel-economy* (last accessed November 22, 2010).

[6] Supplemental Notice of Intent, 75 FR 76337 (Dec. 8, 2010).

basis for technology costs and effectiveness estimates. Although NHTSA practice has typically been to request product plan information reaching several years beyond the end of the anticipated rulemaking time frame in order to provide this context, many manufacturers submitting comments in the past have provided relatively little detail in response for those later model years. Considering past responses to these requests, we expect that most manufacturers' product plans are currently well defined through approximately 2015, somewhat less defined through approximately 2020, and thereafter, increasingly fluid and open to change. As NHTSA and EPA are working jointly to consider standards that cover MYs 2017–2025, we request that manufacturers provide as much information as they can, spanning as many of these model years as feasible, and also summarize major sources of uncertainty. For example, if a manufacturer's plans depend significantly on fuel prices, we request that the manufacturer indicate which fuel prices they have assumed, as well as what general differences in product plans could be expected given significantly lower or higher future fuel prices. Also, as fuel economy regulations are not defined beyond MY 2016, and GHG regulations currently do not change after MY 2016, it is expected that product plan information may be based on requirements continuing to reflect MY 2016 levels through MY 2025. However, if other assumptions have been used, NHTSA requests those assumptions be provided.

To facilitate the submission of comments and to help ensure the conformity of data received regarding manufacturers' product plans from MY 2010 through MY 2025, NHTSA has developed spreadsheet templates for manufacturers' use. The uniformity provided by these spreadsheets is intended to aid and expedite our review, integration, and analysis of the information provided. These templates are the agency's strongly preferred format for data submittal, and can be found on the CAFE webpage at *http://www.nhtsa.gov/fuel-economy* or can be requested from Mr. Ken Katz at *ken.katz@dot.gov.* The templates include an automated tool (*i.e.,* a macro) that performs some auditing to identify missing or potentially erroneous entries. The appendices to this document also include sample tables that manufacturers may refer to when submitting their data to the agency.

In addition, NHTSA would like to note that we will share the information submitted in response to this notice with the Environmental Protection Agency (EPA). This sharing will facilitate NHTSA's and EPA's consideration of the appropriate factors to be used in establishing fuel economy and GHG standards, respectively, for MY 2017 and beyond. Both agencies will ensure that confidential information that is shared is protected from disclosure in accordance with their regulations and practices in this area.

II. Submission of Comments

How do I prepare and submit comments?

Comments should be prepared using the spreadsheet template described above. Please include the docket number of this document in your comments. Please submit two copies of your comments, including the attachments, to Docket Management at the address given above under **ADDRESSES**. Alternatively, comments may also be submitted to the docket electronically by logging onto *http://www.regulations.gov.* Click on the "Help" tab at the top of the page and follow the instructions for finding a regulation and filing the comment electronically.

How can I be sure that my comments were received?

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

How do I submit confidential business information?

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

Will the agency consider late comments?

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. The agency retains discretion to consider late-filed comments, but emphasizes that comments will be most helpful and informative to the agency if submitted in a timely manner, so that the agency may begin reviewing submissions as soon as possible and return to commenters with follow-up questions as necessary.

How can I read the comments submitted by other people?

You may read the comments received by Docket Management at the address given above under **ADDRESSES**. The hours of the Docket are indicated above in the same location. You may also see the comments on the Internet. To read the comments on the Internet, take the following steps:

(1) Go to *http://www.regulations.gov.*

(2) Check the box for "View results by docket folder."

(3) In the field marked "Keyword," type in the docket number found at the beginning of this notice.

(4) On the results page, click on the desired comments. You may download the comments. However, since the comments are imaged documents, instead of word processing documents, the downloaded comments may not be word searchable.

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

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://www.dot.gov/privacy.html.*

Authority: 49 U.S.C. 32902; delegation of authority at 49 CFR 1.50.

Joseph S. Carra,

Acting Associate Administrator for Rulemaking.

Appendix A

I. Definitions

As used in these appendices—

1. "Automobile," "fuel economy," "manufacturer," and "model year (MY)," have the meaning given them in Section 32901 of Chapter 329 of Title 49 of the United States Code, 49 U.S.C. 32901.

2. "Basic engine" has the meaning given in 40 CFR 600.002–93(a)(21).

3. "Cargo-carrying volume," "gross vehicle weight rating" (GVWR), and "passenger-carrying volume" are used as defined in 49 CFR 523.2.

4. "CARB" means California Air Resources Board

5. "Domestically manufactured" is used as defined in Section 32904(b)(2) of Chapter 329, 49 U.S.C. 32904(b)(2).

6. "ED&T" means Engineering, Design and Testing

7. "Footprint" means the product of average track width (measured in inches and rounded to the nearest tenth of an inch) times wheelbase (measured in inches and rounded to the nearest tenth of an inch) divided by 144 and then rounded to the nearest tenth of a square foot as described in 49 CFR 523.2.

8. "Light truck" means an automobile of the type described in 49 CFR 523.3 and 523.5.

9. A "model" of passenger car is a line, such as the Chevrolet Impala, Ford Fusion, Honda Accord, etc., which exists within a manufacturer's fleet.

10. "Model Type" is used as defined in 40 CFR 600.002–93(a)(19).

11. "MY" means model year

12. "Passenger car" means an automobile of the type described in 49 CFR 523.3 and 523.4.

13. "Percent fuel consumption improvements" means that percentage which corresponds to the amount by which respondent could improve the fuel consumption of vehicles in a given model or class through the application of a specified technology, averaged over all vehicles of that model or in that class which feasibly could use the technology. Projections of percent fuel consumption improvement should be based on the assumption of maximum efforts by respondent to achieve the highest possible fuel economy increase through the application of the technology while holding other performance characteristics constant (such as 0–60 miles-per-hour (mph) time, gradeability, towing capacity, NVH, etc.) relative to the respondent's 2010MY vehicles/fleet. The baseline for determination of percent fuel consumption improvement is the level of technology and vehicle performance for respondent's 2010 model year passenger cars or light trucks in the equivalent class.

14. "Percent production implementation rate" means that percentage which corresponds to the maximum number of passenger cars or light trucks of a specified class which could feasibly be produced with the technology if respondent made maximum efforts to apply the technology by a specified model year.

15. "Production" means production for the U.S. market.

16. "Production percentage" means the percent of respondent's passenger cars or light trucks of a specified model projected to be manufactured in a specified model year.

17. "Project" or "projection" refers to the best estimates made by respondent, whether or not based on less than certain information.

18. "R&D" means research and development

19. "Redesign" means any change, or combination of changes, to a vehicle that would change its weight by 50 pounds or more or change its frontal area or aerodynamic drag coefficient by 2 percent or the implementation of new engine.

20. "Refresh" means any change, or combination of changes, to a vehicle that would change its weight by less than 50 pounds and would not change its frontal area or aerodynamic drag coefficient.

21. "Relating to" means constituting, defining, containing, explaining, embodying, reflecting, identifying, stating, referring to, dealing with, or in any way pertaining to.

22. "Respondent" means each manufacturer (including all its divisions) providing answers to the questions set forth in this appendix, and its officers, employees, agents or servants.

23. "RPE" means retail price equivalent

24. "Test Weight" is used as defined in 40 CFR 86.082–2.

25. "Track Width" means the lateral distance between the centerlines of the base tires at ground, including the camber angle.

26. "Truckline" means the name assigned by the Environmental Protection Agency to a different group of vehicles within a make or car division in accordance with that agency's 2001 model year pickup, van (cargo vans and passenger vans are considered separate truck lines), and special purpose vehicle criteria.

27. "Variants of existing engines" means versions of an existing basic engine that differ from that engine in terms of displacement, method of aspiration, induction system or that weigh at least 25 pounds more or less than that engine.

28. "Wheelbase" means the longitudinal distance between front and rear wheel centerlines.

II. Assumptions

All assumptions concerning emission standards, damageability regulations, safety standards, etc., should be listed and described in detail by the respondent.

III. Specifications—Passenger Car and Light Truck Data

Go to *http://www.nhtsa.gov/fuel-economy* for spreadsheet templates.

1. Identify all passenger car and light truck models offered for sale in MY 2010 whose production each respondent projects discontinuing before MY 2017 and identify the last model year in which each will be offered.

2. Identify all basic engines offered by respondent in MY 2010 passenger cars and light trucks which respondent projects it will cease to offer for sale in passenger cars and light trucks before MY 2017, and identify the last model year in which each will be offered.

3. For each model year 2010–2025, list all known or projected car and truck lines and provide the information specified below for each model type. Model types that are essentially identical except for their nameplates (*e.g.,* Ford Fusion/Lincoln MKZ) may be combined into one item. Engines having the same displacement but belonging to different engine families are to be grouped separately. Within the fleet, the vehicles are to be sorted first by car or truck line, second by basic engine, and third by transmission type. For each model type, a specific indexed engine and transmission are to be identified. As applicable, an indexed predecessor model type is also to be identified. Spreadsheet templates can be found at *http://www.nhtsa.gov/fuel-economy*. These templates include codes and definitions for the data that the agency is seeking, including, but not limited to the following:

A. General Information

1. Vehicle Number—a unique number assigned to each model.

2. Manufacturer—manufacturer's name (*e.g.,* Toyota).

3. Model—name of model (*e.g.,* Corolla).

4. Nameplate—vehicle nameplate (*e.g.,* Corolla Matrix).

5. Primary Fuel—classified as CNG = compressed natural gas; D = diesel; E = electricity; E–85 = ethanol; E100 = neat ethanol; G = gasoline; H = hydrogen; LNG = liquefied natural gas; LPG = propane; M85 = methanol; M100 = neat methanol.

6. Fuel Economy on Primary Fuel—measured in miles per gallon; laboratory fuel economy (weighted FTP+highway gasoline-equivalent gallon (GEG), exclusive of any calculation under 49 U.S.C. 32905).

7. Secondary Fuel—classified as CNG = compressed natural gas; D = diesel; E = electricity; E–85 = ethanol; E100 = neat ethanol; G = gasoline; H = hydrogen; LNG = liquefied natural gas; LPG = propane; M85 = methanol; M100 = neat methanol.

8. Fuel Economy on Secondary Fuel—measured in miles per gallon; laboratory fuel economy (weighted FTP + highway GEG, exclusive of any calculation under 49 U.S.C. 32905).

9. Tertiary Fuel—classified as CNG = compressed natural gas; D = diesel; E = electricity; E–85 = ethanol; E100 = neat ethanol; G = gasoline; H = hydrogen; LNG = liquefied natural gas; LPG = propane; M85 = methanol; M100 = neat methanol.

10. Fuel Economy on Tertiary Fuel—measured in miles per gallon; laboratory fuel economy (weighted FTP + highway GEG, exclusive of any calculation under 49 U.S.C. 32905).

11. CAFE Fuel Economy—measured in miles per gallon; laboratory fuel economy (weighted FTP + highway GEG, inclusive of any calculation under 49 U.S.C. 32905).

12. Engine Code—unique number assigned to each engine

a. Manufacturer—manufacturer's name (*e.g.,* General Motors, Ford, Toyota, Honda).

b. Name—name of engine.

c. Configuration—classified as V = V-shaped; I = inline; R = rotary, H = horizontally opposed (boxer).

d. Primary Fuel—classified as CNG = compressed natural gas, D = diesel, E85 = ethanol, E100 = neat ethanol, G = gasoline, H = hydrogen, LNG = liquefied natural gas, LPG = propane, M85 = methanol, M100 = neat methanol.

e. Secondary Fuel—classified as CNG = compressed natural gas, D = diesel, E85 = ethanol, E100 = neat ethanol, G = gasoline, H = hydrogen, LNG = liquefied natural gas, LPG = propane, M85 = methanol, M100 = neat methanol.

f. Country of Origin—name of country where engine is manufactured.

g. Engine Oil Viscosity—ratio between the applied shear stress and the rate of shear, which measures the resistance of flow of the engine oil (as per SAE Glossary of Automotive Terms); typical values as text include 0W20, 5W20, etc.

h. Cycle—combustion cycle of engine; classified as A = Atkinson, AM = Atkinson/Miller, D = Diesel, M = Miller, O = Otto, OA = Otto/Atkinson.

i. Air/Fuel Ratio—the weighted (FTP + highway) air/fuel ratio (mass); a number generally around 14.7 for gasoline engines.

j. Fuel Delivery System—mechanism that delivers fuel to engine; classified as SGDI = stoichiometric gasoline direct injection; LBGDI = lean-burn gasoline direct injection; SFI = sequential fuel injection; MPFI = multipoint fuel injection; TBI = throttle body fuel injection; CRDI = common rail direct injection (diesel); UDI = unit injector direct injection (diesel).

k. Aspiration—breathing or induction process of engine (as per SAE Automotive Dictionary); classified as NA = naturally aspirated, S = supercharged, T = turbocharged, T2P = parallel twin turbocharged, T2S = sequential twin turbocharged, T2ST = staged twin turbocharged, T4 = quad-turbocharged, ST = supercharged and turbocharged.

l. External Exhaust Gas Recirculation (EGR)—recirculation of some of the exhaust gases back into the engine; classified as SSSL = single stage—single loop, SSDL = single stage—dual loop, DSSL = dual stage—single loop, DSDL = dual stage—dual loop, NA = not applicable.

m. EGR Pressure, measured in Pounds per Square Inch (PSI).

n. EGR Cooler Type—classified as AC = air cooled, LC = liquid cooled.

o. EGR Coolant Type—type of coolant used.

p. Engine Brake Mean Effective Pressure (BMEP)—average engine effective pressure, measured as bar.

q. Valvetrain Design—design of the total mechanism from camshaft to valve of an engine that actuates the lifting and closing of a valve (as per SAE Glossary of Automotive Terms); classified as CVA = camless valve actuation, DOHC = dual overhead cam, OHV = overhead valve, SOHC = single overhead cam.

r. Valve Actuation/Timing—valve opening and closing points in the operating cycle (as per SAE J604); classified as F = fixed, ICP = intake cam phasing, CCP = coupled cam phasing, DCP = dual cam phasing.

s. Valve Lift—describes the manner in which the valve is raised during combustion (as per SAE Glossary of Automotive Terms); classified as F = fixed, DVVL = discrete variable valve lift, CVVL = continuously variable valve lift, IVC = intake valve control (*e.g.,* Fiat's MultiAir system).

t. Cylinders—the number of engine cylinders; an integer such as 2, 3, 4, 5, 6, 8, 10 or 12.

u. Valves/Cylinder—the number of valves per cylinder, an integer from 2 through 5.

v. Deactivation—presence of cylinder deactivation mechanism; classified as Y = cylinder deactivation applied; N = cylinder deactivation not applied.

w. Displacement—total volume displaced by a piston in a single stroke multiplied by the number of cylinders; measured in liters.

x. Compression Ratio (min)—typically a number between 8 and 11; (for fixed CR engines, should be identical to maximum CR).

y. Compression Ratio (max)—typically a number between 8 and 20; (for fixed CR engines, should be identical to minimum CR).

z. Max. Horsepower—the maximum power of the engine, measured as horsepower.

aa. Max. Horsepower RPM—rpm at which maximum horsepower is achieved.

bb. Max. Torque—the maximum torque of the engine, measured as lb-ft.

cc. Max Torque RPM—rpm at which maximum torque is achieved.

13. Transmission Code—unique number assigned to each transmission:

a. Manufacturer—manufacturer's name (*e.g.,* General Motors, Ford, Toyota, Honda).

b. Name—name of transmission.

c. Country of origin—where the transmission is manufactured.

d. Type—type of transmission; classified as M = manual, A = automatic (torque converter), AMT = automated manual transmission (single clutch w/torque interrupt), DCT = dual clutch transmission, CVT1 = belt or chain CVT, CVT2 = other CVT (*e.g.,* toroidal), HEVT = hybrid/electric vehicle transmission (for a BISG or CISG type hybrid, please define the actual transmission used, not HEVT).

e. Clutch Type—type of clutch used in AMT or DCT type transmission; D = dry, DA = damp, W = wet.

f. Number of Forward Gears—classified as an integer indicating the number of forward gears; "CVT" for a CVT type transmission; or "n/a".

g. Logic—indicates aggressiveness of automatic shifting; classified as A = aggressive bias toward improving fuel economy, C = conventional shifting. Provide rationale for selection in the transmission notes column.

14. Origin—classification (under CAFE program) as domestic or import, D = domestic, I = import.

B. Production

1. Production—actual and projected U.S. production for MY 2010 to MY 2025 inclusive, measured in number of vehicles.

2. Percent of Production Regulated by CARB Standards—percent of production volume that will be regulated under CARB standards in each of MYs 2010 to MY 2025.

C. MSRP—Measured in 2009 Dollars Actual and Projected Average MSRP (Sales-Weighted, Including Options) for MY 2010 to MY 2025 Inclusive

D. Vehicle Information

1. Subclass—for technology application purposes only and should not be confused with vehicle classification for regulatory purposes; classified as Subcompact, Subcompact Performance, Compact, Compact Performance, Midsize, Midsize Performance, Large, Large Performance, Minivan, Small LT, Midsize LT, Large LT; where LT = SUV/Pickup/Van; use tables below, with example vehicles, to place vehicles into the most appropriate subclass.

Subclass	Example (MY 2010) vehicles
Subcompact	Chevy Aveo, Honda Civic, Volkswagen New Beetle.
Subcompact Performance	Audi TT, Mazda Miata, Subaru Impreza.
Compact	Chevy Cruze, Ford Focus, Nissan Sentra.
Compact Performance	Audi S4 Quattro, Mazda RX8, Mitsubishi Lancer Evolution.
Midsize	Honda Accord, Hyundai Azera, Toyota Camry.
Midsize Performance	Chevy Corvette, Ford Mustang GT, Nissan G37 Coupe.
Large	Audi A8, Cadillac CTS, Ford Taurus.
Large Performance	Bentley Arnage, BMW M5, Daimler CL600.
Minivans	Dodge Caravan, Toyota Sienna.
Small SUV/Pickup/Van	Ford Ranger, Nissan Rogue, Toyota RAV4.
Midsize SUV/Pickup/Van	Jeep Wrangler 4-door, Mazda CX–9, Toyota Tacoma.
Large SUV/Pickup/Van	Chevy Silverado, Ford Econoline, Toyota Sequoia.

2. Style—classified as Convertible, Coupe, Hatchback, Sedan, Minivan, Pickup, Sport Utility, Van, Wagon.

3. Light Truck Indicator—a unique code(s) (*e.g.,* 2ii, 7i) assigned to each vehicle which represents the design feature(s) that classify it as a light truck, classified as:

(0) The vehicle neither has off-road design features (defined under 49 CFR 523.5(b) and described by numbers 1 and 2 below) nor has functional characteristics (defined under 49 CFR 523.5(a) and described by numbers 3 through 7 below) that would allow it to be properly classified as a light truck, thus the vehicle is properly classified as a passenger car.

An automobile capable of off-highway operation, as indicated by the fact that it:
(1)(i) Has 4-wheel drive; or

(ii) Is rated at more than 6,000 pounds gross vehicle weight; and

(2) Has at least four of the following characteristics calculated when the automobile is at curb weight, on a level surface, with the front wheels parallel to the automobile's longitudinal centerline, and the tires inflated to the manufacturer's recommended pressure—

(i) Approach angle of not less than 28 degrees.

(ii) Breakover angle of not less than 14 degrees.

(iii) Departure angle of not less than 20 degrees.

(iv) Running clearance of not less than 20 centimeters.

(v) Front and rear axle clearances of not less than 18 centimeters each.

An automobile designed to perform at least one of the following functions:

(3) Transport more than 10 persons;

(4) Provide temporary living quarters;

(5) Transport property on an open bed;

(6) Provide, as sold to the first retail purchaser, greater cargo-carrying than passenger-carrying volume, such as in a cargo van; if a vehicle is sold with a second-row seat, its cargo-carrying volume is determined with that seat installed, regardless of whether the manufacturer has described that seat as optional; or (7) Permit expanded use of the automobile for cargo-carrying purposes or other non-passenger-carrying purposes through:

(i) For non-passenger automobiles manufactured prior to model year 2012, the removal of seats by means installed for that purpose by the automobile's manufacturer or with simple tools, such as screwdrivers and wrenches, so as to create a flat, floor level, surface extending from the forward most point of installation of those seats to the rear of the automobile's interior; or

(ii) For non-passenger automobiles manufactured in model year 2008 and beyond, for vehicles equipped with at least 3 rows of designated seating positions as standard equipment, permit expanded use of the automobile for cargo-carrying purposes or other non-passenger-carrying purposes through the removal or stowing of foldable or pivoting seats so as to create a flat, leveled cargo surface extending from the forward most point of installation of those seats to the rear of the automobile's interior.

4. Structure—classified as either L = Ladder or U = Unibody

5. Drive—classified as A = all-wheel drive; F = front-wheel drive; R = rear-wheel-drive; 4 = 4-wheel drive [7]

6. Axle Ratio—ratio of the speed of the drive shaft to the speed of the driven wheels

7. Length—measured in inches; defined per SAE J1100, L103 (Sept. 2005)

8. Width—measured in inches; defined per SAE J1100, W116 (Sept. 2005)

9. Wheelbase—measured to the nearest tenth of an inch; defined per SAE J1100, L101 (Sept. 2005), and clarified above

10. Track Width (front)—measured to the nearest tenth of an inch; defined per SAE J1100, W101–1 (Sept. 2005), and clarified above

11. Track Width (rear)—measured to the nearest tenth of an inch; defined per SAE J1100, W101–2 (Sept. 2005), and clarified above

12. Footprint—the product of average track width (measured in inches and rounded to the nearest tenth of an inch) times wheelbase (measured in inches and rounded to the nearest tenth of an inch) divided by 144 and then rounded to the nearest tenth of a square foot: Defined per 49 CFR 523.2.

13. Base Tire—the tire specified as standard equipment by a manufacturer on each vehicle configuration of a model type; (*e.g.,* 275/40R17).

14. Running Clearance—measured in centimeters; defined per 49 CFR 523.2.

15. Front Axle Clearance—measured in centimeters; defined per 49 CFR 523.2.

16. Rear Axle Clearance—measured in centimeters; defined per 49 CFR 523.2.

17. Approach Angle—measured in degrees; defined per 49 CFR 523.2.

18. Breakover Angle—measured in degrees; defined per 49 CFR 523.2.

19. Departure Angle—measured in degrees; defined per 49 CFR 523.2.

20. Curb Weight—total weight of vehicle including batteries, lubricants, and other expendable supplies but excluding the driver, passengers, and other payloads, measured in pounds; per SAE J1100 (Sept. 2005).

21. Test Weight—weight of vehicle as tested, including the driver, operator (if necessary), and all instrumentation (as per SAE J1263); measured in pounds.

22. GCWR—Gross Combined Weight Rating, as defined per 49 CFR 571.3, means the value specified by the manufacturer as the loaded weight of a combination vehicle, which is determined by the procedures and requirements found in SAE J2807.

23. GVWR—Gross Vehicle Weight Rating; as defined per 49 CFR 523.2 measured in pounds.

24. Towing Capacity (Maximum)—measured in pounds.

25. Payload—measured in pounds.

26. Cargo volume behind the front row—measured in cubic feet, defined per Table 28 of SAE J1100 (Sept. 2005).

27. Cargo volume behind the second row—measured in cubic feet, defined per Table 28 of SAE J1100 (Sept. 2005).

28. Cargo volume behind the third row—measured in cubic feet, defined per Table 28 of SAE J1100 (Sept. 2005).

29. Enclosed Volume—measured in cubic feet.

30. Passenger Volume—measured in cubic feet; the volume measured using SAE J1100 as per EPA Fuel Economy regulations (40 CFR 600.315–82, "Classes of Comparable Automobiles"). This is the number that manufacturers calculate and submit to EPA.

31. Cargo Volume Index—defined per Table 28 of SAE J1100 (Sept. 2005).

32. Luggage Capacity—measured in cubic feet; defined per SAE J1100, V1 (Sept. 2005).

33. Seating (max)—number of usable seat belts before folding and removal of seats (where accomplished without special tools); provided in integer form.

34. Number of Standard Rows of Seating—number of rows of seats that each vehicle comes with as standard equipment; provided in integer form (*e.g.,* 1, 2, 3, 4, or 5).

35. Frontal Area—a measure of the wind profile of the vehicle, typically calculated as the height times width of a vehicle body, *e.g.,* 25 square feet.

36. Aerodynamic Drag Coefficient, C_d—a dimensionless coefficient that relates the motion resistance force created by the air drag over the entire surface of a moving vehicle to the force of dynamic air pressure acting only over the vehicle's frontal area, *e.g.,* 0.25.

37. Base Tire Rolling Resistance, C_{rr}—a dimensionless coefficient that relates the motion resistance force due to tire energy losses (*e.g.,* deflection, scrubbing, slip, and air drag) to a vehicle's weight for the base tire (highest production volume tire) used in the laboratory fuel economy test (weighted FTP + highway), *e.g.,* 0.0012 Normalized on (pound force/1,000 pound) basis.

38. Fuel Capacity—measured in gallons of diesel fuel or gasoline; MJ (LHV) of other fuels (or chemical battery energy).

39. Electrical System Voltage—measured in volts, *e.g.,* 12 volt, 42 volts.

40. Power Steering—H = hydraulic; E = electric; EH = electro-hydraulic.

41. Percent of Production Volume Equipped with air conditioning (A/C).

42. A/C Refrigerant Type—e.g. HFC–134a; HFC–152a; CO_2.

43. A/C Refrigerant Quantity—measured in pounds.

44. A/C Compressor Displacement—measured in cubic centimeters.

45. A/C CARB or EPA credit—measured in grams per mile; g/mile CO_2 equivalent as reportable under California ARB's AB 1493 or EPA's GHG Regulation.

46. N_2O Emission Rate—measured in grams per mile; as reportable under California ARB's AB 1493 Regulation.

47. CH_4 Emission Rate—measured in grams per mile; as reportable under California ARB's AB 1493 Regulation.

48. Estimated Total CARB Credits—measured in grams per mile; g/mile CO_2 equivalent as reportable under California ARB's AB 1493 Regulation.

E. Hybridization/Electrification

1. Type of Hybrid/Electric vehicle—classified as MHEV = 12V micro hybrid, BISG = belt mounted integrated starter generator, CISG = crank mounted integrated starter generator, PSHEV = power-split hybrid, P2HEV = P2 hybrid, 2MHEV = 2-mode hybrid, PHEV = plug-in hybrid, EV = electric vehicle, H = hydraulic hybrid, P = pneumatic hybrid.

2. Electrical Only Driving Range (for EV and Plug-in only)—driving range powered by electric drive only—measured in miles. Please specify the basis for the range (e.g., combined city/highway test cycle).

3. Petroleum Only Driving Range (for Plug-in only)—driving range powered by petroleum drivetrain only—measured in miles. Please specify the basis for the range (e.g., combined city/highway test cycle).

4. Blended Driving Range (for HEV, PHEV and EV)—driving range with both electrical and petroleum powertrain measured in miles. Please specify the basis for the range (e.g., combined city/highway test cycle).

[7] NHTSA considers "4-wheel drive" to refer only to vehicles that have selectable 2- and 4-wheel drive settings, as opposed to all-wheel drive, which is not driver-selectable.

5. Voltage (volts) or, for hydraulic hybrids, pressure (psi) of the vehicle.

6. Battery Information—

a. Battery Type—classification such as NiMH = Nickel Metal Hydride; Li-ion = Lithium Ion; Li-Air = Lithium Air.

b. Battery 100% Discharge Energy—battery energy when the battery is 100% discharged, measured as kWh.

c. Fraction of Useable Energy (%)—Percent of useable energy for the battery which should take into consideration of battery fade, temperature effect and other factors that have an effect on usage energy of the battery.

d. Battery Chemistry for Cathode—Chemistries such as $LiNi_{0.8}Co_{0.15}Al_{0.05}O_2$(NCA), $LiFePO_4$(LFP), $LiMn_2O_4$ (MS), etc.

e. Battery Chemistry for Anode—Chemistries such as Graphite, Amorphous carbon, Lithium titanate, Lithium alloys, Lithium Oxides, etc.

f. Nominal Voltage for battery, measured as volts.

g. Weight of All Battery Packs, measured as kg—Weight should include closure, cooling system, control system and ancillary systems.

h. Battery Manufacturer.

7. Power Electronics Information—

a. Primary Motor Size, measured as kW.

b. Secondary Motor Size, measured as kW.

c. Primary Inverter size, measured as kW.

d. Secondary Inverter size, measured as kW.

8. Battery Only Range (charge depleting PHEV or EV)—measured in miles.

9. Maximum Battery Only Vehicle Speed—measured in miles per hour; maximum speed at which a HEV/PHEV/EV can still operate solely on battery power measured on a flat road using the vehicle's FTP weight.

10. Percentage of braking energy recovered and stored over weighted FTP + highway drive cycle.

11. Percentage of maximum motive power provided by stored energy system.

12. Electrified Accessories—list of electrified accessories; classified as WP = water (coolant) pump; OP = oil pump; AC = air conditioner compressor.

F. Energy Consumption [8]—of total fuel energy (higher heating value) consumed over FTP city and highway tests (each weighted as for items 5 and 6 above), shares attributable to the following loss mechanisms, such that the sum of the shares equals one.

1. System irreversibility governed by the Second Law of Thermodynamics.

2. Heat lost to the exhaust and coolant streams.

3. Engine friction (*i.e.,* the part of mechanical efficiency lost to friction in such engine components as bearings and rods, as could be estimated from engine dynamometer test results).

4. Pumping losses (*i.e.,* the part of mechanical efficiency lost to work done on gases inside the cylinder, as could be estimated from engine dynamometer test results).

5. Accessory losses (*i.e.,* the part of fuel efficiency lost to work done by engine-driven accessories, as could be estimated from bench test results for the individual components).

6. Transmission losses (*i.e.,* the part of driveline efficiency lost to friction in such transmission components as gears, bearings, and hydraulics, as could be estimated from chassis dynamometer test results).

7. Aerodynamic drag of the body, as could be estimated from coast-down test results.

8. Rolling resistance in the tires, as could be estimated from coast-down test results.

9. Work done on the vehicle itself, as could be estimated from the vehicle's inertia mass and the fuel economy driving cycles.

G. Planning and Assembly

1. U.S. Content—overall percentage, by value, that originated in the U.S.

2. Canadian Content—overall percentage, by value, that originated in Canada.

3. Mexican Content—overall percentage, by value, that originated in Mexico.

4. Domestic Content—overall percentage, by value, that originated in the U.S., Canada and Mexico.

5. Final Assembly City.

6. Final Assembly State/Province (if applicable).

7. Final Assembly Country.

8. Predecessor—number (or name) of model upon which current model is based, if any.

9. Refresh Years—model years of most recent and future refreshes through the 2025 time period; *e.g.,* 2010, 2015, 2020, 2025.

10. Redesign Years—model years of most recent and future redesigns through the 2025 time period; *e.g.,* 2012, 2017, 2022; where redesign means any change or combination of changes to a vehicle that would change its weight by 50 pounds or more or change its frontal area or aerodynamic drag coefficient by 2 percent or more.

11. Employment Hours Per Vehicle—number of hours of U.S. labor applied per vehicle produced.

H. The agency also requests that each manufacturer provide an estimate of its overall passenger car CAFE and light truck CAFE for each model year. This estimate should be included as an entry in the spreadsheets that are submitted to the agency.

4. As applicable, please explain the differences between the product plans submitted in response to the 2009 product plan requests and the product plans being submitted in response to this request.

5. Relative to MY 2009 levels, for MYs 2010–2025 please provide information, by carline and as an average effect on a manufacturer's entire passenger car fleet and by truckline and as an average effect on a manufacturer's entire light truck fleet, on the weight (increases or decreases) and/or fuel economy impacts of the following standards or equipment:

A. FMVSS No. 214, Side Pole Impact.

B. FMVSS No. 216, Roof Crush Resistance.

C. FMVSS No. 226, Ejection Mitigation.

D. FMVSS No. 111, Rear Detection System.

E. Voluntary installation of safety equipment (*e.g.,* forward collision warning); please provide the specific item(s)/system(s).

F. Pedestrian Global Technical Regulation (GTR).

G. Environmental Protection Agency regulations.

H. California Air Resources Board requirements.

I. Other applicable motor vehicle regulations affecting fuel economy. Please specify the regulations which affect the weight change.

For the following questions, whenever RPE cost is requested, please also provide the RPE multiplier value assumed and whether the component is manufactured in-house or out-sourced.

6. For each specific model (and model year if applicable) of respondent's passenger car and light truck fleets projected to implement one or more of the following and/or any other weight reduction methods:

A. Substitution of materials;

B. Use of new vehicle structural, system or component designs;

C. "Downsizing" of existing vehicle design due to the downsizing of vehicle dimensions (interior and exterior) and/or footprint;

D. "Downsizing" of existing vehicle design due to the downsizing of vehicle powertrain or component, *i.e.,* secondary mass reduction.

Please provide the following information:

(i) description of the method, for example:

—For material substitution, substituting a composite body panel for a steel panel;

—For downsizing, reducing front, rear, or side overhang (the dimensions of the vehicle outside the "footprint" area), or reducing track width or wheelbase;

—For use of new vehicle, structural, system or component designs, replacing a body-on-frame structure with a unibody structure, or replacing an existing fuel tank with a smaller fuel tank (*i.e.,* maintaining range).

(ii) The weight reduction, in pounds, averaged over the model;

(iii) The percent fuel economy improvement averaged over the model;

(iv) The basis for your answer to (iii), (*e.g.,* data from dynamometer tests conducted by respondent, engineering analysis, computer simulation, reports of test by others);

(v) The per vehicle incremental RPE cost (in 2009 dollars), averaged over the model, associated with the method;

(vi) The total capital cost, in constant 2009 dollars, required to implement the method, please subdivide the cost into product development (R&D/ED&T) and capital investment (equipment, tolling plant/facilities, etc.) costs, indicate if these costs are included or amortized in the incremental RPE cost (v) above;

(vii) The maximum production capacity, expressed in units of capacity per year, associated with the capital expenditure in (vi) above.

(viii) The actual capacity and percent production implementation that is planned to be used each year and the reasons limiting the implementation of the method.

(ix) The actual capacity and percent production implementation that is planned for vehicles for sale in the United States.

7. For each specific model (and model year if applicable) of respondent's passenger car

[8] This information is sought in order to account for a given vehicle model's fuel economy as partitioned into nine energy loss mechanisms. The agency may use this information to inform our estimates of the extent to which a given technology reduces losses in each mechanism.

and light truck fleets projected to implement one or more of the following and/or any other aerodynamic drag reduction methods:

A. Revised exterior components (*e.g.,* front fascia or side view mirrors)

B. Addition of aerodynamic treatment, such as addition of underbody panels, usage of active grill shutter, etc

C. Vehicle design changes (*e.g.,* change in ride height or optimized cooling flow path)

Please provide the following information:

(i) Description of the method/aerodynamic change

(ii) The percent reduction of the aerodynamic drag coefficient (C_d) and the C_d prior to the reduction, averaged over the model;

(iii) The percent fuel economy improvement averaged over the model;

(iv) The basis for your answer to (iii), (*e.g.,* data from dynamometer tests conducted by respondent, wind tunnel testing, engineering analysis, computer simulation, reports of test by others);

(v) The per vehicle incremental RPE cost (in 2009 dollars), averaged over the model, associated with the method;

(vi) The total capital cost, in constant 2009 dollars, required to implement the method, subdivide the cost into product development (R&D/ED&T) and capital investment (equipment, tolling plant/facilities, etc.) costs, indicate if these costs are included or amortized in the incremental RPE cost (v) above;

(vii) The maximum production capacity, expressed in units of capacity per year, associated with the capital expenditure in (vi) above.

(viii) The actual capacity and percent production implementation that is planned to be used each year and the reasons limiting the implementation of the method.

(ix) The actual capacity and percent production implementation that is planned for vehicles for sale in the United States.

8. For each specific model (and model year if applicable) of respondent's passenger car and light truck fleets projected to implement one or more of the following and/or any other A/C leakage reduction or A/C efficiency improvement methods:

A. Low permeation hoses.

B. Improved system fittings, connections and seals (including compressor shaft seal).

C. Externally controlled fixed or variable displacement compressor.

D. Automatic default to recirculated cabin air.

E. Improved blower and fan motor controls.

F. Electronic expansion valve.

G. Improved-efficiency evaporators and condensers.

H. Oil separator.

Please provide the following information:

(i) Description of the method, (*e.g.,* implementation of electronic control valve).

(ii) The g/mile CO_2 equivalent as reportable under California ARB's AB 1493 Regulation, averaged over the model;

(iii) The basis for your answer to (ii), (*e.g.,* data from dynamometer tests conducted by respondent, engineering analysis, computer simulation, reports of test by others);

(iv) The per vehicle incremental RPE cost (in 2009 dollars), averaged over the model, associated with the method;

(v) The percent production implementation rate and the reasons limiting the implementation rate.

9. Indicate any of your MYs 2010–2025 passenger car and light truck model types that have higher average test weights than comparable MY 2010 model types. Describe the reasons for any weight increases (*e.g.,* increased option content, less use of premium materials) and provide supporting justification.

10. Please provide your estimates of projected total industry U.S. passenger car sales and light truck sales, separately, for each model year from 2009 through 2025, inclusive.

11. Please provide your company's assumptions for U.S. gasoline and diesel fuel prices during 2009 through 2025.

12. Please provide projected production capacity available for the North American market (at standard production rates) for each of your company's passenger carline and light truckline designations during MYs 2010–2025.

13. Please provide your estimate of production lead-time for new models, your expected model life in years, and the number of years over which tooling costs are amortized. Additionally, the agency is requesting that manufactures provide vehicle or design changes that characterize a freshening and those changes that characterize a redesign.

IV. Technologies, Cost and Potential Fuel Economy Improvements

Spreadsheet templates for the tables mentioned in the following section can be found at *http://www.nhtsa.gov/fuel-economy.*

1. The agency requests that manufacturers, for each passenger car and light truck model projected to be manufactured for US sale by respondent between MYs 2010–2025, provide the following information on new technology applications, including A/C technologies that will be eligible under EPA GHG standards.

(i) Description of the nature of the technological improvement; including the vehicle's baseline technology that the technology replaces (*e.g.,* 6-speed automatic transmission replacing a 4-speed automatic transmission)

(ii) The percent fuel consumption improvement or the g/mile CO_2 equivalent reduction for A/C technologies, averaged over the model; please indicate if the weight saving (or increase), associated with the implementation of the technology, is accounted for in the fuel economy improvement estimate.

(iii) The basis for your answer to (ii), (*e.g.,* data from dynamometer tests conducted by respondent, engineering analysis, computer simulation, reports of test by others);

(iv) The per vehicle incremental RPE cost (in 2009 dollars), averaged over the model, associated with implementing the new technology in MY 2017 or the first MY of implementation;

(v) The total capital cost, in constant 2009 dollars, required to implement the new technology, subdivide the cost into product development (R&D/ED&T) and capital investment (equipment, tolling plant/facilities, etc.) costs, indicate if these costs are included or amortized in the incremental RPE cost (iv) above;

(vi) The maximum production capacity, expressed in units of capacity per year, associated with the capital expenditure in (v) above.

(vii) The actual capacity and percent production implementation that is planned to be used each year and the reasons limiting the implementation of the new technology.

(ix) The actual capacity and percent production implementation that is planned for vehicles for sale in the United States.

In regards to costs, the agency is requesting information on cost reductions available through learning effects that are anticipated, from MY 2017 to MY 2025, so information should be provided regarding what the cost reductions associated with learning effects are, when and at what production volumes they occur, and to what degrees such learning is expected to be available.[9] The agency is also asking that the indirect cost or retail price equivalent markup factor (used to determine the indirect cost estimates) is stated in the response.

2. Additionally, the agency requests that manufacturers and other interested parties provide the same information, as requested above, for the technologies listed in the following tables and any other potential technologies that may be implemented to improve fuel economy. These potential technologies can be inserted into additional rows at the end of each table. Examples of other potential technologies could include but are not limited to: Homogenous Charge Compression Ignition (HCCI), Electric Vehicle (EV) and Fuel Cell Vehicle specific technologies. In an effort to standardize the information received the agency requests that if possible respondents fill in the following tables:

Table IV–1 with estimates of the model year of availability for each technology listed and any other identified technology.

Table IV–2 with estimated phase-in rates [10] by year for each technology listed and any other additional technologies. Engineering, planning and financial constraints can prohibit many technologies from being applied across an entire fleet of vehicles within a year, so the agency requests

[9] "Learning effects" describes the reduction in unit production costs as a function of accumulated production volume and small redesigns that reduce costs. Applying learning effects, or "curves," requires estimates of three parameters: (1) The initial production volume that must be reached before cost reductions begin to be realized (referred to as "threshold volume"); (2) the percent reduction in average unit cost that results from each successive doubling of cumulative production volume (usually referred to as the "learning rate"); and (3) the initial cost of the technology.

[10] In NHTSA's 2006 rulemaking establishing CAFE standards for MY 2008–2011 light trucks, the agency considered phase-in caps by ceasing to add a given technology to a manufacturer's fleet in a specific model year once it has increased the corresponding penetration rate by at least the amount of the cap. Having done so, it applied other technologies in lieu of the "capped" technology.

information on possible constraints on the rates at which each technology can penetrate a manufacturer's fleet.

Tables IV–3a, b and IV–4a, b with estimates for incremental RPE costs (in 2009 dollars) and incremental fuel consumption reductions for each technology listed and any other additional technologies. These estimates, for the technologies already listed, should assume that the preceding technologies, as defined by the decision trees in Appendix B, have already been applied and/or will be superseded. The agency is requesting that respondents fill in incremental RPE costs and fuel consumption reductions estimates for all vehicle subclasses listed. If a respondent feels that the incremental RPE cost and fuel consumption reduction estimates are similar for different subclasses they may combine subclasses.

Table IV–5 with estimates for the percentage by which each technology reduces energy losses attributable to each of nine energy loss mechanisms.

Tables IV–6a, b with estimates for synergies [11] that can occur when multiple technologies are applied.

[11] When two or more technologies are added to a particular vehicle model to improve its fuel efficiency, the resultant fuel consumption reduction may sometimes be higher or lower than the product of the individual effectiveness values for those items. This may occur because one or more technologies applied to the same vehicle partially address the same source or sources of engine or vehicle losses. Alternately, this effect may be seen when one technology shifts the engine operating points, and therefore increases or reduces the fuel consumption reduction achieved by another technology or set of technologies. The difference between the observed fuel consumption reduction associated with a set of technologies and the product of the individual effectiveness values in that set is sometimes referred to as a "synergy." Synergies may be positive (increased fuel consumption reduction compared to the product of the individual effects) or negative (decreased fuel consumption reduction).

Table IV–7 with estimates of battery and power electronics information, listed below, for HEV, PHEV and EV technologies. For cost information the agency is requesting that respondents provide explicit MY 2017, MY 2020 and MY 2025 appropriate costs, in addition to the requested learning effects and mark-up factor assumptions discussed above, specific to HEVs, PHEVs and EVs.

(i) The 100% discharge energy battery pack RPE cost, measured as $/kWh (in 2009 dollars), which equals the total cost per kWh of the battery cell, battery pack closure, control system, cooling system and ancillary systems.

(ii) The usable energy battery pack RPE cost, measured as $/kWh (in 2009 dollars), which equals the total cost per kWh of the battery cell, battery pack closure, control system, cooling system and ancillary systems.

(iii) The battery cell RPE cost, measured as in $/kWh (in 2009 dollars), which equals the cost per kWh at the battery cell level before the cell is integrated into battery pack

(iv) The battery warranty (time), measured in number of years

(v) The battery warranty (mileage), measured in miles

(vi) The expected battery life (time), measured in number years

(vii) The expected battery life (mileage), measured in number miles

(viii) The primary motor RPE cost, measured as $/kW (in 2009 dollars)

(ix) The secondary motor RPE cost, measured as $/kW (in 2009 dollars)

(x) The primary inverter RPE cost, measured as $/kW (in 2009 dollars)

(xi) The secondary inverter RPE cost, measured as $/kW (in 2009 dollars)

3. The agency also asks that manufacturers or other interested parties provide information on appropriate sequencing of technologies, so that accumulated cost and fuel consumption effects may be evaluated incrementally. As examples of possible technology sequences, "decision trees" are shown in Appendix B below.

4. For each new or redesigned vehicle identified in response to Question III–3 provide your best estimate of the following, in terms of constant 2009 dollars:

A. Total capital costs required to implement the new/redesigned model according to the implementation schedules specified in your response. Subdivide the capital costs into product development (R&D/ED&T), and investment (equipment, tooling, plant/facilities, etc.) costs.

B. The maximum production capacity, expressed in units of capacity per year, associated with the capital expenditure in (a) above. Specify the number of production shifts on which your response is based and define "maximum capacity" as used in your answer.

C. The actual capacity that is planned to be used each year for each new/redesigned model.

D. The increase in variable costs per affected unit, based on the production volume specified in (b) above.

E. The equivalent retail price increase per affected vehicle for each new/redesigned model. Provide an example describing methodology used to determine the equivalent retail price increase.

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Table IV-1: List of Technologies and Year of Availability

TECHNOLOGY	Abrev.	Year of Availability
Low Friction Lubricants	LUB	
Engine Friction Reduction	EFR	
VVT - Coupled Cam Phasing (CCP) on SOHC	CCPS	
Discrete Variable Valve Lift (DVVL) on SOHC	DVVLS	
Cylinder Deactivation on SOHC	DEACS	
VVT - Intake Cam Phasing (ICP)	ICP	
VVT - Dual Cam Phasing (DCP)	DCP	
Discrete Variable Valve Lift (DVVL) on DOHC	DVVLD	
Continuously Variable Valve Lift (CVVL)	CVVL	
Cylinder Deactivation on DOHC	DEACD	
Stoichiometric Gasoline Direct Injection (GDI)	SGDI	
Cylinder Deactivation on OHV	DEACO	
Variable Valve Actuation - CCP and DVVL on OHV	VVA	
Stoichiometric Gasoline Direct Injection (GDI) on OHV	SGDIO	
Conversion to DOHC with DCP	CDOHC	
Turbocharging and Downsizing	TRBDS	
Exhaust Gas Recirculation (EGR) Boost, Level 1	EGRB	
Exhaust Gas Recirculation (EGR) Boost, Level 2	EGRB2	
Lean Burn Direct Injection with TRBDS	LBDI	
Advanced Diesel	ADSL	
6-Speed Manual/Improved Internals	6MAN	
Improved Auto. Trans. Controls/Externals	IATC	
6-Speed Auto Trans with Improved Internals	NAUTO	
Dual Clutch Transmission (Dry/Wet)	DCT	
New Transmission (7+ Speed Auto or 7+ Speed DCT)	NTRANS	
Electric Power Steering	EPS	
Improved Accessories	IACC	
12V Micro-Hybrid	MHEV	
Belt mounted Integrated Starter Generator	BISG	
Crank mounted Integrated Starter Generator	CISG	
Strong Hybrid (P2 or 2-mode hybrid)	SHEV1	
Strong Hybrid (P2 or 2-mode hybrid) with EGRB	SHEV2	
Plug-in Hybrid - 20 mi range	PHEV20	
Plug-in Hybrid - 40 mi range	PHEV40	
Electric Vehicle	EV	
Fuel Cell Vehicle	FCV	
Mass Reduction, Level 1 (5%)	MR1	
Mass Reduction, Level 2 (7.5%)	MR2	
Mass Reduction, Level 3 (10%)	MR3	
Mass Reduction, Level 4 (15%)	MR4	
Mass Reduction, Level 5 (20%)	MR5	
Low Rolling Resistance Tires, Level 1	ROLL1	
Low Rolling Resistance Tires, Level 2	ROLL2	
Low Drag Brakes	LDB	
Secondary Axle Disconnect	SAX	
Aero Drag Reduction, Level 1	AERO1	
Aero Drag Reduction, Level 2 (Active Reduction)	AERO2	

Table IV-2: Phase-In Caps

		Percent Phase-in Rate per Year															
TECHNOLOGY	Abrev.	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025
Low Friction Lubricants	LUB																
Engine Friction Reduction	EFR																
VVT - Coupled Cam Phasing (CCP) on SOHC	CCPS																
Discrete Variable Valve Lift (DVVL) on SOHC	DVVLS																
Cylinder Deactivation on SOHC	DEACS																
VVT - Intake Cam Phasing (ICP)	ICP																
VVT - Dual Cam Phasing (DCP)	DCP																
Discrete Variable Valve Lift (DVVL) on DOHC	DVVLD																
Continuously Variable Valve Lift (CVVL)	CVVL																
Cylinder Deactivation on DOHC	DEACD																
Stoichiometric Gasoline Direct Injection (GDI)	SGDI																
Cylinder Deactivation on OHV	DEACO																
Variable Valve Actuation - CCP and DVVL on OHV	VVA																
Stoichiometric Gasoline Direct Injection (GDI) on OH	SGDIO																
Conversion to DOHC with DCP	CDOHC																
Turbocharging and Downsizing	TRBDS																
Exhaust Gas Recirculation (EGR) Boost, Level 1	EGRB																
Exhaust Gas Recirculation (EGR) Boost, Level 2	EGRB2																
Lean Burn Direct Injection with TRBDS	LBDI																
Advanced Diesel	ADSL																
6-Speed Manual/Improved Internals	6MAN																
Improved Auto. Trans. Controls/Externals	IATC																
6-Speed Auto Trans with Improved Internals	NAUTO																
Dual Clutch Transmission (Dry/Wet)	DCT																
New Transmission (7+ Speed Auto or 7+ Speed DC	NTRANS																
Electric Power Steering	EPS																
Improved Accessories	IACC																
12V Micro-Hybrid	MHEV																
Belt mounted Integrated Starter Generator	BISG																
Crank mounted Integrated Starter Generator	CISG																
Strong Hybrid (P2 or 2-mode hybrid)	SHEV1																
Strong Hybrid (P2 or 2-mode hybrid) with EGRB	SHEV2																
Plug-in Hybrid - 20 mi range	PHEV20																
Plug-in Hybrid - 40 mi range	PHEV40																
Electric Vehicle	EV																
Fuel Cell Vehicle	FCV																
Mass Reduction, Level 1 (5%)	MR1																
Mass Reduction, Level 2 (7.5%)	MR2																
Mass Reduction, Level 3 (10%)	MR3																
Mass Reduction, Level 4 (15%)	MR4																
Mass Reduction, Level 5 (20%)	MR5																
Low Rolling Resistance Tires, Level 1	ROLL1																
Low Rolling Resistance Tires, Level 2	ROLL2																
Low Drag Brakes	LDB																
Secondary Axle Disconnect	SAX																
Aero Drag Reduction, Level 1	AERO1																
Aero Drag Reduction, Level 2 (Active Reduction)	AERO2																

Table IV-3a: Technology Cost Estimates

VEHICLE TECHNOLOGY RETAIL PRICE EQUIVALENT INCREMENTAL COSTS PER VEHICLE (2008$) BY VEHICLE SUBCLASS							
		Subcompact	Performance Subcompact	Compact	Performance Compact	Midsize	Performance Midsize
TECHNOLOGY	Abrev.	Car	Car	Car	Car	Car	Car
Low Friction Lubricants	LUB						
Engine Friction Reduction	EFR						
VVT - Coupled Cam Phasing (CCP) on SOHC	CCPS						
Discrete Variable Valve Lift (DVVL) on SOHC	DVVLS						
Cylinder Deactivation on SOHC	DEACS						
VVT - Intake Cam Phasing (ICP)	ICP						
VVT - Dual Cam Phasing (DCP)	DCP						
Discrete Variable Valve Lift (DVVL) on DOHC	DVVLD						
Continuously Variable Valve Lift (CVVL)	CVVL						
Cylinder Deactivation on DOHC	DEACD						
Stoichiometric Gasoline Direct Injection (GDI)	SGDI						
Cylinder Deactivation on OHV	DEACO						
Variable Valve Actuation - CCP and DVVL on OHV	VVA						
Stoichiometric Gasoline Direct Injection (GDI) on OH	SGDIO						
Conversion to DOHC with DCP	CDOHC						
Turbocharging and Downsizing	TRBDS						
Exhaust Gas Recirculation (EGR) Boost, Level 1	EGRB						
Exhaust Gas Recirculation (EGR) Boost, Level 2	EGRB2						
Lean Burn Direct Injection with TRBDS	LBDI						
Advanced Diesel	ADSL						
6-Speed Manual/Improved Internals	6MAN						
Improved Auto. Trans. Controls/Externals	IATC						
6-Speed Auto Trans with Improved Internals	NAUTO						
Dual Clutch Transmission (Dry/Wet)	DCT						
New Transmission (7+ Speed Auto or 7+ Speed DC	NTRANS						
Electric Power Steering	EPS						
Improved Accessories	IACC						
12V Micro-Hybrid	MHEV						
Belt mounted Integrated Starter Generator	BISG						
Crank mounted Integrated Starter Generator	CISG						
Strong Hybrid (P2 or 2-mode hybrid)	SHEV1						
Strong Hybrid (P2 or 2-mode hybrid) with EGRB	SHEV2						
Plug-in Hybrid - 20 mi range	PHEV20						
Plug-in Hybrid - 40 mi range	PHEV40						
Electric Vehicle	EV						
Fuel Cell Vehicle	FCV						
Mass Reduction, Level 1 (5%)	MR1						
Mass Reduction, Level 2 (7.5%)	MR2						
Mass Reduction, Level 3 (10%)	MR3						
Mass Reduction, Level 4 (15%)	MR4						
Mass Reduction, Level 5 (20%)	MR5						
Low Rolling Resistance Tires, Level 1	ROLL1						
Low Rolling Resistance Tires, Level 2	ROLL2						
Low Drag Brakes	LDB						
Secondary Axle Disconnect	SAX						
Aero Drag Reduction, Level 1	AERO1						
Aero Drag Reduction, Level 2 (Active Reduction)	AERO2						

Table IV-3b: Technology Cost Estimates

VEHICLE TECHNOLOGY RETAIL PRICE EQUIVALENT INCREMENTAL COSTS PER VEHICLE (2008$) BY VEHICLE SUBCLASS							
			Performance				
		Large	Large	Minivan	Small	Midsize	Large
TECHNOLOGY	Abrev.	Car	Car	LT	LT	LT	LT
Low Friction Lubricants	LUB						
Engine Friction Reduction	EFR						
VVT - Coupled Cam Phasing (CCP) on SOHC	CCPS						
Discrete Variable Valve Lift (DVVL) on SOHC	DVVLS						
Cylinder Deactivation on SOHC	DEACS						
VVT - Intake Cam Phasing (ICP)	ICP						
VVT - Dual Cam Phasing (DCP)	DCP						
Discrete Variable Valve Lift (DVVL) on DOHC	DVVLD						
Continuously Variable Valve Lift (CVVL)	CVVL						
Cylinder Deactivation on DOHC	DEACD						
Stoichiometric Gasoline Direct Injection (GDI)	SGDI						
Cylinder Deactivation on OHV	DEACO						
Variable Valve Actuation - CCP and DVVL on OHV	VVA						
Stoichiometric Gasoline Direct Injection (GDI) on OH	SGDIO						
Conversion to DOHC with DCP	CDOHC						
Turbocharging and Downsizing	TRBDS						
Exhaust Gas Recirculation (EGR) Boost, Level 1	EGRB						
Exhaust Gas Recirculation (EGR) Boost, Level 2	EGRB2						
Lean Burn Direct Injection with TRBDS	LBDI						
Advanced Diesel	ADSL						
6-Speed Manual/Improved Internals	6MAN						
Improved Auto. Trans. Controls/Externals	IATC						
6-Speed Auto Trans with Improved Internals	NAUTO						
Dual Clutch Transmission (Dry/Wet)	DCT						
New Transmission (7+ Speed Auto or 7+ Speed DC	NTRANS						
Electric Power Steering	EPS						
Improved Accessories	IACC						
12V Micro-Hybrid	MHEV						
Belt mounted Integrated Starter Generator	BISG						
Crank mounted Integrated Starter Generator	CISG						
Strong Hybrid (P2 or 2-mode hybrid)	SHEV1						
Strong Hybrid (P2 or 2-mode hybrid) with EGRB	SHEV2						
Plug-in Hybrid - 20 mi range	PHEV20						
Plug-in Hybrid - 40 mi range	PHEV40						
Electric Vehicle	EV						
Fuel Cell Vehicle	FCV						
Mass Reduction, Level 1 (5%)	MR1						
Mass Reduction, Level 2 (7.5%)	MR2						
Mass Reduction, Level 3 (10%)	MR3						
Mass Reduction, Level 4 (15%)	MR4						
Mass Reduction, Level 5 (20%)	MR5						
Low Rolling Resistance Tires, Level 1	ROLL1						
Low Rolling Resistance Tires, Level 2	ROLL2						
Low Drag Brakes	LDB						
Secondary Axle Disconnect	SAX						
Aero Drag Reduction, Level 1	AERO1						
Aero Drag Reduction, Level 2 (Active Reduction)	AERO2						

Table IV-4a: Technology Effectiveness Estimates

VEHICLE TECHNOLOGY INCREMENTAL FUEL CONSUMPTION REDUCTION (-%) BY VEHICLE SUBCLASS							
		Subcompact	Performance Subcompact	Compact	Performance Compact	Midsize	Performance Midsize
TECHNOLOGY	Abrev.	Car	Car	Car	Car	Car	Car
Low Friction Lubricants	LUB						
Engine Friction Reduction	EFR						
VVT - Coupled Cam Phasing (CCP) on SOHC	CCPS						
Discrete Variable Valve Lift (DVVL) on SOHC	DVVLS						
Cylinder Deactivation on SOHC	DEACS						
VVT - Intake Cam Phasing (ICP)	ICP						
VVT - Dual Cam Phasing (DCP)	DCP						
Discrete Variable Valve Lift (DVVL) on DOHC	DVVLD						
Continuously Variable Valve Lift (CVVL)	CVVL						
Cylinder Deactivation on DOHC	DEACD						
Stoichiometric Gasoline Direct Injection (GDI)	SGDI						
Cylinder Deactivation on OHV	DEACO						
Variable Valve Actuation - CCP and DVVL on OHV	VVA						
Stoichiometric Gasoline Direct Injection (GDI) on OHV	SGDIO						
Conversion to DOHC with DCP	CDOHC						
Turbocharging and Downsizing	TRBDS						
Exhaust Gas Recirculation (EGR) Boost, Level 1	EGRB						
Exhaust Gas Recirculation (EGR) Boost, Level 2	EGRB2						
Lean Burn Direct Injection with TRBDS	LBDI						
Advanced Diesel	ADSL						
6-Speed Manual/Improved Internals	6MAN						
Improved Auto. Trans. Controls/Externals	IATC						
6-Speed Auto Trans with Improved Internals	NAUTO						
Dual Clutch Transmission (Dry/Wet)	DCT						
New Transmission (7+ Speed Auto or 7+ Speed DCT	NTRANS						
Electric Power Steering	EPS						
Improved Accessories	IACC						
12V Micro-Hybrid	MHEV						
Belt mounted Integrated Starter Generator	BISG						
Crank mounted Integrated Starter Generator	CISG						
Strong Hybrid (P2 or 2-mode hybrid)	SHEV1						
Strong Hybrid (P2 or 2-mode hybrid) with EGRB	SHEV2						
Plug-in Hybrid - 20 mi range	PHEV20						
Plug-in Hybrid - 40 mi range	PHEV40						
Electric Vehicle	EV						
Fuel Cell Vehicle	FCV						
Mass Reduction, Level 1 (5%)	MR1						
Mass Reduction, Level 2 (7.5%)	MR2						
Mass Reduction, Level 3 (10%)	MR3						
Mass Reduction, Level 4 (15%)	MR4						
Mass Reduction, Level 5 (20%)	MR5						
Low Rolling Resistance Tires, Level 1	ROLL1						
Low Rolling Resistance Tires, Level 2	ROLL2						
Low Drag Brakes	LDB						
Secondary Axle Disconnect	SAX						
Aero Drag Reduction, Level 1	AERO1						
Aero Drag Reduction, Level 2 (Active Reduction)	AERO2						

Table IV-4b: Technology Effectiveness Estimates

VEHICLE TECHNOLOGY INCREMENTAL FUEL CONSUMPTION REDUCTION (-%) BY VEHICLE SUBCLASS							
		Large	Performance Large	Minivan	Small	Midsize	Large
TECHNOLOGY	Abrev.	Car	Car	LT	LT	LT	LT
Low Friction Lubricants	LUB						
Engine Friction Reduction	EFR						
VVT - Coupled Cam Phasing (CCP) on SOHC	CCPS						
Discrete Variable Valve Lift (DVVL) on SOHC	DVVLS						
Cylinder Deactivation on SOHC	DEACS						
VVT - Intake Cam Phasing (ICP)	ICP						
VVT - Dual Cam Phasing (DCP)	DCP						
Discrete Variable Valve Lift (DVVL) on DOHC	DVVLD						
Continuously Variable Valve Lift (CVVL)	CVVL						
Cylinder Deactivation on DOHC	DEACD						
Stoichiometric Gasoline Direct Injection (GDI)	SGDI						
Cylinder Deactivation on OHV	DEACO						
Variable Valve Actuation - CCP and DVVL on OHV	VVA						
Stoichiometric Gasoline Direct Injection (GDI) on OH	SGDIO						
Conversion to DOHC with DCP	CDOHC						
Turbocharging and Downsizing	TRBDS						
Exhaust Gas Recirculation (EGR) Boost, Level 1	EGRB						
Exhaust Gas Recirculation (EGR) Boost, Level 2	EGRB2						
Lean Burn Direct Injection with TRBDS	LBDI						
Advanced Diesel	ADSL						
6-Speed Manual/Improved Internals	6MAN						
Improved Auto. Trans. Controls/Externals	IATC						
6-Speed Auto Trans with Improved Internals	NAUTO						
Dual Clutch Transmission (Dry/Wet)	DCT						
New Transmission (7+ Speed Auto or 7+ Speed DC	NTRANS						
Electric Power Steering	EPS						
Improved Accessories	IACC						
12V Micro-Hybrid	MHEV						
Belt mounted Integrated Starter Generator	BISG						
Crank mounted Integrated Starter Generator	CISG						
Strong Hybrid (P2 or 2-mode hybrid)	SHEV1						
Strong Hybrid (P2 or 2-mode hybrid) with EGRB	SHEV2						
Plug-in Hybrid - 20 mi range	PHEV20						
Plug-in Hybrid - 40 mi range	PHEV40						
Electric Vehicle	EV						
Fuel Cell Vehicle	FCV						
Mass Reduction, Level 1 (5%)	MR1						
Mass Reduction, Level 2 (7.5%)	MR2						
Mass Reduction, Level 3 (10%)	MR3						
Mass Reduction, Level 4 (15%)	MR4						
Mass Reduction, Level 5 (20%)	MR5						
Low Rolling Resistance Tires, Level 1	ROLL1						
Low Rolling Resistance Tires, Level 2	ROLL2						
Low Drag Brakes	LDB						
Secondary Axle Disconnect	SAX						
Aero Drag Reduction, Level 1	AERO1						
Aero Drag Reduction, Level 2 (Active Reduction)	AERO2						

Table IV-5: Energy Loss Mechanism Estimates

Percent Reduction of Energy Loss by Loss Mechanism										
TECHNOLOGY	Abrev.	System Irreversibility	Exhaust and Coolant Heat Loss	Engine Friction	Pumping Loss	Accessory Losses	Transmission Losses	Aerodynamic Drag	Tire Rolling Resistance	Vehicle Work
Low Friction Lubricants	LUB									
Engine Friction Reduction	EFR									
VVT - Coupled Cam Phasing (CCP) on SOHC	CCPS									
Discrete Variable Valve Lift (DVVL) on SOHC	DVVLS									
Cylinder Deactivation on SOHC	DEACS									
VVT - Intake Cam Phasing (ICP)	ICP									
VVT - Dual Cam Phasing (DCP)	DCP									
Discrete Variable Valve Lift (DVVL) on DOHC	DVVLD									
Continuously Variable Valve Lift (CVVL)	CVVL									
Cylinder Deactivation on DOHC	DEACD									
Stoichiometric Gasoline Direct Injection (GDI)	SGDI									
Cylinder Deactivation on OHV	DEACO									
Variable Valve Actuation - CCP and DVVL on OHV	VVA									
Stoichiometric Gasoline Direct Injection (GDI) on OHV	SGDIO									
Conversion to DOHC with DCP	CDOHC									
Turbocharging and Downsizing	TRBDS									
Exhaust Gas Recirculation (EGR) Boost, Level 1	EGRB									
Exhaust Gas Recirculation (EGR) Boost, Level 2	EGRB2									
Lean Burn Direct Injection with TRBDS	LBDI									
Advanced Diesel	ADSL									
6-Speed Manual/Improved Internals	6MAN									
Improved Auto. Trans. Controls/Externals	IATC									
6-Speed Auto Trans with Improved Internals	NAUTO									
Dual Clutch Transmission (Dry/Wet)	DCT									
New Transmission (7+ Speed Auto or 7+ Speed DCT)	NTRANS									
Electric Power Steering	EPS									
Improved Accessories	IACC									
12V Micro-Hybrid	MHEV									
Belt mounted Integrated Starter Generator	BISG									
Crank mounted Integrated Starter Generator	CISG									
Strong Hybrid (P2 or 2-mode hybrid)	SHEV1									
Strong Hybrid (P2 or 2-mode hybrid) with EGRB	SHEV2									
Plug-in Hybrid - 20 mi range	PHEV20									
Plug-in Hybrid - 40 mi range	PHEV40									
Electric Vehicle	EV									
Fuel Cell Vehicle	FCV									
Mass Reduction, Level 1 (5%)	MR1									
Mass Reduction, Level 2 (7.5%)	MR2									
Mass Reduction, Level 3 (10%)	MR3									
Mass Reduction, Level 4 (15%)	MR4									
Mass Reduction, Level 5 (20%)	MR5									
Low Rolling Resistance Tires, Level 1	ROLL1									
Low Rolling Resistance Tires, Level 2	ROLL2									
Low Drag Brakes	LDB									
Secondary Axle Disconnect	SAX									
Aero Drag Reduction, Level 1	AERO1									
Aero Drag Reduction, Level 2 (Active Reduction)	AERO2									

Table IV-6a: Technology Synergy Estimates

Synergies		Fuel Consumption Improvement Synergy values by Subclass Positive values are [positive] synergies, negative values are dissynergies.					
Technology A	Technology B	Subcompact PC	Subcompact Perf. PC	Compact PC	Compact Perf. PC	Midsize PC	Midsize Perf. PC
ICP	NAUTO						

Table IV-6b: Technology Synergy Estimates

Synergies		Fuel Consumption Improvement Synergy values by Subclass Positive values are [positive] synergies, negative values are dissynergies.					
Technology A	Technology B	Large PC	Large Perf. PC	Minivan LT	Small LT	Midsize LT	Large LT
ICP	NAUTO						

Table IV-7: Battery and Power Electronics Estimates

Battery and Power Electronics Estimates										
		HEV			PHEV			EV		
	Units	MY2017	MY2020	MY2025	MY2017	MY2020	MY2025	MY2017	MY2020	MY2025
Battery Pack RPE Cost (100% Discharge Energy)	$/kWh									
Battery Pack RPE Cost (Usable Energy)	$/kWh									
Battery Cell RPE Cost	$/kWh									
Battery Warranty (Time)	years									
Battery Warranty (Mileage)	miles									
Expected Battery Life (Time)	years									
Expected Battery Life (Mileage)	miles									
Primary Motor RPE Cost	$/kW									
Secondary Motor RPE Cost	$/kW									
Primary Inverter RPE Cost	$/kW									
Secondary Inverter RPE Cost	$/kW									

Appendix B. Technology Decision Trees

Figure 1. Engine Technology Decision Tree

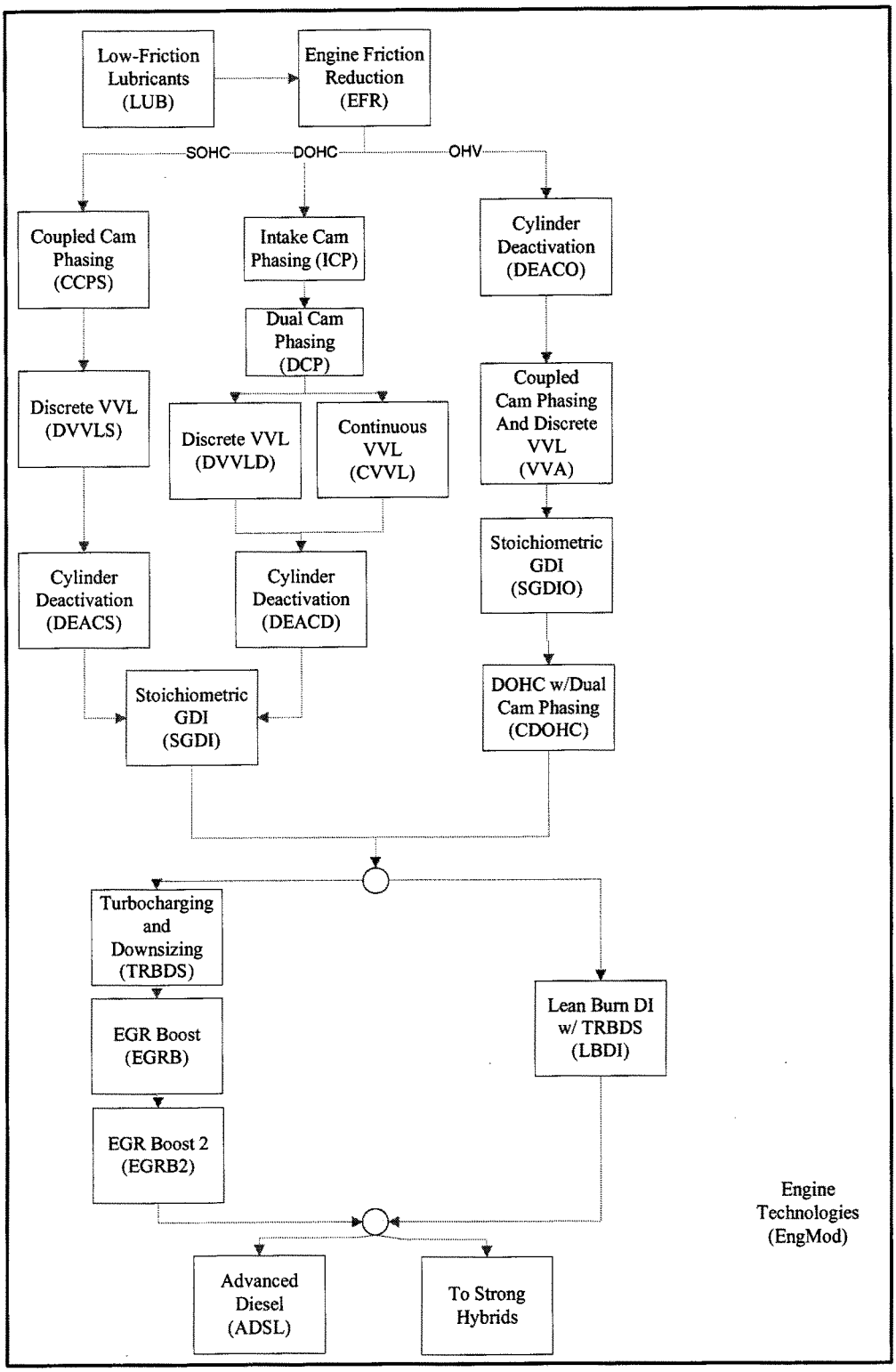


Figure 2. Electrification/Accessory, Transmission and Hybrid Technology Decision Tree

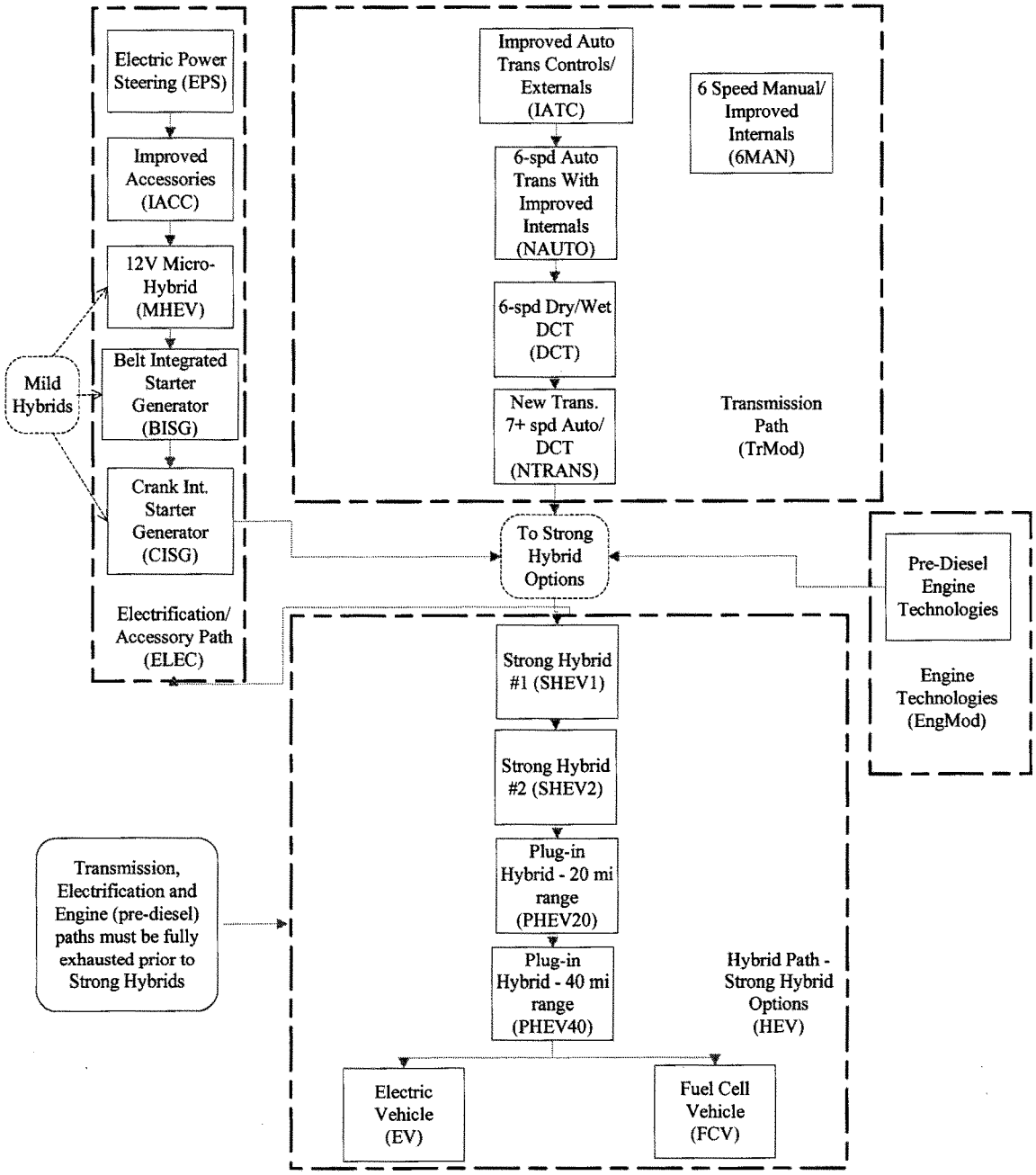
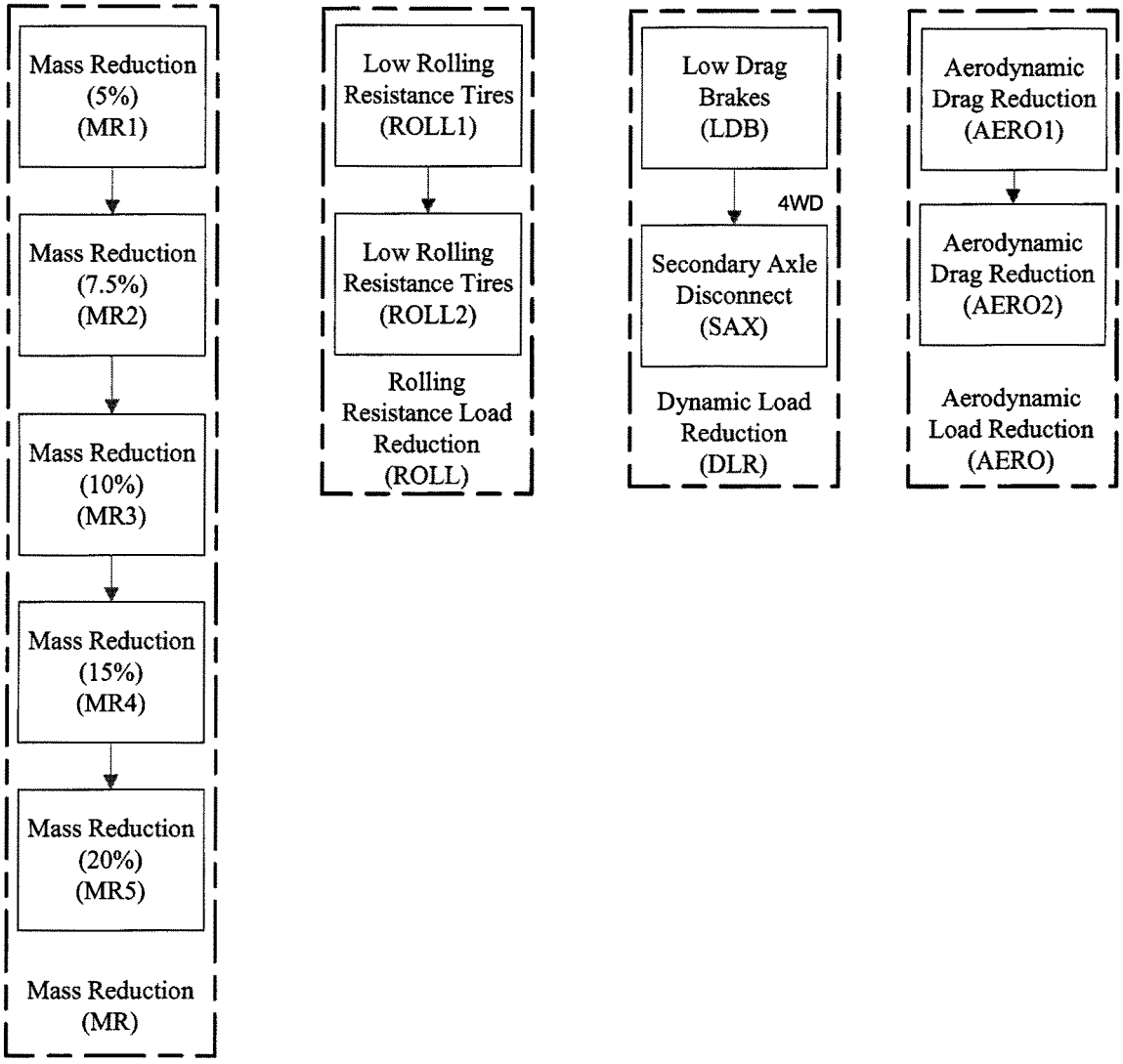


Figure 3. Vehicle Technology Decision Tree



[FR Doc. 2010–32163 Filed 12–21–10; 8:45 am]
BILLING CODE 4910–59–C

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Parts 821 and 826

Rules of Practice in Air Safety Proceedings and Implementing the Equal Access to Justice Act of 1980

AGENCY: National Transportation Safety Board (NTSB or Board).

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: The NTSB seeks comments from the public regarding amendments to its regulations which set forth rules of procedure for the NTSB's review of certificate actions taken by the Federal Aviation Administration (FAA), and those which set forth rules of procedure concerning applications for fees and expenses under the Equal Access to Justice Act (EAJA). The NTSB is undertaking a review in an effort to respond to parties' suggestions for changing the rules, in order to update rules that may be outdated, in the interest of modernizing the rules to accommodate prospective electronic filing and document availability in case dockets.

DATES: Send your comments on or before February 22, 2011.

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

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to NTSB Office of General Counsel, 490 L'Enfant Plaza East, SW., Washington, DC 20594–2000.
- *Facsimile:* Fax comments to 202–314–6090.
- *Hand Delivery:* Bring comments to 490 L'Enfant Plaza East, SW., 6th Floor, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Gary Halbert, General Counsel, (202) 314–6080.

SUPPLEMENTARY INFORMATION:

Comments Invited

The NTSB invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to any economic, environmental, energy, or federalism impacts that may result in amending part 821 or part 826. The most helpful comments would reference a specific section, explain the reason for any recommended change, and include supporting data or rationale. To ensure the docket does not contain duplicative comments, please send only one copy of written comments, or, if you are filing comments electronically, please submit your comments only once.

We will file in the docket all comments we receive, as well as a report summarizing any substantive public contact with NTSB personnel concerning this proposed rulemaking. Before amending part 821 or part 826, we will consider all comments we receive on or before the closing date for comments. As described below, we are particularly interested in reviewing comments pertaining to: The standard for the NTSB's review of the FAA's "emergency" determinations; discovery and exchange of documents in air safety proceedings; suggestions concerning electronic filing of documents in such cases; and updates to the procedural rules governing EAJA claims.

Part 821: Rules of Practice in Air Safety Proceedings

Emergency Review Process: Regulatory History

The FAA is authorized, under 49 U.S.C. 44709(e)(2), to issue orders amending, modifying, suspending, or revoking certificates issued on an "emergency" basis. In non-emergency cases, the certificate holder may continue to exercise the privileges of the certificate(s) affected by such an order while an appeal of the order is pending with the NTSB. Emergency orders are issued by the FAA where it finds that the interests of safety require that the order be effective immediately, and, in those cases, certificate privileges may not be exercised during the pendency of the appeal. Section 716 of the Aviation Investment and Reform Act for the 21st Century (hereinafter, "the Act") amended 49 U.S.C. 44709 by granting the NTSB authority to review such emergency determinations. Public Law 106–181, section 716 (2000) (codified at 49 U.S.C. 44709(e)(3)).

On July 11, 2000, in order to implement that provision, the NTSB published an Interim Rule with a request for comments. 65 FR 42637. This Interim Rule amended 49 CFR part 821 by providing the NTSB's administrative law judges with the authority to issue orders affirming or denying the FAA's determination that an emergency exists under 49 U.S.C. 44709(e).

The NTSB received a number of comments in response to the Interim Rule, which it considered when drafting the Final Rule. Those comments were primarily directed at the following subjects: The standard of review of emergency determinations; the burden of proof and the evidence to be reviewed; and an intermediate appeal process to the full Board. In addition, a suggestion was made to allow electronic filings in such proceedings. On April 29, 2003, the NTSB published the Final Rule, which included one major change from the Interim Rule: It altered the standard of review for emergency determinations.

A. Standard of Review

The standard of review of emergency determinations in the Interim Rule directed NTSB law judges to decide whether the Administrator abused his or her discretion in finding that an emergency existed under the facts alleged in the Administrator's order, which the NTSB assumed to be true for the limited purpose of reviewing the emergency determination. The NTSB incorporated the abuse of discretion standard for review set forth in the Interim Rule from *Nevada Airlines* v. *Bond,* 622 F.2d 1017 (9th Cir. 1980). Subsequent to *Nevada Airlines,* the Ninth Circuit, in *Tur* v. *FAA,* 4 F.3d 766, 768 (1993), reaffirmed the "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law" standard it articulated in *Nevada Airlines.* That standard was also applied in *Ickes* v. *FAA,* 299 F.3d 260 (3rd Cir. 2002) (citing *Blackman* v. *Busey,* 938 F.2d 659, 663 (6th Cir. 1991) and *Nevada Airlines,* and stating, "our standard of review when assessing an FAA response to a perceived emergency is appropriately deferential: we ask only whether the finding of an emergency 'was a clear error of judgment lacking any rational basis in fact.' "). *See also Armstrong* v. *FAA,* 515 F.3d 1294 (D.C. Cir. 2008) (implying, in dicta, that the appropriate standard for review of emergency determinations is an "arbitrary and capricious" standard).

After issuing the Interim Rule, the NTSB received two comments asserting that the abuse of discretion standard is not appropriate for the NTSB to apply to its reviews of emergency determinations. Both commenters stated that the abuse of discretion standard used in *Nevada Airlines* was a standard for judicial review and was not suitable for administrative review by the NTSB.

However, based on the comments, the standard of review provided for in the Final Rule at section 821.54(e) provides: "Within 5 days after the Board's receipt of [a petition for review of the FAA's emergency determination], the * * * law judge * * * shall dispose of the petition by written order, and, in so doing, shall consider whether, based on the acts and omissions alleged in the Administrator's order, and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal."

The NTSB adopted a standard that requires a law judge to ascertain whether the Administrator's emergency determination was appropriate under the circumstances, given the potential threat to aviation safety, rather than merely deciding whether the Administrator's emergency determination was rationally supportable under an abuse of discretion standard. Thus, the standard adopted in the Final Rule represented a substantive departure from the more stringent standard that had been generally accepted by the courts.

B. Burden of Proof and Evidence

Related to the standard of review in emergency determination cases, some commenters objected to the provision in the Interim Rule that reviews of emergency determinations be undertaken under the assumption that facts alleged by the Administrator are true. That assumption remained unchanged in the Final Rule. Note: Section 821.54(e) does not explicitly state that the allegations of the FAA's complaint are "deemed true," but instead uses the word "assum[ed]." The NTSB modeled this language after subsection (b) of the Board's Stale Complaint Rule, codified at 49 CFR 821.33. The NTSB concluded that the right to challenge an emergency determination should not be an opportunity to contest the factual allegations underlying the certificate action. The Board believed its rules already provided an opportunity for contesting those factual allegations in emergency cases via an expedited review process, which must be completed within 60 days, and the NTSB determined that it would be impractical to accomplish that expedited review process within the preliminary 5-day emergency determination review process.

The NTSB also received several comments concerning the review of evidence during the emergency determination review phase; most commenters asserted that certificate holders need more evidence from the FAA in order to contest the determination that an emergency exists. After carefully considering the comments concerning the presentation of evidence during the emergency review determination phase, the NTSB included the following provision in section 821.54(d) of its Final Rule: "No hearing shall be held on a petition for review of an emergency determination. However, the law judge may, on his or her own initiative, and strictly in keeping with the prohibition on ex parte communications * * * solicit from the parties additional information to supplement that previously provided by the parties."

C. Appeals Process

Several commenters were also concerned with the Interim Rule's provision, in section 821.54(f), that the law judge's determination concerning an emergency review petition would be considered final. The commenters provided various suggestions for an appeal process, in which a certificate holder could appeal the law judge's determination that an emergency exists to the Board. In the Final Rule, the NTSB decided not to institute such an intermediate appellate procedure for review of the law judges' decisions in reviewing emergency determinations. The NTSB determined that it was not necessary and would prove infeasible given the 5-day statutory period in which the Board must act on a petition. In order to address concerns of inconsistency and lack of precedent, the NTSB provided in the Final Rule that it would, in those cases that are appealed to the Board for a decision on the merits of an emergency or other immediately effective order of the Administrator, state the Board's concurrence or disagreement with the law judge's ruling on a petition challenging the emergency determination whenever it would be beneficial to address the issues raised, and that such views of the Board would serve as binding precedent in future cases.

D. Electronic Filings

Finally, one commenter suggested that the NTSB consider permitting electronic filing in emergency proceedings. The NTSB declined to adopt such a provision in the Final Rule.

Request for Comments

A. Standard for NTSB Review of FAA Emergency Determinations

Recently, the NTSB has received requests from outside organizations to further alter the standard of review for emergency determinations. In particular, parties have asked the NTSB to consider removing the language of section 821.54(e) that provides that the law judge should assume that the acts and omissions alleged in the FAA's emergency order are true. Because of such interest, the NTSB specifically invites written comments concerning this issue along with support for the position.

B. Discovery and Exchanges of Information by the Parties

The NTSB has also received requests for amendments to its rules governing the discovery process and exchanges of information by the parties in air safety enforcement proceedings, and would like to invite written comments concerning discovery obligations in cases on appeal. For example, in the interest of ensuring that parties understand their discovery obligations, should the Rules of Practice require law judges routinely to issue prehearing orders? In addition, should the Rules impose any specific sanctions for a party's failure to provide information requested in discovery? The NTSB specifically invites comments on these issues along with the reasoning for any recommendation to make changes, as well as general concerns regarding pre-hearing exchanges of information by the parties.

C. Electronic Filing of Documents

The NTSB is committed to creating an electronic filing system for cases involving certificate actions at some point in the future. Currently, the NTSB is in the initial stages of exploring options for such a system. The NTSB is nevertheless interested in obtaining ideas and suggestions at this juncture from commenters. The NTSB notes that many certificate-holders proceed *pro se* (without representation by legal counsel), and encourages comments that suggest means by which parties acting *pro se* may avail themselves of the electronic filing process.

Part 826: EAJA Procedural Rules

Background Information

The NTSB promulgated part 826 on October 1, 1981, in light of the need for procedural rules to govern cases arising out of the EAJA, codified at 5 U.S.C. 504. In the Final Rule that the NTSB published promulgating part 826

(published at 46 FR 48208 (Oct. 1, 1981)), the NTSB organized part 826 into three subparts: Subpart A contains general provisions, such as the purpose of part 826, which proceedings are covered and which applicants are eligible, and which fees and expenses are allowable, among other subjects; subpart B contains provisions concerning the required information that applicants must furnish the NTSB in order to receive an award; and subpart C sets forth the NTSB's procedures for considering EAJA applications. In 1989, the NTSB published a Final Rule amending the authority citation for part 826, and revising section 826.4, which addresses the eligibility of applicants (published at 54 FR 10332–01 (Mar. 13, 1989)). Specifically, the NTSB revised three subsections of section 826.4(b) to provide limitations on which applicants may be eligible for an award. The NTSB has not amended part 826 since the March 1989 Final Rule.

Request for Comments

Recently, the NTSB Office of General Counsel received an inquiry from an attorney who advised that section 826.40, which provides instructions for receiving payment of an award from the FAA, was outdated, in that it provides an incorrect address and contact information for the FAA office responsible for managing payments of awards under the EAJA. The NTSB seeks to ensure that its regulations are current, accurate, legally enforceable, and helpful to individuals to whom they apply. Therefore, the NTSB plans to update section 826.40, as well as any other sections within part 826 that may also be inaccurate.

The NTSB invites written comments from any individuals interested in this rulemaking. As stated above, comments should specify the section needing amendment, and provide clear recommendations of the proposed changes along with supporting data and rationale.

The NTSB reminds potential commenters that 5 U.S.C. 504 governs the applicability of the EAJA, and the NTSB will not attempt to expand this applicability in amending part 826. The NTSB also will observe and respect courts' interpretations of 5 U.S.C. 504, and, in general, will not adopt suggestions that are contrary to the Federal Courts of Appeals' interpretations.

In general, the NTSB is receptive to considering suggestions concerning the promulgation of new sections regarding subjects not presently addressed in part 826. The NTSB does not intend to enact proposed provisions that it believes would not be helpful, would impose an undue burden on the FAA or the EAJA applicant, or would be contrary to any law, regulation, or executive order. The NTSB invites comments concerning proposed amendments to part 826 in light of these proclamations.

Regulatory Notices

1. Executive Order 12866 (Regulatory Planning and Review)

This advance notice of proposed rulemaking is not a significant regulatory action under Executive Order 12866. Therefore, Executive Order 12866 does not require a Regulatory Assessment.

2. Executive Order 13132 (Federalism)

The NTSB has analyzed this ANPRM in accordance with the principles and criteria contained in Executive Order 13132. Any rulemaking proposal resulting from this notice would not propose any regulations that would: (1) Have a substantial direct effect on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government; (2) impose substantial direct compliance costs on state and local governments; or (3) preempt state law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

3. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires each agency to review its rulemaking to assess the potential impact on small entities, unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. The NTSB does not believe that any proposal resulting from this ANPRM will have a significant economic impact on a substantial number of small entities. However, the NTSB invites comments to facilitate any further analysis on this issue.

Dated: December 15, 2010.

Deborah A.P. Hersman,

Chairman.

[FR Doc. 2010–32056 Filed 12–21–10; 8:45 am]

BILLING CODE 7533–01–P

Notices

Federal Register
Vol. 75, No. 245
Wednesday, December 22, 2010

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

ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD

Meetings

AGENCY: Architectural and Transportation Barriers Compliance Board.

ACTION: Notice of meetings.

SUMMARY: The Architectural and Transportation Barriers Compliance Board (Access Board) plans to hold its regular committee and Board meetings in Washington, DC, Monday through Wednesday, January 10–12, 2011, at the times and location noted below.

DATES: The schedule of events is as follows:

Monday, January 10, 2011

10:45–11:15 a.m. Budget Committee
11:15–Noon Technical Programs Committee
1:30–2:30 p.m. Planning and Evaluation Committee
2:45–4 Ad Hoc Committee Meetings: Closed to Public

Tuesday, January 11, 2011

9–2:45 p.m. Ad Hoc Committee Meetings: Closed to Public
3–4 Ad Hoc Committee Meetings: Airport Terminal Access, Accessible Design in Education

Wednesday, January 12, 2011

9:30–Noon Frontiers Ad Hoc Committee Meetings
1:30–3 p.m. Board Meeting

ADDRESSES: All meetings will be held at the Access Board Conference Room, 1331 F Street, NW., Suite 800, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: For further information regarding the meetings, please contact David Capozzi, Executive Director, (202) 272–0010 (voice); (202) 272–0082 (TTY).

SUPPLEMENTARY INFORMATION: At the Board meeting scheduled on the afternoon of Wednesday, January 12, 2011, the Access Board will consider the following agenda items:

- Approval of the draft November 10, 2010 meeting minutes
- Budget Committee Report
- Planning and Evaluation Committee Report
- Technical Programs Committee Report
- Ad Hoc Committee Reports
  - Shared Use Paths Accessibility Guidelines—Advance Notice of Proposed Rulemaking (vote)
  - Public Rights-of-Way Accessibility Guidelines—Notice of Proposed Rulemaking (vote)
- Executive Director's Report
- Presentation from Aaron Bishop, Executive Director, National Council on Disability
- Public Comment, Open Topics

All meetings are accessible to persons with disabilities. An assistive listening system, computer assisted real-time transcription (CART), and sign language interpreters will be available at the Board meeting and committee meetings. Persons attending Board meetings are requested to refrain from using perfume, cologne, and other fragrances for the comfort of other participants (*see http://www.access-board.gov/about/policies/fragrance.htm* for more information).

David M. Capozzi,

Executive Director.

[FR Doc. 2010–32105 Filed 12–21–10; 8:45 am]

BILLING CODE 8150–01–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–821]

Certain Hot-Rolled Carbon Steel Flat Products From India: Amended Final Results of Countervailing Duty Administrative Review Pursuant to Court Decision

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

SUMMARY: On November 16, 2010, the Court of International Trade (CIT) issued an order in *JSW Steel Limited v. United States, and United States Steel Corporation and Nucor Corporation,* Court No. 08–00247, Order Of Judgment By Stipulation Of The Parties (November 16, 2010) (*JSW*) pertaining to the Department's agreement with JSW Steel Limited (JSW), setting the final countervailing rate for the period of review (POR) of January 1, 2006, through December 31, 2006 (2006 POR) to 76.88 percent, and specifying the future countervailing duty cash deposit rate to 76.88 percent for that company. The Department is amending the final results of the administrative review of the countervailing duty order on certain hot-rolled carbon steel flat products (HRCS) from India covering the 2006 POR, to reflect the CIT's order in *JSW.*

DATES: *Effective Date:* December 22, 2010.

FOR FURTHER INFORMATION CONTACT: Gayle Longest, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–3338.

SUPPLEMENTARY INFORMATION:

Background

On July 14, 2008, the Department published its final results in the countervailing duty administrative review of HRCS from India covering the POR of January 1, 2006, through December 31, 2006. *See Certain Hot-Rolled Carbon Steel Flat Products From India: Final Results of Countervailing Duty Administrative Review,* 73 FR 40295 (July 14, 2008) (*Final Results*), and accompanying Issues and Decision Memorandum ("I&D Memorandum").

JSW filed a lawsuit challenging certain aspects of the final results concerning JSW. The Department entered into a settlement agreement with JSW.

Pursuant to the Order Of Judgment By Stipulation Of The Parties, the CIT directed the Department to: (1) Amend the *Final Results* with respect to JSW, setting the final countervailing duty rate for the 2006 POR to 76.88 percent, and specifying the future countervailing duty cash deposit rate for JSW to be 76.88 percent; (2) issue instructions to U.S. Customs and Border Protection (CBP) requiring the liquidation of the entries at issue at 76.88 percent; and (3) issue instructions to CBP establishing the future cash deposit rate for JSW at the rate of 76.88 percent, which will remain in place until it is changed by the Department in a future

administrative review of the firm with respect to the countervailing duty order on HRCS from India.

Amended Final Results

In accordance with the CIT's order, the countervailing duty rate for JSW for the period January 1, 2006, through December 31, 2006, is 76.88 percent. In addition, the cash deposit rate for JSW is 76.88 percent.

Assessment of Duties

In accordance with the CIT's order, U.S. Customs and Border Protection (CBP) shall assess countervailing duties on all appropriate entries covered by these amended final results. The Department intends to issue liquidation instructions to CBP 15 days after publication of these amended final results in the **Federal Register**. The Department will also instruct CBP to collect cash deposits of estimated countervailing duties on shipments of the subject merchandise produced by JSW, entered or withdrawn from warehouse, for consumption on or after the date of publication of these amended final results.

Notification

We are issuing and publishing these amended final results of administrative review in accordance with sections 751(a)(1) and 777(i) of the Tariff Act of 1930, as amended.

Dated: December 16, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–32170 Filed 12–21–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[Application No. 10–0005]

Export Trade Certificate of Review

ACTION: Notice of application (Application #10–0005) for an Export Trade Certificate of Review from ARC Industries LTD ("ARC").

SUMMARY: The Office of Competition and Economic Analysis, International Trade Administration, U.S. Department of Commerce, has received an application for an Export Trade Certificate of Review ("Certificate"). This notice summarizes the conduct for which certification is sought and requests comments relevant to whether the Certificate should be issued.

FOR FURTHER INFORMATION CONTACT: Joseph E. Flynn, Director, Office of Competition and Economic Analysis, International Trade Administration, by telephone at (202) 482–5131 (this is not a toll-free number) or e-mail at *etca@trade.gov.*

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. Sections 4001–21) authorizes the Secretary of Commerce to issue Export Trade Certificates of Review. An Export Trade Certificate of Review protects the holder and the members identified in the Certificate from State and Federal government antitrust actions and from private treble damage antitrust actions for the export conduct specified in the Certificate and carried out in compliance with its terms and conditions. Section 302(b)(1) of the Export Trading Company Act (15 U.S.C. 4012(b)(1)) and 15 CFR 325.6(a) require the Secretary to publish a notice in the **Federal Register** identifying the applicant and summarizing its proposed export conduct. Under 15 CFR 325.6(a), any interested party may, within twenty days after the date of publication of this notice, submit written comments to the Secretary on the application.

Request for Public Comments Request for Public Comments

Interested parties may submit written comments relevant to the determination whether a Certificate should be issued. If the comments include any privileged or confidential business information, it must be clearly marked as such, and a nonconfidential version of the comments (identified as such) should be included. Any comments not marked privileged or confidential business information will be deemed to be nonconfidential. An original and five (5) copies, plus two (2) copies of the nonconfidential version should be submitted no later than 20 days after the date of this notice to: Office of Competition and Economic Analysis, International Trade Administration, U.S. Department of Commerce, Room 7021X, Washington, DC 20230, or transmitted by E-mail at *oetca@trade.gov.* Information submitted by any person is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552). However, nonconfidential versions of the comments will be made available to the applicant if necessary for determining whether or not to issue the Certificate. Comments should refer to this application as "Export Trade Certificate of Review, application number 10–0005".

Summary of the Application:

Applicant: ARC Industries Ltd. ("ARC"), 3447 Goldenhills Street, Deltona, FL 32728.

Contact: Mr. Abel R. Coombs.

Application No.: 10–0005.

Date Deemed Submitted: December 8, 2010.

Members: None.

The applicant (ARC) seeks a Certificate of Review to engage in the Export Trade Activities and Methods of Operation described below in the following Export Trade and Export Markets.

I. Export Trade

1. *Products:* All products.

2. *Services:* All services.

3. *Technology Rights:* Technology rights that relate to Products and Services including, but not limited to, patents, trademarks, copyrights, and trade secrets.

4. *Export Trade Facilitation Services (as They Relate to the Export of Products, Services, and Technology Rights):* Export Trade Facilitation Services include professional services in the areas of government relations and assistance with state and federal programs; foreign trade and business protocol; consulting; market research and analysis; collection of information on trade opportunities; marketing; negotiations; joint ventures; shipping; export management; export licensing; advertising; documentation and services related to compliance with customs requirements; insurance and financing; trade show exhibitions; organizational development; management and labor strategies; licensing of technology; transportation; and facilitating the formation of products and services associations.

II. Export Markets

The Export markets include all parts of the world except the United States: (the fifty states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands).

III. Export Trade Activities and Methods of Operation

1. With respect to the export of Products and Services, licensing of Technology Rights and provision of Export Trade Facilitation Services, ARC, subject to the terms and conditions below, seeks certification to:

a. Provide and/or arrange for the provision of Export Trade Facilitation Services;

b. Engage in promotional and marketing activities and collect information on trade opportunities in the Export Markets and distribute such information to clients;

c. Enter into exclusive and/or non-exclusive licensing and/or sales agreements with Suppliers for the export of products and services, and/or technology rights to Export Markets;

d. Enter into exclusive and/or non-exclusive agreements with distributors and/or sales representatives in Export Markets;

e. Allocate export sales or divide Export Markets among Suppliers for the sale and/or licensing of products and services and/or technology rights;

f. Allocate export orders among Suppliers;

g. Establish the price of products and services and/or technology rights for sales and/or licensing in Export Markets; and

h. Negotiate, enter into, and/or manage licensing agreements for the export of technology rights.

2. ARC seeks certification to exchange information with individual Suppliers on a one-to-one basis regarding that Supplier's inventories and near-term production schedules in order that the availability of Products for export can be determined and effectively coordinated by ARC with its distributors in Export Markets.

IV. Terms and Conditions

1. In engaging in Export Trade Activities and Methods of Operation, ARC will not intentionally disclose, directly or indirectly, to any Supplier any information about any other Supplier's costs, production, capacity, inventories, domestic prices, domestic sales, or U.S. business plans, strategies, or methods that is not already generally available to the trade or public.

2. ARC will comply with requests made by the Secretary of Commerce on behalf of the Secretary or the Attorney General for information or documents relevant to conduct under the Certificate. The Secretary of Commerce will request such information or documents when either the Attorney General or the Secretary of Commerce believes that the information or documents are required to determine that the Export Trade, Export Trade Activities and Methods of Operation of a person protected by this Certificate of Review continue to comply with the standards of section 303(a) of the Act.

Definition

"Supplier" means a person who produces, provides, or sells Products, Services, and/or Technology Rights.

Dated: December 6, 2010.

Joseph E. Flynn,

Director, Office of Competition and Economic Analysis.

[FR Doc. 2010–32125 Filed 12–21–10; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–824]

Polyethylene Terephthalate Film, Sheet and Strip From India: Extension of Time Limit for Preliminary Results of Antidumping Duty New Shipper Review

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

DATES: *Effective Date:* December 22, 2010.

FOR FURTHER INFORMATION CONTACT: Elfi Blum and Toni Page, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0197 and (202) 482–1398, respectively.

Background

On March 2, 2010, the Department of Commerce (the Department) initiated a new shipper review of the antidumping duty order on polyethylene terephthalate film, sheet and strip from India for the period July 1, 2009, through December 31, 2009. *See Polyethylene Terephthalate Film, Sheet and Strip from India: Initiation of Antidumping Duty and Countervailing Duty New Shipper Reviews,* 75 FR 10758 (March 9, 2010). This new shipper review covers one producer and exporter of the subject merchandise to the United States: SRF Limited. On August 18, 2010, the Department extended the deadline for the preliminary results for this new shipper review until October 22, 2010. *See Polyethylene Terephthalate Film, Sheet and Strip from India: Extension of Time Limit for Preliminary Results of Antidumping Duty New Shipper Review,* 75 FR 52717 (August 27, 2010) (*First Extension*). On October 18, 2010, the Department decided to further extend the deadline for the preliminary results to December 16, 2010. *See Polyethylene Terephthalate Film, Sheet and Strip From India: Extension of Time Limit for Preliminary Results of Antidumping Duty New Shipper Review,* 75 FR 65450 (October 25, 2010) (*Second Extension*).

Extension of Time Limit for the Preliminary Results

Section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.214(i)(1) require the Department to issue the preliminary results of review within 180 days after the date on which the new shipper review was initiated, and final results of the review within 90 days after the date on which the preliminary results were issued. However, if the Department concludes that a new shipper review is extraordinarily complicated, section 751(a)(2)(B)(iv) of the Act and 19 CFR 351.214(i)(2) allow the Department to extend the 180-day period to 300 days, and to extend the 90-day period to 150 days. In the *First Extension* and the *Second Extension,* the Department determined that this new shipper review is extraordinarily complicated because of issues pertaining to the *bona fides* of the new shipper and SRF Limited's reported sales data. *See First Extension,* 75 FR at 52717; *Second Extension,* 75 FR at 65450. The Department finds that it needs additional time to analyze methodological issues related to SRF Limited's reported sales data, and is fully extending the deadline for completion of the preliminary results of this new shipper review, in accordance with section 751(a)(2)(B)(iv) of the Act and 19 CFR 351.214(i)(2). Accordingly, the deadline for the completion of the preliminary results is now December 27, 2010.

This notice is issued and published pursuant to sections 751(a)(2)(B)(iv) and 777(i)(1) of the Act.

Dated: December 16, 2010.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–32168 Filed 12–21–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–866]

Superalloy Degassed Chromium From Japan: Final Results of Sunset Review and Revocation of Antidumping Duty Order

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

SUMMARY: On November 1, 2010, the Department of Commerce (the Department) initiated the sunset review of the antidumping duty order on superalloy degassed chromium (SDC)

from Japan. See *Initiation of Five-Year ("Sunset") Review,* 75 FR 67082 (November 1, 2010) (*Initiation Notice*). Because no domestic interested party responded to the notice of initiation of the sunset review by the applicable deadline, the Department is revoking the antidumping duty order on SDC from Japan.

DATES: *Effective Date:* December 22, 2010.

FOR FURTHER INFORMATION CONTACT: Jerrold Freeman at (202) 482–0180 or Minoo Hatten at (202) 482–1690, AD/CVD Operations, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On December 22, 2005, the Department published in the **Federal Register** the antidumping duty order on SDC from Japan. See *Antidumping Duty Order: Superalloy Degassed Chromium from Japan,* 70 FR 76030 (December 22, 2005).

On November 1, 2010, the Department initiated a sunset review of the antidumping duty order on SDC from Japan pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). See *Initiation Notice.* We received no response to the notice of initiation from domestic interested parties by the applicable deadline date. See 19 CFR 351.218(d)(1)(i). As a result, the Department has concluded that no domestic party intends to participate in the sunset review. *See* 19 CFR 351.218(d)(1)(iii)(A). On November 22, 2010, we notified the International Trade Commission, in writing, that we intend to revoke the antidumping duty order on SDC from Japan. See 19 CFR 351.218(d)(1)(iii)(B)(2).

Scope of the Order

The product covered by the order is all forms, sizes, and grades of SDC from Japan. SDC is a high-purity form of chrome metal that generally contains at least 99.5 percent, but less than 99.95 percent, chromium. SDC contains very low levels of certain gaseous elements and other impurities (typically no more than 0.005 percent nitrogen, 0.005 percent sulphur, 0.05 percent oxygen, 0.01 percent aluminum, 0.05 percent silicon, and 0.35 percent iron). SDC is generally sold in briquetted form, as "pellets" or "compacts," which typically are 1.5 inches x 1 inch x 1 inch or smaller in size and have a smooth surface. SDC is currently classifiable under subheading 8112.21.00 of the Harmonized Tariff Schedule of the United States (HTSUS). The order covers all chromium meeting the above specifications for SDC regardless of tariff classification.

Certain higher-purity and lower-purity chromium products are excluded from the scope of the order. Specifically, the order does not cover electronics-grade chromium, which contains a higher percentage of chromium (typically not less than 99.95 percent), a much lower level of iron (less than 0.05 percent), and lower levels of other impurities than SDC. The order also does not cover "vacuum melt grade" chromium, which normally contains at least 99.4 percent chromium and contains a higher level of one or more impurities (nitrogen, sulphur, oxygen, aluminum and/or silicon) than specified above for SDC.

Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Revocation

Pursuant to section 751(c)(3)(A) of the Act and 19 CFR 351.218(d)(1)(iii)(B)(3), if no domestic interested party files a notice of intent to participate, the Department shall issue a final determination revoking the order within 90 days of the initiation of the review. Because no domestic interested party filed a timely notice of intent to participate in this sunset review, the Department finds that no domestic interested party is participating in this sunset review. Therefore, we are revoking the antidumping duty order on SDC from Japan. The effective date of revocation is December 22, 2010, the fifth anniversary of the antidumping duty order.

Effective Date of Revocation

Pursuant to section 751(c)(3)(A) of the Act and 19 CFR 351.222(i)(2)(i), the Department intends to issue instructions to U.S. Customs and Border Protection, 15 days after publication of this notice, to terminate the suspension of liquidation of the merchandise subject to the order which was entered, or withdrawn from warehouse, for consumption on or after December 22, 2010. Entries of subject merchandise prior to the effective date of revocation will continue to be subject to the suspension of liquidation and antidumping duty deposit requirements. The Department is not conducting any administrative reviews of this order currently but it will conduct an administrative review of the order with respect to subject merchandise entered prior to the effective date of revocation in response to appropriately filed requests for review.

This five-year (sunset) review and notice are published in accordance with sections 751(c) and 777(i)(1) of the Act.

Dated: December 16, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–32172 Filed 12–21–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–831]

Fresh Garlic from the People's Republic of China: Preliminary Results of, Partial Rescission of, and Intent to Rescind, in Part, the 15th Antidumping Duty Administrative Review

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

SUMMARY: The Department of Commerce (Department) is conducting an administrative review of the antidumping duty order on fresh garlic from the People's Republic of China (PRC) covering the period of review (POR), November 1, 2008 through October 31, 2009. The Department initiated this review for 84 producers/exporters (companies). Based on timely withdrawal of requests for review, the Department is now rescinding the review with respect to 54 companies which are listed in Attachment I. As such, this review covers the 30 companies listed in Attachment II.

One producer/exporter selected as a mandatory respondent has participated fully and has demonstrated its eligibility for a separate rate. We preliminarily determine that the respondent sold subject merchandise to the United States at prices below normal value (NV). The Department has also preliminarily determined that total adverse facts available (AFA) is warranted for two mandatory respondents who each failed to cooperate to the best of its ability in this proceeding. The Department preliminarily grants a separate rate to four companies which demonstrated the eligibility for separate rate status. The rates assigned to each of these companies, can be found in the "Preliminary Results of Review" section of this notice. The Department also intends to rescind preliminarily the review with respect to seven companies which each timely submitted a "no shipment" certification. The remaining

fourteen companies for which a review was requested but which failed to timely submit a no-shipment certification, or separate rate certification or application, are part of the PRC-wide entity. A more detailed explanation of the disposition of each of the above companies can be found below.

Interested parties are invited to comment on these preliminary results. If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on entries of subject merchandise during the POR for which assessment rates are above *de minimis.*

DATES: *Effective Date:* December 22, 2010.

FOR FURTHER INFORMATION CONTACT: Scott Lindsay, David Lindgren, or Lingjun Wang, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; *telephone:* (202) 482–0780, (202) 482–3870, and (202) 482–2316, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 16, 1994, the Department published in the **Federal Register** the antidumping duty order on fresh garlic from the PRC. *See Antidumping Duty Order: Fresh Garlic From the People's Republic of China,* 59 FR 59209 (November 16, 1994) (*Order*). On November 2, 2009, the Department published a notice of opportunity to request an administrative review of the antidumping duty order on fresh garlic from the PRC for the period November 1, 2008 through October 31, 2009. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 74 FR 56573 (November 2, 2009). On November 25, 2009 and November 30, 2009, various interested parties timely requested administrative reviews of 84 garlic producers/exporters.

On December 23, 2009, the Department initiated an administrative review for 84 companies. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 74 FR 68229, 68230–68231 (December 23, 2009) (*Initiation Notice*).

On November 25, 2009, Hebei Golden Bird Trading Co., Ltd. (Golden Bird), Jining Yongjia Trade Co., Ltd. (Yongjia), Jinxiang Tianheng Trade Co., Ltd. (Tianheng), Qingdao Tiantaixing Foods Co., Ltd. (QTF), Weifang Chenglong Import & Export Co., Ltd. (Chenglong), each timely certified that it had no shipments during the POR. Also, Qingdao Sea-line International Trading Co. Ltd. (Sea-line) timely certified that it had no shipments during the period of May 1, 2009 through October 31, 2009.[1] On January 22, 2010, Jinan Yipin Corporation Ltd. (Yipin), Shandong Chenhe International Trading Co., Ltd. (Chenhe), Shanghai LJ International Trading Co. (Shanghai LJ), Zhengzhou Yuanli Trading Co. (Yuanli) each timely certified that it had no shipments during the POR.[2] On March 10, 2010, the Fresh Garlic Producers Association (FGPA) and its individual members [3] (collectively, Petitioners) commented on Yongjia and QTF's no shipment representations based on publicly available information through the Port Import Export Reporting Services (PIERS). On March 19, 2010, Yongjia and QTF responded to Petitioners' comments.

On January 12, 2010, the Department released CBP data to interested parties. Comments on the CBP data were due on January 25, 2010. On January 22, 2010, Golden Bird and Tianheng reiterated to the Department that they did not have any shipments during the POR. *See Intent to Rescind, In Part, the Administrative Review* section below.

On January 22, 2010, Henan Weite Industrial Co., Ltd. (Henan Weite), Jinan Farmlady Trading Co., Ltd. (Farmlady), Qingdao Xintianfeng Foods Co., Ltd. (QXF), Shandong Longtai Fruits and Vegetables Co., Ltd. (Longtai), Weifang Hongqiao International Logistic Co., Ltd. (Hongqiao), and Zhenzhou Harmoni Spice Co., Ltd. (Harmoni) each timely submitted a separate rate certification.[4] On January 13, 2010, Shenzhen Greening Trading Co., Ltd. (Shenzhen Greening) timely submitted a separate rate certification. On February 28, 2010, Shenzhen Greening also timely submitted a separate rate application.

On February 12, 2010, the Department issued a memorandum that tolled the deadlines for all Import Administration cases by seven calendar days due to the Federal Government closure. *See* Memorandum for the Record from Ronald Lorentzen, DAS for Import Administration, Tolling of Administrative Deadlines as a Result of the Government Closure During the Recent Snowstorm, dated February 12, 2010. On March 1, 2010, in accordance with section 777A(c)(2) of the Tariff Act of 1930, as amended (the Act), the Department selected the following four companies as mandatory respondents for individual examination in this review: Jinxiang Tianma Freezing Storage Co., Ltd. (Tianma Freezing), Shenzhen Xinboda Industrial Co., Ltd. (Shenzhen Xinboda), Shenzhen Greening and Harmoni. *See* Memorandum from Scott Lindsay, International Trade Analyst, Office 6, Re: Antidumping Administrative Review of Fresh Garlic from the People's Republic of China: Respondent Selection Memorandum (March 1, 2010) (*Respondent Selection Memorandum*), available on file in the Central Records Unit, Room 7046 of the Department's main building.

On March 8, 2010, the Department issued antidumping questionnaires (initial questionnaire) to the four mandatory respondents. On March 11, 2010 and March 30, 2010, Petitioners timely withdrew their requests to review 54 companies. *See* Attachment I. Jinxiang Hejia Co. Ltd. (Hejia) withdrew its own review request on January 13, 2010. However, since Petitioners also requested a review of Hejia, that review continues. On March 30, 2010, Zhengzhou Harmoni Spice Co. Ltd. (Harmoni) withdrew its own review request in addition to Petitioners' withdrawal request. Shenzhen Greening and Tianma Freezing did not respond to the initial questionnaire, nor did they request any extension or state that they were having difficulty in responding to the questionnaire. On April 19, 2010, April 26, 2010, and May 4, 2010, Shenzhen Xinboda submitted responses to the initial questionnaire.[5] On July 21, 2010, Petitioners commented on these responses. On September 17, 2010, and November 17, 2010, Shenzhen Xinboda submitted responses to the first and second supplemental questionnaires.

On April 9, 2010, Petitioners requested that the Department conduct verification of the factual information placed on the record of this proceeding by the mandatory respondents. On June 8, 2010, the Department extended the deadline for the preliminary results of this administrative review until December 7, 2010. *See Fresh Garlic From The People's Republic of China: Extension of Time Limit for Preliminary Results of Antidumping Duty*

[1] Sea-line has an active new shipper review that covers the first six months of the POR covered by this administrative review, November 1, 2008 through April 30, 2009.

[2] On March 11, 2010, Petitioners subsequently withdrew their requests to review Tianheng, Chenglong, and Yuanli.

[3] The individual members of the FGPA are Christopher Ranch L.L.C., The Garlic Company, Valley Garlic, and Vessey and Company, Inc.

[4] Petitioners subsequently withdrew their requests to review Henan Weite and Harmoni.

[5] The Department granted several extensions for various sections of the initial questionnaire.

Administrative Review, 75 FR 32361 (June 8, 2010).

On July 20, 2010, the Department provided all interested parties the opportunity to submit any information they wanted the Department to consider when selecting the surrogate country and surrogate values. On October 19, 2010, Petitioners and Shenzhen Xinboda submitted their respective surrogate data. On October 29, 2010, both parties commented on the other parties' surrogate data.

Period of Review

The POR is November 1, 2008 through October 31, 2009.

Scope of the Order

The products covered by the order are all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, provisionally preserved, or packed in water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing. The differences between grades are based on color, size, sheathing, and level of decay. The scope of this order does not include the following: (a) Garlic that has been mechanically harvested and that is primarily, but not exclusively, destined for non-fresh use; or (b) garlic that has been specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed. The subject merchandise is used principally as a food product and for seasoning. The subject garlic is currently classifiable under subheadings 0703.20.0010, 0703.20.0020, 0703.20.0090, 0710.80.7060, 0710.80.9750, 0711.90.6000, and 2005.90.9700 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive. In order to be excluded from the order, garlic entered under the HTSUS subheadings listed above that is (1) mechanically harvested and primarily, but not exclusively, destined for non-fresh use or (2) specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed must be accompanied by declarations to CBP to that effect.

Partial Rescission of the Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party that requested the review withdraws the request within 90 days of the date of publication of the initiation notice of the requested review. Further, pursuant to 19 CFR 351.213(d)(1), the Department is permitted to extend this time if it is reasonable to do so.

For all but one of the 54 companies listed in Attachment II, Petitioners were the only party that requested the review. With respect to one other company, Harmoni, both Harmoni and Petitioners requested a review of Harmoni. On March 30, 2010, both Petitioners and Harmoni timely withdrew their respective review requests.[6] Therefore, in accordance with 19 CFR 351.213(d)(1), we are rescinding this review with respect to all 54 companies named in the Attachment II.

Intent To Rescind, in Part, the Administrative Review

Under 19 CFR 351.213(d)(3), the Department may rescind a review where there are no exports, sales, or entries of subject merchandise during the respective period of review listed below. In the *Initiation Notice,* the Department stated that any company named in the notice of initiation that had no exports, sales, or entries during the period of review should notify the Department within 30 days of publication of the *Initiation Notice* in the **Federal Register**. The Department stated that it would consider rescinding the review only if the company submitted a properly filed and timely statement certifying that it had no exports, sales, or entries of subject merchandise during the period of review. *See Initiation Notice.* The deadline to submit "no shipment" certifications was January 22, 2010.

As noted above, Golden Bird, Yipin, Yongjia, QTF, Chenhe, and Shanghai LJ each timely certified that it had no shipments during the POR. Also, Sea-line timely certified that it had no shipments during the period May 1, 2009 through October 31, 2009. The Department issued "no-shipment" inquires to CBP and received one response regarding Golden Bird.

On January 22, 2010, Golden Bird and Tianheng reiterated that their certifications are accurate.[7] The Department examined Golden Bird's detailed transaction information provided by CBP, and also invited parties to comment. *See* Memorandum from Scott Lindsay, Re: Antidumping Administrative Review of Fresh Garlic from the People's Republic of China: Placing Additional Customs and Border Protection (CBP) Data on the Record (November 10, 2010). On November 29, 2010, Golden Bird submitted comments continuing to argue that its no-shipment certification was accurate. Based on the evidence on the record, the Department preliminarily determines that Golden Bird did not have any garlic shipments enter the United States during the POR.

On March 10, 2010, Petitioners questioned the accuracy of Yongjia and QTF's no-shipment statement based on PIERS data. On March 19, 2010, Yongjia and QTF responded to Petitioners' comments by challenging the accuracy of PIERS data. The Department examined the detailed transaction information provided by CBP. *See* Memorandum from Scott Lindsay, Re: Antidumping Administrative Review of Fresh Garlic from the People's Republic of China: Placing Additional Customs and Border Protection (CBP) Data on the Record (November 24, 2010). Based on the evidence on the record, the Department preliminarily determines that Yongjia and QTF did not have any garlic shipments enter the United States during the POR.

When examining a no-shipment certification, the Department's practice is to: (1) Review the respondent's no shipment claim; (2) examine CBP entry data to determine whether these data are consistent with the claim; and (3) send a "No Shipment Inquiry" to CBP requesting that CBP notify the Department if it has evidence of shipments from the company making the claim. After taking these three steps, the Department has found no evidence on the record to indicate that these companies had exports, entries, or sales of subject merchandise under this order during the POR, pursuant to 19 CFR 351.213(d)(3). Therefore, the Department is preliminarily rescinding the review with respect to Golden Bird, Yipin, Yongjia, QTF, Chenhe, Sea-line, and Shanghai LJ.

Non-Market Economy Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as a non-market economy (NME) country. In accordance with section 771(18)(c)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See, e.g., Brake Rotors From*

[6] On August 16, 2010, Farmlady urged the Department to determine whether Harmoni had any business dealings with Petitioners before any final rescission. The regulations are clear that so long as the parties that requested the review withdrew the request, the Secretary will rescind the review. Since both withdrawal requests were timely, the Department has no basis to evaluate the reasoning behind party's decision to withdraw its request. Furthermore, Farmlady provided no evidence to support its claim that there have been business dealings between Petitioners and Harmoni.

[7] Petitioners subsequently withdrew their request to review Tianheng, so it became unnecessary to further examine Tianheng's no-shipment certification.

the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review, 71 FR 66304 (November 14, 2006). None of the parties to this proceeding have contested such treatment. Accordingly, we calculated NV in accordance with section 773(c) of the Act, which applies to NME countries.

Separate Rates

As noted above, designation of a country as an NME remains in effect until it is revoked by the Department. *See* section 771(18)(c)(i) of the Act. Accordingly, there is a rebuttable presumption that all companies within the PRC are subject to government control and, thus, should be assessed a single antidumping duty rate.

It is the Department's standard policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to its exports. To establish whether a company is sufficiently independent to be eligible for a separate, company-specific rate, the Department analyzes each exporting entity in an NME country under the test established in the *Final Determination of Sales at Less than Fair Value: Sparklers From the People's Republic of China,* 56 FR 20588 (May 6, 1991) (Sparklers), as amplified by the *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China,* 59 FR 22585 (May 2, 1994) (*Silicon Carbide*).

In the *Initiation Notice,* the Department stated that all firms that wish to qualify for separate-rate status in the administrative reviews involving NME countries must complete, as appropriate, either a separate-rate application or certification, as described below. For these administrative reviews, in order to demonstrate separate-rate eligibility, the Department requires entities for which a review was requested, that were assigned a separate rate in the most recent segment of this proceeding in which they participated, to certify that they continue to meet the criteria for obtaining a separate rate. In this administrative review, Farmlady, QXF, Longtai, and Hongqiao each submitted a separate-rate certification. Although Shenzhen Xinboda did not submit a separate rate certification, as a cooperating mandatory respondent, it did answer all the separate rate questions in our questionnaires. As such, Shenzhen Xinboda, Farmlady, QXF, Longtai, and Hongqiao each provided company-specific information and each stated that it met the criteria for the assignment of a separate rate. We considered whether Shenzhen Xinboda, Farmlady, QXF, Longtai, and Hongqiao were eligible for a separate rate.

The Department's separate-rate status test to determine whether the exporter is independent from government control does not consider, in general, macroeconomic/border-type controls (*e.g.,* export licenses, quotas, and minimum export prices), particularly if these controls are imposed to prevent dumping. The test focuses, rather, on controls over the investment, pricing, and output decision-making process at the individual firm level. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From Ukraine,* 62 FR 61754, 61758 (November 19, 1997), and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of Antidumping Administrative Review,* 62 FR 61276, 61279 (November 17, 1997).

A. Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) other formal measures by the government decentralizing control of companies.

Shenzhen Xinboda, Farmlady, QXF, Longtai, and Hongqiao each certified that, consistent with the most recent segment of this proceeding in which it participated and was granted a separate rate, there is an absence of *de jure* government control of its exports.[8] Each of these companies certified to its separate-rate status, and stated, where applicable, that the company had no relationship with any level of the PRC government with respect to ownership, internal management, and business operations. In this segment, we have no new information on the record that would cause us to reconsider the previous *de jure* control determinations with regard to these companies. Thus, we find that evidence on the record supports a preliminary finding of an absence of *de jure* government control with regard to the export activities of Shenzhen Xinboda, Farmlady, QXF, Longtai, and Hongqiao.

B. Absence of De Facto Control

As stated in previous cases, there is evidence that certain enactments of the PRC central government have not been implemented uniformly among different sectors and/or jurisdictions in the PRC. *See Silicon Carbide,* 59 FR at 22586–87. Therefore, the Department has determined that an analysis of *de facto* control is critical in determining whether the respondents are, in fact, subject to a degree of government control which would preclude the Department from assigning separate rates.

The absence of *de facto* government control over exports is based on whether a company: (1) Sets its own export prices independent of the government and other exporters; (2) retains the proceeds from its export sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) has the authority to negotiate and sign contracts and other agreements; and (4) has autonomy from the government regarding the selection of management. *See, e.g., Silicon Carbide,* 59 FR at 22587, and *Sparklers,* 56 FR at 20589; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China,* 60 FR 22544, 22545 (May 8, 1995).

Shenzhen Xinboda, Farmlady, QXF, Longtai, and Hongqiao each timely submitted a certification of its separate-rate eligibility which stated that, as with the previous period where each company was granted a separate rate; there is an absence of *de facto* government control of each company's exports. Their separate rate certifications, stated, where applicable, that they had no relationship with any level of the PRC government with respect to ownership, internal management, and business operations. In this segment, we have no new information on the record that would cause us to reconsider the previous period's *de facto* control determinations with regard to these companies. Therefore, the Department preliminarily finds that Shenzhen Xinboda, Farmlady, QXF, Longtai, and Hongqiao have established, *prima facie,* that they qualify for separate rates under the

[8] The most recently completed segment of this proceeding in which Xintianfeng and Hongqiao participated and were granted separate rate status was *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 14th Antidumping Duty Administrative Review,* 75 FR 34976 (June 21, 2010). The most recently completed segment of this proceeding in which Longtai and Farmlady participated and was granted separate rate status was *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 12th Administrative Review,* 73 FR 34251 (June 17, 2008).

criteria established by *Silicon Carbide* and *Sparklers.*

Surrogate Country

When the Department investigates imports from an NME country, section 773(c)(1) of the Act directs it to base NV on the NME producer's factors of production (FOPs), valued in a surrogate market economy country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more market economy countries that are: (1) At a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise. Moreover, it is the Department's practice to select an appropriate surrogate country based on the availability and reliability of data from the countries. *See* Department Policy Bulletin No. 04.1: Non-Market Economy Surrogate Country Selection Process (March 1, 2004) (Policy Bulletin).

As discussed in the "Non-Market Economy Country Status" section above, the Department considers the PRC to be an NME country. Pursuant to section 773(c)(4) of the Act, the Department determined that India, Philippines, Indonesia, Thailand, Ukraine, and Peru are countries comparable to the PRC in terms of economic development. *See* Memorandum to All Interested Parties Re: 15th Administrative Review of Fresh Garlic from the People's Republic of China (July 20, 2010) at Attachment 1.

Also, in accordance with section 773(c)(4) of the Act, the Department has found that India is a significant producer of comparable merchandise. Moreover, the Department finds India to be a reliable source for surrogate values (SVs) because India is at a similar level of economic development, is a significant producer of comparable merchandise, and has publicly available and reliable data. Furthermore, the Department notes that India has been the primary surrogate country in past segments of this proceeding, and the only SV data submitted on the record are from Indian sources. Given the above facts, the Department has selected India as the primary surrogate country for this review. The sources of the SVs are discussed under the "Normal Value" section below and in the Memorandum from Scott Lindsay, Re: Preliminary Results of the 2008–2009 Administrative Review of Fresh Garlic from the People's Republic of China: Surrogate Values Memorandum (December 7, 2010) (SV Memorandum). No parties submitted comments concerning selection of the surrogate country.

U.S. Price

In accordance with section 772(a) of the Act, we calculated export prices (EP) for Shenzhen Xinboda's sales to the United States because they were made to unaffiliated parties before the date of importation. We calculated Shenzhen Xinboda's EP based on its price to unaffiliated purchasers in the United States. In accordance with section 772(c) of the Act, where appropriate, we deducted movement expenses (*e.g.* foreign inland freight, international freight, brokerage and handling, marine insurance, warehousing, and U.S. customs duties) from the starting price to unaffiliated purchasers. For the expenses that were either provided by an NME vendor or paid for with an NME currency, we used SVs as appropriate. *See* the "Factor Valuations" section below for details regarding the SV for movement expenses.

Normal Value

A. Methodology

Section 773(c)(1)(B) of the Act provides that the Department shall determine NV using an FOP methodology if the merchandise is exported from an NME country and the information does not permit the calculation of NV using home-market prices, third-country prices, or constructed value under section 773(a) of the Act. The Department calculates NV using each of the FOPs that a respondent consumes in the production of a unit of the subject merchandise because the presence of government controls on various aspects of NMEs renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies. However, there are circumstances in which the Department will modify its standard FOP methodology, choosing to apply SVs to an intermediate input instead of the individual FOPs used to produce that intermediate input. In some cases, a respondent may report factors used to produce an intermediate input that accounts for an insignificant share of total output. When the potential increase in accuracy to the overall calculation that results from valuing each of the FOPs is outweighed by the resources, time, and burden such an analysis would place on all parties to the proceeding, the Department has valued the intermediate input directly using SVs. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from the People's Republic of China,* 68 FR 47538 (August 11, 2003), and accompanying Issues and Decision Memorandum at Comment 1 (PVA) (citing to *Final Results of First New Shipper Review and First Antidumping Duty Administrative Review: Certain Preserved Mushrooms From the People's Republic of China,* 66 FR 31204 (June 11, 2001)).

For the final results of several prior administrative reviews (ARs) and new shipper reviews (NSRs) under the garlic order,[9] the Department found that garlic industry producers in the PRC do not generally track actual labor hours incurred for growing, tending, and harvesting activities and, thus, do not maintain appropriate records which would allow most, if not all, respondents to quantify, report, and substantiate this information. In the preliminary results of the eleventh AR and NSRs, the Department also stated that "should a respondent be able to provide sufficient factual evidence that it maintains the necessary information in its internal books and records that would allow us to establish the completeness and accuracy of the reported FOPs, we will revisit this issue and consider whether to use its reported FOPs in the calculation of NV." *See Fresh Garlic from the People's Republic of China: Partial Rescission and Preliminary Results of the Eleventh Administrative Review and New Shipper Reviews,* 71 FR 71510, 71520 (December 11, 2006).

In the course of this review, Zhengzhou Dadi Garlic Industry Co., Ltd. (Zhengzhou Dadi), Shenzhen Xinboda's producer, did not report FOPs related to growing whole garlic bulbs. As such, for the reasons outlined in the Memorandum from Scott Lindsay, Re: 15th Administrative Review of Fresh Garlic from the People's Republic of China: Intermediate Input Methodology (December 7, 2010) (Intermediate Input Methodology Memorandum), the Department is applying an "intermediate-input product valuation methodology" to calculate Shenzhen Xinboda's NV. Using this methodology,

[9] *See e.g., Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews,* 72 FR 34438 (June 22, 2007); *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 12th Administrative Review,* 73 FR 34251 (June 17, 2008) (12th AR); *Fresh Garlic from the People's Republic of China: Final Results and Rescission, In Part, of Twelfth New Shipper Reviews,* 73 FR 56550 (September 29, 2008); and *Fresh Garlic From the People's Republic of China: Final Results and Partial Rescission of the 13th Antidumping Duty Administrative Review and New Shipper Reviews,* 74 FR 29174 (June 19, 2009) (*13th Administrative Review*).

the Department calculated NV by starting with an SV for the garlic bulb (*i.e.,* the "intermediate product"), adjusting for yield losses during the processing stages, and adding Shenzhen Xinboda's costs, which were calculated using its reported usage rates for processing fresh garlic. *See* Intermediate Input Methodology Memorandum.

B. Factor Valuations

In accordance with section 773(c) of the Act, the Department calculated NV based on the FOP data reported by Shenzhen Xinboda for the POR. We relied on the factor-specific data submitted by Shenzhen Xinboda for the production inputs in their questionnaire responses, where applicable, for purposes of selecting SVs. To calculate NV, the Department multiplied the reported per-unit factor consumption rates by publicly available India SVs.

In selecting the SVs, consistent with our past practice, the Department considered the quality, specificity, and contemporaneity of the data. *See, e.g., Folding Metal Tables and Chairs from the People's Republic of China; Final Results of Antidumping Duty Administrative Review,* 71 FR 71509 (December 11, 2006), and accompanying Issues and Decision Memorandum at Comment 9. As appropriate, the Department adjusted input prices by including freight costs to make them delivered prices. Specifically, the Department added to the SVs, as appropriate, a surrogate freight cost using the shorter of the reported distance from the domestic suppliers to the factory or the distance from the nearest seaport to the factory. This adjustment is in accordance with the decision of the U.S. Court of Appeals for the Federal Circuit (CAFC). *See Sigma Corp.* v. *United States,* 117 F.3d 1401, 1408 (Fed. Cir. 1997). Where necessary, we adjusted the SVs for inflation/deflation using the Wholesale Price Index (WPI) as published in the International Monetary Fund's International Financial Statistics, available at *http://ifs.apdi.net/imf.* For more information regarding the Department's valuation for the various FOPs, *see* SV Memorandum.

Garlic Bulb Valuation

The Department's practice when selecting the "best available information" for valuing FOPs, in accordance with section 773(c)(1) of the Act,[10] is to select, to the extent practicable, SVs which are publicly available, product-specific, representative of a broad market average, tax-exclusive and contemporaneous with the POR. *See e.g., Final Determination of Sales at Less Than Fair Value: Certain Artist Canvas from the People's Republic of China,* 71 FR 16116 (March 30, 2006) and accompanying Issues and Decision Memorandum at Comment 2.

As discussed above, the Department is applying an intermediate input methodology for Shenzhen Xinboda. Therefore, we sought to identify the best available SV for the garlic bulb input into production. *See* Petitioners' Submission Concerning Surrogate Values for Factors of Production and Shenzhen Xinboda's Surrogate Value Submission; *see also,* SV Memorandum. For the preliminary results of this review, we find that data from the Azadpur APMC's "Market Information Bulletin" are the most appropriate information available to value Shenzhen Xinboda's garlic bulb input.

In its responses to the first and second supplemental questionnaires, Shenzhen Xinboda stated that its "document system, including inventory system and accounting system, does not record the different sizes of garlic bulbs;" and "normally uses garlic bulbs of 5 cm to 5.5 cm for the production of peeled garlic." Consistent with our findings in the twelfth AR, the Department continues to find that garlic bulb sizes that range from 55 mm and above are Grade Super-A, and garlic bulb sizes that range between 40 mm and 55 mm are Grade A and Grade Super-A. We have used Grade A and Grade Super A for garlic bulb valuation. *See* SV Memorandum. Because the Grade Super-A prices reported by the APMC which are on the record of this review are from 2007–2008, we inflated them to make them contemporaneous to our POR. *See* SV Memorandum.

Other Factors of Production

In past cases, it has been the Department's practice to value various FOPs using import statistics of the primary selected surrogate country from World Trade Atlas (WTA), as published by Global Trade Information Services (GTIS). *See Certain Preserved Mushrooms From the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review,* 74 FR 50946, 50950 (October 2, 2009) (unchanged in *Certain Preserved Mushrooms From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review,* 74 FR 65520 (December 10, 2009)). However, in October 2009, the Department learned that Indian import data obtained from the WTA, as published by GTIS, began identifying the original reporting currency for India as the U.S. Dollar. The Department then contacted GTIS about the change in the original reporting currency for India from the Indian Rupee to the U.S. Dollar. Officials at GTIS explained that while GTIS obtains data on imports into India directly from the Ministry of Commerce, Government of India, as denominated and published in Indian Rupees, the WTA software is limited with regard to the number of significant digits it can manage. Therefore, GTIS made a decision to change the original reporting currency for Indian data from the Indian Rupee to the U.S. Dollar in order to reduce the loss of significant digits when obtaining data through the WTA software. GTIS explained that it converts the Indian Rupee to the U.S. Dollar using the monthly Federal Reserve exchange rate applicable to the relevant month of the data being downloaded and converted. *See Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping,* 75 FR 20335 (April 19, 2010), and accompanying Issues and Decision Memorandum at Comment 4.

However, the data reported in the Global Trade Atlas (GTA) software published by GTIS reports import statistics, such as those from India, in the original reporting currency and, thus, these data correspond to the original currency value reported by each country. Additionally, the data reported in the GTA software are reported to the nearest digit and, thus, there is not a loss of data by rounding, as there is with the data reported by the WTA software. Consequently, the Department has obtained import statistics from GTA for valuing various FOPs because the GTA import statistics are in the original reporting currency of the country from which the data are obtained, and have the same level of accuracy as the original data released.

Furthermore, with regard to the GTA Indian import-based SVs, in accordance with the Omnibus Trade and Competitiveness Act of 1988 legislative history, the Department continues to apply its long-standing practice of disregarding SVs if it has a reason to believe or suspect the source data may

[10] Section 773(c)(1)(B) of the Act states that "the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority."

be subsidized.[11] In this regard, the Department has previously found that it is appropriate to disregard such prices from Indonesia, South Korea and Thailand, because we have determined that these countries maintain broadly available, non-industry specific export subsidies. *See, e.g., Certain Cut-to-Length Carbon-Quality Steel Plate From Indonesia: Final Results of Expedited Sunset Review,* 70 FR 45692 (August 8, 2005), and accompanying Issues and Decision Memorandum at 4; *Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Final Results of Countervailing Duty Administrative Review,* 74 FR 2512 (January 15, 2009), and accompanying Issues and Decision Memorandum at 17, 19–20; and *Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From Thailand,* 66 FR 50410 (October 3, 2001), and accompanying Issues and Decision Memorandum at 23. Based on the existence of these subsidy programs that were generally available to all exporters and producers in Indonesia, South Korea, and Thailand at the time of the POR, the Department finds that it is reasonable to infer that all exporters from these countries may have benefitted from these subsidies. We also disregarded prices from NME countries [12] and those imports that were labeled as originating from an "unspecified" country from the average Indian import values, because we could not be certain that they were not from either an NME or a country with general export subsidies.

We valued the packing material inputs using weighted-average unit import values derived from the Monthly Statistics of the Foreign Trade of India (MSFTI), as published by the Directorate General of Commercial Intelligence and Statistics of the Ministry of Commerce and Industry, Government of India, and compiled by the GTA.

The Department valued surrogate truck freight cost by using a per-unit average rate calculated from April 2009 data on the following Web site: *http://www.infobanc.com/logistics/logtruck.htm. See Polyethylene Retail Carrier Bags From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review,* 73 FR 52282, 52286 (September 9, 2008) (unchanged in *Polyethylene Retail Carrier Bags From the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 74 FR 6857 (February 11, 2009)); and SV Memorandum at Attachment 9.

To value electricity, the Department used March 2008 electricity price rates from Electricity Tariff & Duty and Average Rates of Electricity Supply in India, published by the Central Electricity Authority of the Government of India. Because these data are not contemporaneous with the POR, we inflated March 2008 prices to make them contemporaneous to our POR. *See* SV Memorandum.

We valued brokerage and handling expenses using a price list of export procedures necessary to export a standardized cargo of goods in India. The price list is compiled based on a survey case study of the procedural requirements for trading a standard shipment of goods by ocean transport in India that is published in *Doing Business 2010: India,* published by the World Bank. *See* SV Memorandum.

The Department is continuing to evaluate options for determining labor values in light of the recent Court of Appeals for the Federal Circuit (CAFC) decision. *See Dorbest Ltd.* v. *United States,* 604 F.3d 1363, 1372 (Fed. Cir. 2010). For these preliminary results, we have calculated an hourly wage rate to use in valuing respondent reported labor input by averaging industry-specific earnings and/or wages in countries that are economically comparable to the PRC and that are significant producers of comparable merchandise.

For the preliminary results of this AR, the Department is valuing labor using a simple average industry-specific wage rate using earnings or wage data reported under Chapter 5B by the International Labor Organization (ILO). To achieve an industry-specific labor value, we relied on industry-specific labor data from the countries we determined to be both economically comparable to the PRC, and significant producers of comparable merchandise. Specifically, for this review, the Department has calculated the wage rate using a simple average of the data provided to the ILO under Sub-Classification 15 of the ISIC–Revision 3 standard by countries determined to be both economically comparable to the PRC and significant producers of comparable merchandise. The Department finds the two-digit description under ISIC–Revision 3 ("Manufacture of Food Products and Beverages") to be the best available wage rate SV on the record because it is specific and derived from industries that produce merchandise comparable to the subject merchandise. A full description of the industry-specific wage rate calculation methodology is provided in the SV Memorandum. Consequently, we averaged the ILO industry-specific wage rate data or earnings data available from the following countries found to be economically comparable to the PRC and to be significant producers of comparable merchandise: Ecuador, Egypt, Indonesia, Jordan, Peru, Philippines, Thailand, and Ukraine. Further information on the calculation of the wage rate can be found in the SV Memorandum. The resulting wage rate is $1.36.

Financial Ratios

Petitioners and Shenzhen Xinboda submitted factual information regarding surrogate financial ratios. *See* Petitioners' Submission Concerning Surrogate Values for Factors of Production and Shenzhen Xinboda's Surrogate Value Submission. After analyzing these comments and factual information, the Department has preliminarily determined that it is appropriate to calculate a single set of surrogate financial ratios applicable to the production and sales of all subject merchandise (both whole and peeled garlic) for these preliminary results using both Tata Tea Ltd.'s (Tata Tea) and Limtex Ltd.'s (Limtex) financial data. Since the 2002–2003 administrative review, the Department has considered tea processing to be sufficiently similar to garlic processing in that neither product is highly processed or preserved prior to sale. *See Fresh Garlic From the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 70 FR 34082 (June 13, 2005), and accompanying Issues and Decision Memorandum at 34–35. Moreover, we note that it is the Department's preference to use financial data from more than one surrogate producer to reflect the broader experience of the surrogate industry. *See, e.g., Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Sixth Antidumping Duty Administrative Review and Final Results of the Ninth New Shipper Review,* 69 FR 42039 (July 13, 2004), and accompanying Issues and Decision Memorandum at Comment 2; *see* also *Final Results of First New Shipper Review and First Antidumping Duty Administrative Review: Certain Preserved Mushrooms From the People's Republic of China,* 66 FR 31204 (June 11, 2001), and accompanying Issues and Decision Memorandum at Comment 3,

[11] Omnibus Trade and Competitiveness Act of 1988, Conf. Report to Accompany H.R. 3, H.R. Rep. No. 576, 100th Cong., 2nd Sess. (1988) at 590.

[12] The NME countries are Armenia, Azerbaijan, Belarus, Georgia, Kyrgyz Republic, Moldova, North Korea, the People's Republic of China, Tajikistan, Turkmenistan, Uzbekistan, and Vietnam.

and *Certain Oil Country Tubular Goods From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping,* 75 FR 20335 (April 19, 2010), and accompanying Issues and Decision Memorandum at Comment 13. We find that calculating an average of these two Indian tea processors' data provides financial ratios that best reflect the broader experience of the garlic industry and that are consistent with our practice during previous reviews. *See Fresh Garlic From the People's Republic of China: Final Results of New Shipper Review,* 75 FR 61130 (October 4, 2010), and accompanying Issues and Decision Memorandum at Comment 4. The Department finds that both Tata Tea's and Limtex's non-integrated production process is similar to that of the garlic industry. We find that the resulting financial ratios from the average of Tata Tea's and Limtex's financial data provide the best surrogate for the garlic industry in the PRC as a whole, based on the information on the record of this review. *See* SV Memorandum.

Margin for the Separate Rate Companies

As discussed above, the Department has preliminarily determined that Farmlady, QXF, Longtai, and Hongqiao have demonstrated their eligibility for separate rate status. The statute and the Department's regulations do not address the establishment of a rate to be applied to individual companies not selected for examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, we have looked to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents we did not examine in an administrative review. For the exporters subject to a review that were determined to be eligible for separate rate status, but were not selected as mandatory respondents, the Department generally weight-averages the rates calculated for the mandatory respondents, excluding any rates that are zero, *de minimis,* or based entirely on facts available (FA). *See, e.g., Wooden Bedroom Furniture From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Review and Partial Rescission of Administrative Review,* 73 FR 8273, 8279 (February 13, 2008) (unchanged in *Wooden Bedroom Furniture From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review,* 73 FR 49162 (August 20, 2008)). For this administrative review, the Department has calculated a positive margin for the single mandatory respondent, Shenzhen Xinboda. Accordingly, for the preliminary results, consistent with our practice, the Department has preliminarily determined that the margin to be assigned to Farmlady, QXF, Longtai, and Hongqiao should be the rate calculated for the single mandatory respondent, Shenzhen Xinboda.

PRC-Wide Entity

The *Initiation Notice* states "{F}or exporters and producers who submit a separate-rate status application or certification and subsequently are selected as mandatory respondents, these exporters and producers will no longer be eligible for separate-rate status unless they respond to all parts of the questionnaire as mandatory respondents." Shenzhen Greening, who after timely submitting separate rate documents did not respond to the initial questionnaire, will remain part of the PRC-wide entity. Tianma Freezing, who also did not respond to the initial questionnaire, will remain part of the PRC-wide entity. In addition, the *Initiation Notice* specifically initiated reviews by name for 16 companies which were not selected as mandatory respondents and which did not submit separate rate documentation. The Department finds these companies failed to demonstrate their eligibility for separate rate status. Accordingly, the Department considers these companies part of the PRC-wide entity. *See* Attachment III.

Facts Otherwise Available and Adverse Facts Available

Sections 776(a)(1) and (2) of the Act provide that, if necessary information is not available on the record, or if an interested party or any other person (A) withholds information that has been requested by the administering authority; (B) fails to provide such information in a timely matter or in the form or manner requested subject to subsections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act, the administering authority shall, subject to section 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department shall promptly inform the party submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that party with an opportunity to remedy or explain the deficiency. Section 782(d) of the Act additionally states that if the party submits further information that is unsatisfactory or untimely, the administering authority may, subject to subsection (e), disregard all or part of the original and subsequent responses. Section 782(e) of the Act provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if: (1) The information is submitted by the deadline established for its submission; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority with respect to the information; and (5) the information can be used without undue difficulties.

Section 776(b) of the Act further provides that, if the Department finds that an interested party has failed to comply by not acting to the best of its ability to comply with a request of information, the Department may use an adverse inference in selecting from among the facts otherwise available. Section 776(b) of the Act also authorizes the Department to use as AFA information derived from the petition, the final determination, a previous administrative review, or other information placed on the record.

For the reasons discussed below, the Department preliminarily determines that, in accordance with sections 776(a)(1), 776(a)(2) and 776(b) of the Act, the use of AFA is appropriate for the preliminary results with respect to the PRC-wide entity, which includes Shenzhen Greening and Tianma Freezing.

Shenzhen Greening and Tianma Freezing were selected as mandatory respondents, but neither responded to the initial questionnaire. Thus, the information necessary for the Department to conduct its analysis is not available in the record. Moreover, the decision by these companies to not respond to the initial questionnaire constitutes a refusal to provide the

Department with information necessary to conduct its antidumping analysis. *See* Sections 776(a)(2)(A) and (B) of the Act. As these companies have withheld necessary information that has been requested by the Department, the Department shall, pursuant to sections 776(a)(1), (a)(2)(A), and (a)(2)(B) of the Act, use facts otherwise available to reach the applicable determination.

In addition, because Shenzhen Greening and Tianma Freezing did not respond to the initial questionnaire and did not request any extension, the Department finds that each of these companies has failed to cooperate by not acting to the best of its ability to comply with the Department's request for information. By withholding the requested information, these companies prevented the Department from conducting any company-specific analysis or calculating dumping margins for the POR. Therefore, pursuant to section 776(b) of the Act, the Department preliminarily determines that an inference that is adverse to the interests of Shenzhen Greening and Tianma Freezing is warranted.

Because we have determined Shenzhen Greening and Tianma Freezing to be part of the PRC-wide entity, the PRC-wide entity is now under review. The Department preliminarily finds that the PRC-wide entity did not respond to the Department's request for information and that necessary information is not available on the record. Moreover, the Department preliminarily finds that the PRC-wide entity significantly impeded the proceeding by withholding information and failing to respond to the Department's request for information within the specified deadlines. Therefore, pursuant to sections 776(a)(1) and (a)(2) of the Act, the Department preliminarily determines that the application of facts otherwise available is warranted for the PRC-wide entity.

In addition, because Shenzhen Greening and Tianma Freezing failed to cooperate by not acting to the best of its ability, the PRC-wide entity did not provide the requested information, which was in the sole possession of the respondents and could not be obtained otherwise. Pursuant to section 776(b) of the Act, we preliminarily determine that in selecting from among the facts otherwise available, an adverse inference is warranted for the PRC-wide entity. By using an inference that is adverse to the interests of the PRC-wide entity, we ensure the companies that are part of the PRC-wide entity will not obtain a more favorable result by failing to cooperate than had they cooperated fully in this review.

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c) authorize the Department to rely on information derived from: (1) The petition; (2) a final determination in the investigation; (3) any previous review or determination; or (4) any information placed on the record. In reviews, the Department normally selects, as AFA, the highest rate on the record of any segment of the proceeding. *See, e.g., Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review,* 68 FR 19504, 19506 (April 21, 2003). The U.S. Court of International Trade (CIT) and the CAFC have consistently upheld the Department's practice in this regard. *See Rhone Poulenc, Inc.* v. *United States,* 899 F.2d 1185, 1190 (Fed. Circ. 1990) (*Rhone Poulenc*); *NSK Ltd.* v. *United States,* 346 F. Supp. 2d 1312, 1335 (CIT 2004) (upholding a 73.55 percent total AFA rate, the highest available dumping margin from a different respondent in a less-than-fair-value investigation); *see also Kompass Food Trading Int'l* v. *United States,* 24 CIT 678, 683–84 (2000) (upholding a 51.16 percent total AFA rate, the highest available dumping margin from a different, fully cooperative respondent); and *Shanghai Taoen International Trading Co., Ltd.* v. *United States,* 360 F. Supp. 2d 1339, 1348 (CIT 2005) (upholding a 223.01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).

The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the margin is "sufficiently adverse so as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." *See Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan,* 63 FR 8909, 8932 (February 23, 1998). The Department's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act,* H.R. Rep. No. 103–316, Vol. 1, at 870 (1994) (*SAA*); *see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Brazil,* 69 FR 76910, 76912 (December 23, 2004). In choosing the appropriate balance between providing respondents with an incentive to respond accurately and imposing a rate that is reasonably related to the respondent's prior commercial activity, selecting the highest prior margin "reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less." *See Rhone Poulenc,* 899 F.2d at 1190.

Consistent with the statute, court precedent, and its normal practice, the Department has preliminarily assigned the rate of $4.71 per kilogram, the highest rate determined in any segment of this proceeding, to the PRC-wide entity, which includes the companies named in Attachment III. *See 13th Administrative Review.* As discussed further in the "Corroboration of Secondary Information Used as Adverse Facts Available" section below, this rate has been corroborated.

Corroboration of Secondary Information Used as Adverse Facts Available

Section 776(c) of the Act provides that, where the Department selects from among the facts otherwise available and relies on "secondary information," the Department shall, to the extent practicable, corroborate that information from independent sources reasonably at the Department's disposal. Secondary information is described in the *SAA* as "{i}nformation derived from the petition that gave rise to the investigation or review, the final determination covering the subject merchandise, or any previous review under section 751 concerning the subject merchandise." *See SAA* at 870. The *SAA* states that "corroborate" means to determine that the information used has probative value. *Id.* The Department has determined that to have probative value, information must be reliable and relevant. *See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 61 FR 57391, 57392 (November 6, 1996) (unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final*

Results of Antidumping Duty Administrative Reviews and Termination in Part, 62 FR 11825 (March 13, 1997)). The *SAA* also states that independent sources used to corroborate such evidence may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation or review. *See SAA* at 870; *see also Notice of Preliminary Determination of Sales at Less Than Fair Value: High and Ultra-High Voltage Ceramic Station Post Insulators from Japan,* 68 FR 35627, 35629 (June 16, 2003) (unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: High and Ultra-High Voltage Ceramic Station Post Insulators from Japan,* 68 FR 62560 (November 5, 2003); and *Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada,* 70 FR 12181, 12183 (March 11, 2005).

To be considered corroborated, information must be found to be both reliable and relevant. Unlike other types of information, such as input costs or selling expenses, there are no independent sources for calculated dumping margins. The only sources for calculated margins are administrative determinations. The per-unit AFA rate we are applying for the current review was calculated using the *ad valorem* rate contained in the petition in the original investigation of garlic from the PRC and was applied as the per-unit AFA rate in the most recently completed administrative reviews of this order. *See, e.g., Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 14th Antidumping Duty Administrative Review,* 75 FR 34976 (June 21, 2010) (*Garlic 14*). Furthermore, no information has been presented in the current review that calls into question the reliability of this information. Thus, the Department finds that the information is reliable.

With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin. *See, e.g., Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review,* 61 FR 6812, 6814 (February 22, 1996). Similarly, the Department does not apply a margin that has been discredited. *See D&L Supply Co.* v. *United States,* 113 F.3d 1220, 1221 (Fed. Cir. 1997) (the Department will not use a margin that has been judicially invalidated). None of these unusual circumstances are present with respect to the rate being used here. Moreover, the rate selected, *i.e.,* $4.71 per kilogram, is the rate currently applicable to the PRC-wide entity. The Department assumes that if an uncooperative respondent could have obtained a lower rate, it would have cooperated. *See Rhone Poulenc,* 899 F.2d at 1190–91 and *Ta Chen Stainless Steel Pipe, Inc.* v. *United States,* 24 CIT 841, 848 (2000) (respondents should not benefit from failure to cooperate). As there is no information on the record of this review that demonstrates that this rate is not appropriate to use as AFA for the PRC-wide entity in the current review, we determine that this rate has relevance.

As this AFA rate is both reliable and relevant, we determine that it has probative value, and is thus in accordance with the requirement, under section 776(c) of the Act, that secondary information be corroborated to the extent practicable (*i.e.,* that it has probative value).

Currency Conversion

We made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the dates of the U.S. sales, as certified by the Federal Reserve Bank. *See http://www.ia.ita.doc.gov/exchange/index.html.*

Verification

Following the publication of these preliminary results, we intend to verify, as provided in section 782(i)(3) of the Act, sales and FOP information submitted by the Shenzhen Xinboda, as appropriate. At verification, we will use standard verification procedures, including on-site inspection of the manufacturer's facilities, the examination of relevant sales and financial records, and the selection of original source documentation containing relevant information. We will prepare verification reports outlining our verification results and place these reports on file in the Central Records Unit, room 7046 of the main Commerce building.

Preliminary Results of Review

As a result of our review, we preliminarily determine that the following margins exist for the period November 1, 2008 through October 31, 2009:

FRESH GARLIC FROM THE PRC 2008–2009 ADMINISTRATIVE REVIEW

Manufacturer/exporter	Weighted-average margin (dollars per kilogram)
Shenzhen Xinboda Industrial Co., Ltd.	$0.72
Jinan Farmlady Trading Co., Ltd.	0.72
Qingdao Xintianfeng Foods Co., Ltd.	0.72
Shandong Longtai Fruits and Vegetables Co., Ltd.	0.72
Weifang Hongqiao International Logistic Co., Ltd.	0.72
PRC-wide Entity (*see* Attachment III)	4.71

Assessment Rates

The Department will instruct U.S. Customs and Border Protection ("CBP") to assess antidumping duties on all appropriate entries. For the companies listed above which had a separate rate granted in a previously completed segment of this proceeding that was in effect during the instant review period, antidumping duties shall be assessed on entries subject to the separate rate at rates equal to the cash deposit of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). The Department intends to issue appropriate assessment instructions for such companies directly to CBP 15 days after the publication of this notice in the **Federal Register**. For any of the companies listed above that do not currently have a separate rate (and thus remain a part of the PRC-wide entity), the Department will issue assessment instructions upon the

completion of this administrative review.

Consistent with the final results of *Garlic 14,* we will direct CBP to assess importer-specific assessment rates based on the resulting per-unit (*i.e.,* per kilogram) amount on each entry of the subject merchandise during the POR. Specifically, we will divide the total dumping margins for each importer by the total quantity of subject merchandise sold to that importer during the POR to calculate a per-unit assessment amount. We will direct CBP to assess importer-specific assessment rates based on the resulting per-unit (*i.e.,* per kilogram) amount on each entry of the subject merchandise during the POR if any importer-specific assessment rate calculated in the final results of this review is above *de minimis.*

Cash Deposit Requirements

Consistent with the final results of *Garlic 14,* we will establish and collect a per-kilogram cash-deposit amount which will be equivalent to the company-specific dumping margin published in the final results of this review. Specifically, the following cash deposit requirements will be effective upon publication of the final results of this review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results, as provided by section 751(a)(1) of the Act: (1) For subject merchandise exported by Shenzhen Xinboda, the cash deposit rate will be the per-unit rate determined in the final results of this administrative review and; (2) for subject merchandise exported by Farmlady, QXF, Longtai, or Hongqiao, the cash deposit rates will be the per-unit rate determined in the final results of this administrative review; (3) for subject merchandise exported by PRC exporters subject to this administrative review that have not been found to be entitled to a separate rate (*see* Attachment III), the cash deposit rate will be the per-unit PRC-wide rate determined in the final results of administrative review; (4) for subject merchandise exported by all other PRC exporters that have not been found to be entitled to a separate rate, the cash deposit rate will be the per-unit PRC-wide rate determined in the final results of administrative review; (5) for previously-investigated or previously-reviewed PRC and non-PRC exporters who received a separate rate in a prior segment of the proceeding and which were not under review in this segment of the proceeding, the cash deposit rate will continue to the rate assigned in that prior segment of the proceeding; (6) the cash deposit rate for non-PRC exporters of subject merchandise which have not received their own rate will be the rate applicable to the PRC exporter that supplied that non-PRC exporter. These requirements, when imposed, shall remain in effect until further notice.

Disclosure

We will disclose the calculations used in our analysis to parties to this proceeding not later than ten days after the date of public announcement, or if there is no public announcement within five days of the date of publication of this notice. *See* 19 CFR 351.224(b).

Comments

Interested parties are invited to comment on the preliminary results and may submit case briefs and/or written comments within 30 days of the date of publication of this notice, unless otherwise notified by the Department. *See* 19 CFR 351.309(c)(ii). Rebuttal briefs, limited to issues raised in the case briefs, will be due five days later, pursuant to 19 CFR 351.309(d). Parties who submit case or rebuttal briefs in this proceeding are requested to submit with each argument: (1) A statement of the issue; and (2) a brief summary of the argument. Parties are requested to provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited. Additionally, parties are requested to provide their case and rebuttal briefs in electronic format (*e.g.,* preferably Microsoft Word or Adobe Acrobat).

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration within 30 days of the date of publication of this notice. Requests should contain: (1) The party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. *See* 19 CFR 351.310(c). Issues raised in the hearing will be limited to those raised in case and rebuttal briefs. The Department will issue the final results of this review, including the results of its analysis of issues raised in any such written briefs not later than 90 days after these preliminary results are issued, unless the final results are extended. *See* 19 CFR 351.241(i).

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these preliminary results in accordance with sections 751(a)(2)(B) and 777(i) of the Act, and 19 CFR 351.214(h) and 351.221(b)(4).

Dated: December 17, 2010.

Paul Piquado,

Acting Deputy Assistant Secretary for Import Administration.

Attachment I

Companies Being Rescinded

The following companies were named in our *Initiation Notice.* Subsequently, interested parties withdrew all relevant requests for review for these companies. Therefore, pursuant to 19 CFR 351.213(d)(1), we are rescinding this administrative review with respect to these companies.

1. American Pioneer Shipping
2. Anhui Dongqian Foods Ltd.
3. Anqiu Haoshun Trade Co., Ltd.
4. APS Qingdao
5. Chiping Shengkang Foodstuff Co., Ltd.
6. Hangzhou Guanyu Foods Co., Ltd.
7. Henan Weite Industrial Co., Ltd.
8. Hongqiao International Logistics Co.
9. IT Logistics Qingdao Branch
10. Jinan Solar Summit International Co., Ltd.
11. Jining Highton Trading Co., Ltd.
12. Jining Jiulong International Trading Co., Ltd.
13. Jining Tiankuang Trade Co., Ltd.
14. Jinxiang County Huaguang Food Import & Export Co., Ltd.[13]
15. Jinxiang Dacheng Food Co., Ltd.
16. Jinxiang Fengsheng Import & Export Co., Ltd.
17. Jinxiang Jinma Fruits Vegetables Products Co., Ltd.
18. Jinxiang Tianheng Trade Co., Ltd.
19. Juye Homestead Fruits and Vegetables Co., Ltd.
20. Kingwin Industrial Co., Ltd.
21. Laiwu Fukai Foodstuff Co., Ltd.
22. Laizhou Xubin Fruits and Vegetables
23. Linyi City Heding District Jiuli Foodstuff Co.
24. Ningjin Ruifeng Foodstuff Co., Ltd.
25. Qingdao Apex Shipping Co., Ltd.
26. Qingdao Lianghe International Trade Co., Ltd.
27. Qingdao Sino-World International Trading Co., Ltd.
28. Qingdao Winner Foods Co., Ltd.
29. Qingdao Yuankang International
30. Rizhao Huasai Foodstuff Co., Ltd.
31. Samyoung America (Shanghai) Inc.
32. Shandong Chengshun Farm Produce Trading Co., Ltd.

[13] f/k/a Jinxian County Huaguang Food Import & Export Co., Ltd. in the Initiation Notice.

33. Shandong China Bridge Imports
34. Shandong Dongsheng Eastsun Foods Co., Ltd.
35. Shandong Garlic Company
36. Shandong Jinxiang Zhengyang Import & Export Co., Ltd.
37. Shandong Sanxing Food Co., Ltd.
38. Shandong Xingda Foodstuffs Group Co., Ltd.
39. Shandong Yipin Agro (Group) Co., Ltd.
40. Shanghai Goldenbridge International Co., Ltd.
41. Shanghai Great Harvest International Co., Ltd.
42. T&S International, LLC
43. Taian Eastsun Foods Co., Ltd.
44. Taian Solar Summit Food Co., Ltd.
45. V.T. Impex (Shandong) Limited
46. Weifang Chenglong Import & Export Co., Ltd.
47. Weifang Naike Foodstuffs Co., Ltd.
48. WSSF Corporation (Weifang)
49. Xiamen Huamin Import Export Company
50. Xiamen Keep Top Imp. and Exp. Co., Ltd.
51. You Shi Li International Trading Co., Ltd.
52. Zhangzhou Xiangcheng Rainbow Greenland Food Co., Ltd.
53. Zhengzhou Harmoni Spice Co., Ltd.
54. Zhengzhou Yuanli Trading Co., Ltd.

Attachment II

Companies Subject to the Administrative Review

1. Anqiu Friend Food Co., Ltd.
2. Chengwu County Yuanxiang Industry & Commerce Co., Ltd.
3. Hebei Golden Bird Trading Co., Ltd.
4. Heze Ever-Best International Trade Co., Ltd. (f/k/a Shandong Heze International Trade and Developing Company)
5. Jinan Farmlady Trading Co., Ltd.
6. Jinan Yipin Corporation Ltd.
7. Jining Yongjia Trade Co., Ltd.
8. Jinxiang Dongyun Freezing Storage Co., Ltd. (a/k/a Jinxiang Eastward Shipping Import and Export Limited Company)
9. Jinxiang Hejia Co., Ltd.
10. Jinxiang Shanyang Freezing Storage Co., Ltd.
11. Jinxiang Tianma Freezing Storage Co., Ltd.
12. Linshu Dading Private Agricultural Products Co., Ltd.
13. Qingdao Saturn International Trade Co., Ltd.
14. Qingdao Sea-Line International Trading Co., Ltd.
15. Qingdao Tiantaixing Foods Co., Ltd.
16. Qingdao Xintianfeng Foods Co., Ltd.
17. Qufu Dongbao Import & Export Trade Co., Ltd.
18. Shandong Chenhe Int'l Trading Co., Ltd.
19. Shandong Longtai Fruits and Vegetables Co., Ltd.
20. Shandong Wonderland Organic Food Co., Ltd.
21. Shanghai Ever Rich Trade Company
22. Shanghai LJ International Trading Co., Ltd.
23. Shenzhen Fanhui Import & Export Co., Ltd.
24. Shenzhen Greening Trading Co., Ltd.
25. Shenzhen Xinboda Industrial Co., Ltd.
26. Taian Fook Huat Tong Kee Pte. Ltd.
27. Taiyan Ziyang Food Co., Ltd.
28. Weifang Hongqiao International Logistic Co., Ltd.
29. Weifang Shennong Foodstuff Co., Ltd.
30. XuZhou Simple Garlic Industry Co., Ltd.

Attachment III

Companies Under Review Subject to the PRC-Wide Rate

1. Anqiu Friend Food Co., Ltd.
2. Chengwu County Yuanxiang Industry & Commerce Co., Ltd.
3. Heze Ever-Best International Trade Co., Ltd. (f/k/a Shandong Heze International Trade and Developing Company)
4. Jinxiang Dongyun Freezing Storage Co., Ltd. (a/k/a Jinxiang Eastward Shipping Import and Export Limited Company)
5. Jinxiang Hejia Co., Ltd.
6. Jinxiang Shanyang Freezing Storage Co., Ltd.
7. Linshu Dading Private Agricultural Products Co., Ltd.
8. Qingdao Saturn International Trade Co., Ltd.
9. Qufu Dongbao Import & Export Trade Co., Ltd.
10. Shandong Wonderland Organic Food Co., Ltd.
11. Shanghai Ever Rich Trade Company
12. Shenzhen Fanhui Import & Export Co., Ltd.
13. Taian Fook Huat Tong Kee Pte. Ltd.
14. Taiyan Ziyang Food Co., Ltd.
15. Weifang Shennong Foodstuff Co., Ltd.
16. XuZhou Simple Garlic Industry Co., Ltd.
17. Jinxiang Tianma Freezing Storage Co., Ltd.
18. Shenzhen Greening Trading Co., Ltd.

[FR Doc. 2010–32166 Filed 12–21–10; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA102

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Council to convene public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council will convene a meeting of the Vessel Monitoring System (VMS) Advisory Panel.

DATES: The meeting will convene at 8:30 a.m. on Thursday, January 13, 2011 and conclude by 4 p.m. on Thursday, January 13, 2011.

ADDRESSES: The meeting will be held at the Crowne Plaza Hotel 5303 West Kennedy Boulevard, Tampa, FL 33609; *telephone:* (813) 289–1950.

Council address: Gulf of Mexico Fishery Management Council, 2203 N. Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Dr. John Froeschke, Fishery Biologist-Statistician; Gulf of Mexico Fishery Management Council; *telephone:* (813) 348–1630 x235.

SUPPLEMENTARY INFORMATION: The Vessel Monitoring System (VMS) Advisory Panel will meet to discuss operation, design, usage of vessel monitoring systems, and resulting data from these systems. The Advisory Panel will discuss the potential role of VMS in enhanced seafood traceability in Gulf of Mexico fisheries. This will include status and review of existing seafood traceability programs and potential mechanisms to enhance seafood safety in the future. The Advisory Panel will also consider technical issues with VMS and consider potential solutions to use VMS more effectively, increase user-friendliness of VMS units including enhanced communication for reporting fishing activities. Finally, the Advisory Panel will also consider future roles and potential applications of VMS software in Gulf of Mexico fisheries. The meeting will conclude with draft recommendations presented to the Gulf of Mexico Fishery Management Council at its February 7–10, 2011 meeting in Gulfport, MS.

Copies of the agenda and other related materials can be obtained by calling (813) 348–1630.

Although other non-emergency issues not on the agenda may come before the Advisory Panel for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal action during this meeting. Actions of the Advisory Panel will be restricted to those issues specifically identified in the agenda and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take action to address the emergency.

Special Accommodations

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

Dated: December 17, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–32082 Filed 12–21–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA103

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council's (Council) Groundfish Management Team (GMT) will hold a working meeting, which is open to the public.

DATES: The GMT meeting will be held Monday, January 10, 2011 from 3 p.m. until business for the day is completed. The GMT meeting will reconvene Tuesday, January 11 through Friday, January 14, from 8:30 a.m. until business for each day is completed.

ADDRESSES: The GMT meeting will be held at the Renaissance Long Beach Hotel, 111 East Ocean Boulevard, Long Beach, CA 90802.

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

FOR FURTHER INFORMATION CONTACT: Ms. Kelly Ames or Mr. John DeVore, Groundfish Management Staff Officers; *telephone:* (503) 820–2280.

SUPPLEMENTARY INFORMATION: The purpose of the GMT work session is to review team roles and responsibilities, conduct workload planning for 2011, review the latest West Coast Groundfish Observer Data, and discuss improvements to the biennial management process. The GMT may also address other assignments relating to groundfish management. No management actions will be decided by the GMT.

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

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: December 17, 2010.

Tracey L. Thompson,

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

[FR Doc. 2010–32083 Filed 12–21–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XA096

Marine Mammals; File No. 14335

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

ACTION: Notice; receipt of application for permit amendment.

SUMMARY: Notice is hereby given that the Alaska SeaLife Center, Seward, AK, has applied for an amendment to Scientific Research Permit No. 14335.

DATES: Written, telefaxed, or e-mail comments must be received on or before January 21, 2011.

ADDRESSES: The application and related documents are available for review by selecting "Records Open for Public Comment" from the *Features* box on the Applications and Permits for Protected Species home page, *https://apps.nmfs.noaa.gov,* and then selecting File No. 14335 from the list of available applications.

These documents are also available upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 713–0376; and

Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668; phone (907) 586–7221; fax (907) 586–7249.

Written comments on this application should be submitted to the Chief, Permits, Conservation and Education Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713–0376, or by e-mail to *NMFS.Pr1Comments@noaa.gov.* Please include the File No. in the subject line of the e-mail comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits, Conservation and Education Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

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

SUPPLEMENTARY INFORMATION: The subject amendment to Permit No. 14335 is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

Permit No. 14335, issued on August 17, 2009 (74 FR 44822), authorizes the permit holder to take Steller sea lions (*Eumetopias jubatus*) during investigations of the decline of the western stock and its failure to recover, and to assist recovery efforts. Data may be obtained on juvenile survival, epidemiology, endocrinology, immunology, virology, physiology, ontogenetic and annual body condition cycles, foraging behavior and habitat selection. Pups and juveniles of both sexes in the Gulf of Alaska may be captured each year, with a subset of juveniles selected for temporary quarantine captivity and associated projects at the ASLC. Activities involve capture, drug administration, anesthesia, fecal and urine collection, external and internal instruments, marking, morphometrics, behavioral observations, photogrammetry, tissue sampling, ultrasound, and x-ray. The permit also authorizes research-related mortality of Steller sea lions from the western stock.

The permit holder is requesting the permit be amended to revise terms and conditions related to mitigation for temporary captivity, and associated post-surgical and hot-branding monitoring. Specifically, the permit holder requests permission to: (1) Reduce the post-surgical monitoring from 14 days to 10 days prior to release; (2) surgically implant animals that are below capture mass; and (3) retain for surgical implantation and other captive

studies animals that fail to feed within 10 days of capture.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activities proposed are consistent with the Preferred Alternative in the Final Programmatic Environmental Impact Statement for Steller Sea Lion and Northern Fur Seal Research (NMFS 2007), and that issuance of the permit would not have a significant adverse impact on the human environment.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: December 15, 2010.

Tammy C. Adams,

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

[FR Doc. 2010–32162 Filed 12–21–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XZ87

Takes of Marine Mammals Incidental to Specified Activities; St. George Reef Light Station Restoration and Maintenance at Northwest Seal Rock, Del Norte County, CA

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

ACTION: Notice; proposed incidental take authorization; request for comments.

SUMMARY: NMFS has received an application from the St. George Reef Lighthouse Preservation Society (SGRLPS), for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment incidental to conducting aircraft operations, and lighthouse renovation and light maintenance activities on the St. George Reef Light Station on Northwest Seal Rock (NWSR) in the northeast Pacific Ocean. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to SGRLPS to incidentally harass, by Level B harassment only, four species of marine mammals during the specified activity.

DATES: Comments and information must be received no later than January 21, 2011.

ADDRESSES: Comments on the application should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing e-mail comments is *ITP.Cody@noaa.gov.* NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications* without change. All Personal Identifying Information (for example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

A copy of the application containing a list of the references used in this document may be obtained by writing to the above address, telephoning the contact listed here (*see* **FOR FURTHER INFORMATION CONTACT**) or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.* The following associated documents are also available at the same internet address: Environmental Assessment (EA) prepared by NMFS; and the finding of no significant impact (FONSI). Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Jeannine Cody, NMFS, Office of Protected Resources, NMFS, (301) 713–2289 or Monica DeAngelis, NMFS Southwest Regional Office, (562) 980–3232.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(D) of the MMPA (16 U.S.C. 1371(a)(5)(D)) directs the Secretary of Commerce to authorize, upon request, the incidental, but not intentional, taking by harassment of small numbers of marine mammals of a species or population stock, by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental taking of small numbers of marine mammals shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). The authorization must set forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat, and monitoring and reporting of such takings. NMFS has defined "negligible impact" in 50 CFR 216.103 as "* * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA establishes a 45-day time limit for NMFS' review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the public comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Summary of Request

NMFS received a letter on October 13, 2010, from the SGRLPS requesting the taking by harassment, of small numbers of marine mammals, incidental to aircraft operations and restoration and maintenance activities on the St. George Reef Light Station (Station). At NMFS' request, the SGRLPS submitted a complete and adequate application on November 3, 2010. The SGRLPS aims to: (1) Restore and preserve the Station on a monthly basis (November 1–April 30, annually); and (2) perform periodic, annual maintenance on the Station's optical light system.

The Station, which is listed in the National Park Service's National Register of Historic Places, is located on Northwest Seal Rock (NWSR) offshore of Crescent City, California in the northeast Pacific Ocean.

The proposed activities would occur in the vicinity of a possible pinniped haul out site located on NWSR.

Acoustic and visual stimuli generated by: (1) Helicopter landings/takeoffs; (2) noise generated during restoration activities (*e.g.,* painting, plastering, welding, and glazing); (3) maintenance activities (*e.g.,* bulb replacement and automation of the light system); and (4) human presence, may have the potential to cause any pinnipeds hauled out on NWSR to flush into the surrounding water or to cause a short-term behavioral disturbance. These types of disturbances are the principal means of marine mammal taking associated with these activities and the SGRLPS has requested an authorization to take 204 California sea lions (*Zalophus californianus*); 36 Pacific Harbor seals (*Phoca vitulina*); 172 Steller sea lions (*Eumetopias jubatus*); and six northern fur seals (*Callorhinus ursinus*) by Level B harassment.

This is SGRLPS' second request for an IHA and the monitoring results from the first IHA appear in the Proposed Monitoring section of this notice.

Description of the Specified Activity

SGRLPS proposes to conduct the proposed activities (aircraft operations, lighthouse restoration, and light maintenance activities) between November 1 through April 30, annually, at a maximum frequency of one session per month. The proposed duration for each session would last no more than three days (*e.g.,* Friday, Saturday, and Sunday).

Aircraft Operations

Because NWSR has no safe landing area for boats, the proposed restoration activities would require the SGRLPS to transport personnel and equipment from the California mainland to NWSR by a small helicopter. Helicopter landings take place on top of the engine room (caisson) which is approximately 15 m (48 ft) above the surface of the rocks on NWSR.

SGRLPS proposes to transport no more than 15 work crew members and equipment to NWSR for each session and estimates that each session would require no more than 36 helicopter landings/takeoffs per month. During landing, the helicopter would land on the caisson to allow the work crew members to disembark and retrieve their equipment located in a basket attached to the underside of the helicopter. The helicopter would then return to the mainland to pick up additional personnel and equipment. Even though SGRLPS would use the helicopter to transport work crew members and materials on the first and last days of the three-day activity, the helicopter would likely fly to and from the Station on all three days of the restoration and maintenance activities.

Proposed schedule: SGRLPS would conduct a maximum of 16 flights (eight arrivals and eight departures) for the first day. The first flight would depart from Crescent City Airport at approximately 9 a.m. for a six-minute flight to NWSR. The helicopter would land and takeoff immediately after offloading personnel and equipment every 20 minutes (min). The total duration of the first day's aerial operations would last for approximately three hours (hrs) and 34 min and would end at approximately 12:34 p.m. Crew members would remain overnight at the Station and would not return to the mainland on the first day.

For the second day, the SGRLPS would conduct a maximum of 10 flights (five arrivals and five departures) to transport additional materials on and off the islet. The first flight would depart from Crescent City Airport at 9 a.m. for a six-minute flight to NWSR. The total duration of the second day's aerial operations would last up to three hours.

For the final day of operations, SGRLPS would conduct a maximum of ten helicopter flights (five arrivals and five departures) to transport the remaining crew members and equipment/material back to the Crescent City Airport. The total duration of the third day's helicopter operations in support of restoration would last up to two hrs.

As a mean of funding support for the restoration activities, the SGRLPS will conduct public tours of the Station during the last day of the proposed restoration and maintenance activities. SGRLPS proposes to transport visitors to the Station during the Sunday work window period. Although some of these flights would be conducted solely for the transportation of tourists, those flights would be conducted at a later stage when no pinnipeds are expected to be at the Station. The proposed IHA does not include additional allowance for animals that might be affected by additional flights for the transportation of tourists.

Lighthouse Restoration Activities

Restoration activities would include the removal of peeling paint and plaster, restoration of interior plaster and paint, refurbishing structural and decorative metal, reworking original metal support beams throughout the lantern room and elsewhere, replacing glass as necessary, and upgrading the present electrical system. The SGRLPS expects to complete most of the major restoration work within three years.

Light Maintenance Activities

The SGRLPS will need to conduct maintenance on the Station's beacon light at least once or up to two times per year within the proposed work window. Scheduled light maintenance activities would coincide with lighthouse restoration activities conducted monthly during the period of November 1, through April 30, annually. The SGRLPS expects that maintenance activities would not exceed three hrs per each monthly session.

Emergency Light Maintenance

If the beacon light fails during the period from February 15, 2011, through April 30, 2011, or during the period of November 1, 2011, through December 31, 2011, the SGRLPS proposes to send a crew of two to three people to the Station by helicopter to repair the beacon light. For each emergency repair event, the SGRLPS proposes to conduct a maximum of four flights (two arrivals and two departures) to transport equipment and supplies. The helicopter may remain on site or transit back to shore and make a second landing to pick up the repair personnel.

In the case of an emergency repair between May 1, 2011, and October 31, 2011, the SGRLPS would consult with the NMFS Southwest Regional Office (SWRO) to best determine the timing of the trips to the lighthouse, on a case-by-case basis, based upon the existing environmental conditions and the abundance and distribution of any marine mammals present on NWSR. The SWRO biologists would have real-time knowledge regarding the animal use and abundance of the NWSR at the time of the repair request and would make a decision regarding when the trips to the lighthouse can be made during the emergency repair time window that would have the least practicable adverse impact to marine mammals. The SWRO would also ensure that the SGRLPS' request for incidental take during emergency repairs would not exceed the number of incidental take authorized in the proposed IHA.

Complete automation of the light generating system and automatic backup system will minimize maintenance and emergency repair visits to the island. The light is solar powered using one solar panel; an installed second panel serves as a backup which is automatically activated if needed. A second smaller bulb in the lantern is activated if the primary bulb fails. Use of high quality, durable materials and thorough weatherproofing is planned to minimize trips for maintenance and

repair in the future. All tools and supplies are stored on the island so that a minimal number of transport trips for emergency maintenance will be necessary.

Acoustic Source Specifications

R44 Raven Helicopter

The SGRLPS plans to charter a Raven R44 helicopter, owned and operated by Air Shasta Rotor and Wing, LLC. The Raven R44, which seats three passengers and one pilot, is a compact-sized (1134 kilograms (kg), 2500 pounds (lbs)) helicopter with two-bladed main and tail rotors. Both sets of rotors are fitted with noise-attenuating blade tip caps that would decrease flyover noise.

Metrics Used in This Document

This section includes a brief explanation of the sound measurements frequently used in the discussions of acoustic effects in this document. Sound pressure is the sound force per unit area, and is usually measured in micropascals (μPa), where 1 pascal (Pa) is the pressure resulting from a force of one newton exerted over an area of one square meter. Sound pressure level (SPL) is expressed as the ratio of a measured sound pressure and a reference level. The commonly used reference pressure is 1 μPa for under water, and the units for SPLs are dB re: 1 μPa. The commonly used reference pressure is 20 μPa for in air, and the units for SPLs are dB re: 20 μPa.

SPL (in decibels (dB)) = 20 log (pressure/reference pressure).

SPL is an instantaneous measurement and can be expressed as the peak, the peak-peak (p-p), or the root mean square (rms). Root mean square, which is the square root of the arithmetic average of the squared instantaneous pressure values, is typically used in discussions of the effects of sounds on vertebrates and all references to SPL in this document refer to the root mean square unless otherwise noted. SPL does not take the duration of a sound into account.

Characteristics of the Aircraft Noise

Noise testing performed on the R44 Raven Helicopter, as required for Federal Aviation Administration approval, required an overflight at 150 m (492 ft) above ground level, 109 knots and a maximum gross weight of 1,134 kg (2,500 lbs). The noise levels measured on the ground at this distance and speed were 81.9 decibels (dB) re: 20 μPa (A-weighted) for the model R44 Raven I, or 81.0 dB re: 20 μPa (A-weighted) for the model R44 Raven II (NMFS, 2007).

The helicopter would land on the Station's caisson and presumably, the received sound levels would increase above 81–81.9 dB re: 20 μPa (A-weighted) at the landing area.

Characteristics of Restoration and Maintenance Noise

Restoration and maintenance activities would involve the removal of peeling paint and plaster, restoration of interior plaster and paint, refurbishing structural and decorative metal, reworking original metal support beams throughout the lantern room and elsewhere, replacing glass as necessary, upgrading the present electrical system; and annual light beacon maintenance. Any noise associated with these activities is likely to be from light construction (*e.g.,* sanding, hammering, or use of hand drills). The SGRLPS proposes to confine all restoration activities to the existing structure which would occur on the upper levels of the Station. The pinnipeds of NWSR do not have access to this area.

NMFS expects that acoustic stimuli resulting from the proposed helicopter operations; noise from maintenance and restoration activities; and human presence has the potential to harass marine mammals, incidental to the conduct of the proposed activities. NMFS expects these disturbances to be temporary and result, at worst, in a temporary modification in behavior and/or low-level physiological effects (Level B Harassment) of small numbers of certain species of marine mammals.

Description of the Specified Geographic Region

The Station is located on a small, rocky islet (41°50′24″ N, 124°22′06″ W) approximately nine kilometers (km) (6.0 miles (mi)) in the northeast Pacific Ocean, offshore of Crescent City, California (Latitude: 41°46′48″ N; Longitude: 124°14′11″ W). NWSR is approximately 91.4 m (300 ft) in diameter that peaks at 5.18 m (17 ft) above mean sea level. The Station, built in 1892, rises 45.7 m (150 ft) above the sea, consists of hundreds of granite blocks, is topped with a cast iron lantern room, and covers much of the surface of the islet.

Description of Marine Mammals in the Area of the Proposed Specified Activity

The marine mammal species likely to be harassed incidental to helicopter operations, lighthouse restoration, and lighthouse maintenance on NWSR are the California sea lion (*Zalophus californianus*), the Pacific Harbor seal (*Phoca vitulina*), the eastern (Distinct Population Segment) U.S. stock of Steller sea lion (*Eumetopias jubatus*), and the eastern Pacific stock of northern fur seal (*Callorhinus ursinus).* General information of these species can be found in Caretta *et al.,* (2009) and Allen and Angliss (2010) and is available at the following URLs: *http://www.nmfs.noaa.gov/pr/pdfs/sars/po2009.pdf* and *http://www.nmfs.noaa.gov/pr/pdfs/sars/ak2009.pdf* respectively. Refer to these documents for information on these species. Additional information on these species is presented below this section.

California Sea Lion

California sea lions are not listed as threatened or endangered under the Endangered Species Act (ESA; 16 U.S.C. 1531 *et seq.*), nor are they categorized as depleted under the MMPA. The California sea lion includes three subspecies: *Z. c. wollebaeki* (on the Galapagos Islands), *Z. c. japonicus* (in Japan, but now thought to be extinct), and Z. *c. californianus* (found from southern Mexico to southwestern Canada; herein referred to as the California sea lion). The subspecies is comprised of three stocks: (1) The U.S. stock, beginning at the U.S./Mexico border extending northward into Canada; (2) the western Baja California stock, extending from the U.S./Mexico border to the southern tip of the Baja California peninsula; and (3) the Gulf of California stock, which includes the Gulf of California from the southern tip of the Baja California peninsula and across to the mainland and extends to southern Mexico (Lowry *et al.,* 1992).

In 2009, the estimated population of the U.S. stock of California sea lion ranged from 141,842 to 238,000 animals and the maximum population growth rate was 6.52 percent when pup counts from El Niño years (1983, 1984, 1992, 1993, 1998, and 2003) were removed (Carretta *et al.,* 2009).

Major rookeries for the California sea lion exist on the Channel Islands off southern California and on the islands situated along the east and west coasts of Baja California. Males are polygamous, establishing breeding territories that may include up to fourteen females. They defend their territories with aggressive physical displays and vocalization. Sea lions reach sexual maturity at four to five years old and the breeding season lasts from May to August. Most pups are born from May through July and weaned at 10 months old.

Crescent Coastal Research (CCR) conducted a three-year (1998–2000) survey of the wildlife species on NWSR for the SGRLPS. They reported that

counts of California sea lions on NWSR varied greatly (from six to 541) during the observation period from April 1997 through July 2000. CCR reported that counts for California sea lions during the spring (April–May), summer (June–August), and fall (September–October), averaged 60, 154, and 235, respectively (CCR, 2001).

Pacific Harbor Seal

Pacific harbor seals are not listed as threatened or endangered under the ESA, nor are they categorized as depleted under the MMPA. The animals inhabit near-shore coastal and estuarine areas from Baja California, Mexico, to the Pribilof Islands in Alaska. Pacific harbor seals are divided into two subspecies: *P. v. stejnegeri* in the western North Pacific, near Japan, and *P. v. richardsi* in the northeast Pacific Ocean. The latter subspecies, recognized as three separate stocks, inhabits the west coast of the continental United States, including: The outer coastal waters of Oregon and Washington states; Washington state inland waters; and Alaska coastal and inland waters. Two of these stocks, the California stock and Oregon/Washington coast stock, of Pacific harbor seals are identified off the coast of Oregon and California for management purposes under the MMPA. However, the stock boundary is difficult to distinguish because of the continuous distribution of harbor seals along the west coast and any rigid boundary line is (to a greater or lesser extent) arbitrary, from a biological perspective (Carretta *et al.,* 2009). Due to the location of the proposed project which is situated near the border of Oregon and California, both stocks could be present within the proposed project area.

In 2009, the estimated population of the California of Pacific harbor seals ranged from 31,600 to 34,233 animals and the maximum population growth rate was 3.5 percent. The estimated population of the Oregon/Washington coast stocks was 24,732 animals (Carretta *et al.,* 2009).

In California, over 500 harbor seal haulout sites are widely distributed along the mainland and offshore islands, and include rocky shores, beaches and intertidal sandbars (Lowry *et al.,* 2005). Harbor seals mate at sea and females give birth during the spring and summer, although the pupping season varies with latitude. Pups are nursed for an average of 24 days and are ready to swim minutes after being born. Harbor seal pupping takes place at many locations and rookery size varies from a few pups to many hundreds of pups. The nearest harbor seal rookery relative to the proposed project site is at Castle Rock National Wildlife Refuge, located approximately 965 m (0.6 mi) south of Point St. George, and 2.4 km (1.5 mi) north of the Crescent City Harbor in Del Norte County, California (USFWS, 2007).

CCR noted that harbor seal use of NWSR was minimal, with only one sighting of a group of six animals, during 20 observation surveys. They hypothesized that harbor seals may avoid the islet because of its distance from shore, relatively steep topography, and full exposure to rough and frequently turbulent sea swells.

Northern Fur Seal

Northern fur seals are not listed as threatened or endangered under the ESA. However, they are categorized as depleted under the MMPA. Northern fur seals occur from southern California north to the Bering Sea and west to the Sea of Okhotsk and Honshu Island of Japan. Two separate stocks of northern fur seals are recognized within U.S. waters: An Eastern Pacific stock distributed among sites in Alaska, British Columbia; and a San Miguel Island stock distributed along the west coast of the continental U.S.

Northern fur seals may temporarily haul out on land at other sites in Alaska, British Columbia, and on islets along the west coast of the continental United States, but generally this occurs outside of the breeding season (Fiscus, 1983).

In 2009, the estimated population of the San Miguel Island stock ranged from 5,096 to 9,424 animals and the maximum population growth rate was 8.6 percent (Carretta *et al.,* 2009).

Northern fur seals breed in Alaska and migrate along the west coast during fall and winter. Due to their pelagic habitat, they are rarely seen from shore in the continental U.S., but individuals occasionally come ashore on islands well offshore (i.e., Farallon Islands and Channel Islands in California). During the breeding season, approximately 74 percent of the worldwide population is found on the Pribilof Islands in Alaska, with the remaining animals spread throughout the North Pacific Ocean (Lander and Kajimura, 1982).

CCR observed one male northern fur seal on NWSR in October, 1998 (CCR, 2001). It is possible that a few animals may use the island more often that indicated by the CCR surveys, if they were mistaken for other otariid species (M. DeAngelis, NMFS, pers. comm.).

Steller Sea Lion

The Steller sea lion eastern stock is listed as threatened under the ESA and is categorized as depleted under the MMPA. Steller sea lions range along the North Pacific Rim from northern Japan to California (Loughlin *et al.,* 1984), with centers of abundance and distribution in the Gulf of Alaska and Aleutian Islands, respectively. Two separate stocks of Steller sea lions were recognized within U.S. waters: an eastern U.S. stock, which includes animals east of Cape Suckling, Alaska (144° W), and a western U.S. stock, which includes animals at and west of Cape Suckling (Loughlin, 1997). The species is not known to migrate, but individuals disperse widely outside of the breeding season (late May through early July), thus potentially intermixing with animals from other areas.

In 2009, the estimated population of the eastern U.S. stock ranged from 45,095 to 55,832 animals and the maximum population growth rate was 3.1 percent (Allen and Angliss, 2009).

The eastern U.S. stock of Steller sea lions breeds on rookeries located in southeast Alaska, British Columbia, Oregon, and California; there are no rookeries located in Washington state. Counts of pups on rookeries conducted near the end of the birthing season are nearly complete counts of pup production.

Despite the wide-ranging movements of juveniles and adult males in particular, exchange between rookeries by breeding adult females and males (other than between adjoining rookeries) appears low, although males have a higher tendency to disperse than females (NMFS 1995, Trujillo *et al.,* 2004, Hoffman *et al.,* 2006). A northward shift in the overall breeding distribution has occurred, with a contraction of the range in southern California and new rookeries established in southeastern Alaska (Pitcher *et al.,* 2007).

CCR reported that Steller sea lion numbers at NWSR ranged from 20 to 355 animals. Counts of Steller sea lions during the spring (April–May), summer (June–August), and fall (September–October), averaged 68, 110, and 56, respectively (CCR, 2001). A more recent survey at NWSR between 2000 and 2004 showed Steller sea lion numbers ranged from 175 to 354 in July (M. Lowry, NMFS/SWFSC, unpubl. data). Winter use of NWSR by Steller sea lion is presumed to be minimal, due to inundation of the natural portion of the island by large swells.

Other Marine Mammals in the Proposed Action Area

There are several endangered cetaceans that have the potential to transit in the vicinity of NWSR including the blue (*Balaenoptera*

musculus), fin (*Balaenoptera physalus*), humpback (*Megaptera novaeangliae*), sei (*Balaenoptera borealis*), north Pacific right (*Eubalena japonica*), sperm (*Physeter macrocephalus*), and southern resident killer (*Orcinus orca*) whales.

California (southern) sea otters (*Enhydra lutris nereis*), listed as threatened under the ESA and categorized as depleted under the MMPA, usually range in coastal waters within two km of shore. Neither CCR nor the SGRLPS has encountered California sea otters on NWSR during the course of the four-year wildlife study (CCR, 2001). The U.S. Fish and Wildlife Service (USFWS) manages the sea otter and NMFS will not consider this species further in this proposed IHA notice.

All of the aforementioned species are found farther offshore than the proposed action area and are not likely to be affected by the restoration and maintenance activities. Accordingly, NMFS will not consider these species in greater detail and the proposed IHA will only address requested take authorizations for pinnipeds.

Potential Effects on Marine Mammals

Acoustic and visual stimuli generated by: (1) Helicopter landings/takeoffs; (2) noise generated during restoration activities (*e.g.,* painting, plastering, welding, and glazing); and (3) maintenance activities (*e.g.,* bulb replacement and automation of the light system) may have the potential to cause Level B harassment of any pinnipeds hauled out on NWSR. The effects of sounds from helicopter operations and/or restoration and maintenance activities might include one of the following: temporary or permanent hearing impairment or behavioral disturbance (Southall, *et al.,* 2007).

Hearing Impairment

Marine mammals produce sounds in various important contexts—social interactions, foraging, navigating, and to responding to predators. The best available science suggests that pinnipeds have a functional aerial hearing sensitivity between 75 hertz (Hz) and 75 kilohertz (kHz) and can produce a diversity of sounds, though generally from 100 Hz to several tens of kHz (Southall, *et al.,* 2007).

Exposure to high intensity sound for a sufficient duration may result in auditory effects such as a noise-induced threshold shift—an increase in the auditory threshold after exposure to noise (Finneran, Carder, Schlundt, and Ridgway, 2005). Factors that influence the amount of threshold shift include the amplitude, duration, frequency content, temporal pattern, and energy distribution of noise exposure. The magnitude of hearing threshold shift normally decreases over time following cessation of the noise exposure. The amount of threshold shift just after exposure is called the initial threshold shift. If the threshold shift eventually returns to zero (i.e., the threshold returns to the pre-exposure value), it is called temporary threshold shift (TTS) (Southall *et al.,* 2007).

Pinnipeds have the potential to be disturbed by airborne and underwater noise generated by the engine of the aircraft (Born, Riget, Dietz, and Andriashek, 1999; Richardson, Greene, Malme, and Thomson, 1995). Data on underwater TTS-onset in pinnipeds exposed to pulses are limited to a single study which exposed two California sea lions to single underwater pulses from an arc-gap transducer and found no measurable TTS following exposures up to 183 dB re: 1 µPa (peak-to-peak) (Finneran, Dear, Carder, and Ridgway, 2003).

TTS has been demonstrated and studied in certain captive odontocetes and pinnipeds exposed to strong sounds (reviewed in Southall *et al.,* 2007). In 2004, researchers measured auditory fatigue to airborne sound in harbor seals, California sea lions, and northern elephant seals (*Mirounga angustirostris*) after exposure to nonpulse noise for 25 minutes (Kastak, Southall, Holt, Kastak, and Schusterman, 2004). In the study, the harbor seal experienced approximately 6 dB of TTS at 99 dB re: 20 µPa. Onset of TTS was identified in the California sea lion at 122 dB re: 20 µPa. The northern elephant seal experienced TTS-onset at 121 dB re: 20 µPa (Kastak *et al.,* 2004).

There is a dearth of information on acoustic effects of helicopter overflights on pinniped hearing and communication (Richardson *et al.,* 1995) and to NMFS' knowledge, there has been no specific documentation of TTS, let alone permanent threshold shift (PTS), in free-ranging pinnipeds exposed to helicopter operations during realistic field conditions.

In 2008, NMFS issued an IHA to the U.S. Fish and Wildlife Service (USFWS) for the take of small numbers of Steller sea lions and Pacific harbor seals, incidental to rodent eradication activities on an islet offshore of Rat Island, AK conducted by helicopter. The 15-minute aerial treatment consisted of the helicopter slowly approaching the islet at an elevation of over 1,000 feet (304.8 m); gradually decreasing altitude in slow circles; and applying the rodenticide in a single pass and returning to Rat Island. The gradual and deliberate approach to the islet resulted in the sea lions present initially becoming aware of the helicopter and calmly moving into the water. Further, the USFWS reported that all responses fell well within the range of Level B harassment (*i.e.,* alert head raises without moving or limited, short-term displacement resulting from aircraft noise due to helicopter overflights).

As a general statement from the available information, pinnipeds exposed to intense (approximately 110 to 120 dB re: 20 µPa) nonpulse sounds often leave haulout areas and seek refuge temporarily (minutes to a few hours) in the water (Southall *et al.,* 2007). Any noise attributed to the SGRLPS' proposed helicopter operations on NWSR would be short-term (approximately 5 min per trip). NMFS would expect the ambient noise levels to return to a baseline state when helicopter operations have ceased for the day. Per Richardson *et al.* (1995), approaching aircraft generally flush animals into the water and noise from a helicopter is typically directed down in a "cone" underneath the aircraft. As the helicopter landings take place 15 m (48 ft) above the surface of the rocks on NWSR, NMFS presumes that the received sound levels would increase above 81–81.9 dB re: 20 µPa (A-weighted) at the landing pad. However, NMFS does not expect that the increased received levels of sound from the helicopter would cause TTS or PTS because the pinnipeds would flush before the helicopter approached NWSR; thus increasing the distance between the pinnipeds and the received sound levels on NWSR during the proposed action.

Behavioral Disturbance

There is increasing recognition that the effect of human disturbance on wildlife is highly dependent on the nature of the disturbance (Burger *et al.,* 1995; Klein *et al.,* 1995; and Kucey, 2005). Disturbances resulting from human activity can impact short- and long-term pinniped haul out behavior (Renouf *et al.,* 1981; Schneider and Payne, 1983; Terhune and Almon, 1983; Allen *et al.,* 1984; Stewart, 1984; Suryan and Harvey, 1999; Mortenson *et al.,* 2000; and Kucey and Trites, 2006). The apparent skittishness of both harbor seals and Steller sea lions raises concerns regarding behavioral and physiological impacts to individuals and populations experiencing high levels of human disturbance. It is well known that human activity can flush harbor seals off haul out sites (Allen *et al.,* 1984; Calambokidis *et al.,* 1991;

Suryan and Harvey, 1999; Mortenson *et al.,* 2000).

The Hawaiian monk seal (*Monachus schauinslandi*) has been shown to avoid beaches that have been disturbed often by humans (Kenyon, 1972). Stevens and Boness (2003) concluded that after the 1997–98 El Niño, when populations of the South American fur seal, *Arctocephalus australis,* in Peru declined dramatically, seals abandoned some of their former primary breeding sites, but continued to breed at adjacent beaches that were more rugged (*i.e.,* less likely to be used by humans). Abandoned and unused sites were more likely to have human disturbance than currently used sites. In one case, human disturbance appeared to cause Steller sea lions to desert a breeding area at Northeast Point on St. Paul Island, Alaska (Kenyon, 1962).

It is likely that the initial helicopter approach to the Station would cause a subset, or all of the marine mammals hauled out on NWSR to depart the rock and flush into the water. The physical presence of aircraft could also lead to non-auditory effects on marine mammals involving visual or other cues. Airborne sound from a low-flying helicopter or airplane may be heard by marine mammals while at the surface or underwater. In general, helicopters tend to be noisier than fixed wing aircraft of similar size and underwater sounds from aircraft are strongest just below the surface and directly under the aircraft. Noise from aircraft would not be expected to cause direct physical effects but have the potential to affect behavior. The primary factor that may influence abrupt movements of animals is engine noise, specifically changes in engine noise. Responses by mammals could include hasty dives or turns, change in course, or flushing and stampeding from a haul out site. There are few well documented studies of the impacts of aircraft overflight over pinniped haul out sites or rookeries, and many of those that exist, are specific to military activities (Efroymson *et al.,* 2001).

Several factors complicate the analysis of long- and short-term effects for aircraft overflights. Information on behavioral effects of overflights by military aircraft (or component stressors) on most wildlife species is sparse. Moreover, models that relate behavioral changes to abundance or reproduction, and those that relate behavioral or hearing effects thresholds from one population to another are generally not available. In addition, the aggregation of sound frequencies, durations, and the view of the aircraft into a single exposure metric is not always the best predictor of effects and it may also be difficult to calculate. Overall, there has been no indication that single or occasional aircraft flying above pinnipeds in water cause long term displacement of these animals (Richardson *et al.,* 1995). The Lowest Observed Adverse Effects Levels (LOAELs) are rather variable for pinnipeds on land, ranging from just over 150 m (492 ft) to about 2,000 m (6,562 ft) (Efroymson *et al.,* 2001). A conservative (90th percentile) distance effects level is 1,150 m (3,773 ft). Most thresholds represent movement away from the overflight. Bowles and Stewart (1980) estimated an LOAEL of 305 m (1,000 ft) for helicopters (low and landing) in California sea lions and harbor seals observed on San Miguel Island, CA; animals responded to some degree by moving within the haul out and entering into the water, stampeding into the water, or clearing the haul out completely. Both species always responded with the raising of their heads. California sea lions appeared to react more to the visual cue of the helicopter than the noise.

If pinnipeds are present on NWSR, it is likely that a helicopter landing at the Station would cause 100 percent of the pinnipeds on NWSR to flush; however, when present, they appear to show rapid habituation to helicopter landing and departure (Crescent Coastal Research, 2001; Guy Towers, SGRLPS, pers. com.). According to the CCR Report (2001), while up to 40 percent of the California and Steller sea lions present on the rock have been observed to enter the water on the first of a series of helicopter landings, as few as zero percent have flushed on subsequent landings on the same date.

If pinnipeds are present on NWSR, Level B behavioral harassment of pinnipeds may occur during helicopter landing and takeoff from NWSR due to the pinnipeds temporarily moving from the rocks and lower structure of the Station into the sea due to the noise and appearance of helicopter during approaches and departures. It is expected that all or a portion of the marine mammals hauled out on the island will depart the rock and move into the water upon initial helicopter approaches. The movement to the water is expected to be gradual due to the required controlled helicopter approaches (*see* Proposed Mitigation section), the small size of the aircraft, the use of noise-attenuating blade tip caps on the rotors, and behavioral habituation on the part of the animals as helicopter trips continue throughout the day. During the sessions of helicopter activity, if present on NWSR, some animals may be temporarily displaced from the island and either raft in the water or relocate to other haul-outs.

Sea lions have shown habituation to helicopter flights within a day at the project site and most animals are expected to return soon after helicopter activities cease for that day. By clustering helicopter arrival/departures within a short time period, animals are expected to show less response to subsequent landings. No impact on the population size or breeding stock of Steller sea lions, California sea lions, Pacific harbor seals, or northern fur seals is expected to occur.

Restoration and maintenance activities would involve the removal of peeling paint and plaster, restoration of interior plaster and paint, refurbishing structural and decorative metal, reworking original metal support beams throughout the lantern room and elsewhere, replacing glass as necessary, upgrading the present electrical system; and annual light beacon maintenance. Any noise associated with these activities is likely to be from light construction (*e.g.,* sanding, hammering, or use of hand drills) and the pinnipeds may be disturbed by human presence. Animals respond to disturbance from humans in the same way as they respond to the risk of predation, by avoiding areas of high risk, either completely or by using them for limited periods (Gill *et al.,* 1996).

Mortality

Sudden movement of large numbers of animals may cause a stampede. In order to prevent such stampedes from occurring within the sea lion colony, certain mitigation requirements and restrictions, such as controlled helicopter approaches and limited access period during the pupping season, will be imposed should an IHA be issued. As such, and because any pinnipeds nearby likely would avoid the approaching helicopter, the SGRLPS anticipates that there will be no instances of injury or mortality during the proposed project.

Anticipated Effects on Habitat

The NMFS expects that there will be no long- or short-term physical impacts to pinniped habitat on NWSR. The SGRLPS proposes to confine all restoration activities to the existing structure which would occur on the upper levels of the Station which are not used by marine mammals. The SGRLPS would remove all waste, discarded materials and equipment from the island after each visit. The proposed activities will not result in any permanent impact on habitats used by marine mammals, including the food

sources they use. The main impact associated with the proposed activity will be temporarily elevated noise levels and the associated direct effects on marine mammals, previously discussed in this notice.

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and the availability of such species or stock for taking for certain subsistence uses.

As a way to reduce potential Level B behavioral harassment to marine mammals that would result from the proposed project, NMFS proposes that the following mitigation measures would be required.

Time and Frequency: Lighthouse restoration activities are to be conducted at maximum of once per month between February 15, 2011, through April 30, 2011, or between November 1, 2011, through December 31, 2011. Each restoration session will last no more than three days. Maintenance of the light beacon will occur only in conjunction with restoration activities.

Helicopter Approach and Timing Techniques: The SGRLPS shall ensure that helicopter approach patterns to the lighthouse will be such that the timing techniques are least disturbing to marine mammals. To the extent possible, the helicopter should approach NWSR when the tide is too high for the marine mammals to haul-out on NWSR.

Since the most severe impacts (stampede) are precipitated by rapid and direct helicopter approaches, initial approach to the Station must be offshore from the island at a relatively high altitude (*e.g.,* 800–1,000 ft, or 244–305 m). Before the final approach, the helicopter shall circle lower, and approach from area where the density of pinnipeds is the lowest. If for any safety reasons (*e.g.,* wind condition) such helicopter approach and timing techniques cannot be achieved, the SGRLPS must abort the restoration and maintenance activities for that day.

Avoidance of Visual and Acoustic Contact with People on Island: The SGRLPS members and restoration crews shall be instructed to avoid making unnecessary noise and not expose themselves visually to pinnipeds around the base of the lighthouse. Although no impacts from these activities were seen during the 2001 CCR study, it is relatively simple to avoid this potential impact. The door to the lower platform (which is used at times by pinnipeds) shall remain closed and barricaded to all tourists and other personnel.

NMFS has carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another:

- The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;
- The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and
- The practicability of the measure for applicant implementation, including safety and practicality of implementation.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS or recommended by the public, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Proposed Monitoring

Summary of Previous Monitoring

The SGRLPS complied with the mitigation and monitoring required under the previous authorization for the 2010 season. In compliance with the 2010 IHA, the SGRLPS submitted a final report on the activities at Station, covering the period of January 27, 2010 through April 30, 2010. During the effective dates of the 2010 IHA, the SGRLPS conducted two sessions of aircraft operations and restoration activities on NWSR which did not exceed the activity levels analyzed under the 2010 authorization.

The 2010 IHA required that the SGRLPS conduct a pre-restoration and post-restoration aerial survey of all marine mammals hauled-out on NWSR for each session. NMFS restricted the SGRLPS' taking of aerial photographs to an altitude greater than 300 m (984 feet ft) during the first arrival flight and the last departure flight. This is the minimum altitude set within the 2010 Biological Opinion (BiOp) Incidental Take Statement (ITS) which follows the reference distance of 300 m (984 feet ft) for in-air measurements and predictions established by Richardson *et al.* (1995).

On February 26, 2010, the SGRLPS' photographed the haulout areas on the initial approach to NWSR at an altitude of 900 m (2,953 ft). During the approach, the photographer observed no animals hauled out on NWSR. The SGRLPS observed no animals hauled on NWSR during the two-day restoration session and no pinnipeds were present during the helicopter's February 28th departure flight to the mainland.

On April 9, 2010, the SGRLPS' photographed the haulout areas on the initial approach to NWSR at an altitude of 900 m (2,953 ft). Similar to the February session, the photographer observed no animals hauled out on NWSR during approach. The SGRLPS observed no animals hauled on NWSR during the three-day restoration session and no pinnipeds were present during the helicopter's April 11th departure flight to the mainland.

The SGRLPS observed no animals hauled on NWSR during the entirety of each session. As there were no observed impacts to pinnipeds from these activities, NMFS was unable to assess the effectiveness of mitigation measures for helicopter approaches set forth in the 2010 IHA. However, the 2010 IHA restricted SGRLP's access to NWSR during the pupping season, thus effecting the least practical adverse impact on the species or stock. These results did not refute NMFS' original findings.

The dates, times, activities, absence/presence information, and required monitoring are summarized in Tables 1 and 2.

TABLE 1—SUMMARY OF AIRCRAFT OPERATIONS CONDUCTED IN FEBRUARY 2010

Date	Time	Activity	Monitoring conducted	Animals present
26–Feb	8:30 PST	Helicopter flight—survey NWSR	Yes	Absent
27–Feb	8:30 PST	Helicopter flight—arrive NWSR	Yes	Absent
27–Feb	8:31 PST	Helicopter flight—depart NWSR	Yes	Absent
27–Feb	8:46 PST	Helicopter flight—arrive NWSR	Yes	Absent
27–Feb	8:47 PST	Helicopter flight—depart NWSR	Yes	Absent
27–Feb	9:05 PST	Helicopter flight—arrive NWSR	Yes	Absent
27–Feb	9:06 PST	Helicopter flight—depart NWSR	Yes	Absent
27–Feb	9:36 PST	Helicopter flight—arrive NWSR	Yes	Absent
27–Feb	9:37 PST	Helicopter flight—depart NWSR	Yes	Absent
27–Feb	10:00 PST	Helicopter flight—arrived NWSR (sling load operations)	Yes	Absent
27–Feb	10:01 PST	Helicopter flight—departed NWSR	Yes	Absent
27–Feb	10:20 PST	Helicopter flight—arrived NWSR (sling load operations)	Yes	Absent
27–Feb	10:21 PST	Helicopter flight—departed NWSR	Yes	Absent
27–Feb	10:40 PST	Helicopter flight—arrived NWSR (sling load operations)	Yes	Absent
27–Feb	10:41 PST	Helicopter flight—departed NWSR	Yes	Absent
28–Feb	9:00 PST	Helicopter flight—arrive NWSR	Yes	Absent
28–Feb	9:07 PST	Helicopter flight—depart NWSR	Yes	Absent
28–Feb	9:30 PST	Helicopter flight—arrive NWSR	Yes	Absent
28–Feb	9:32 PST	Helicopter flight—depart NWSR	Yes	Absent
28–Feb	9:50 PST	Helicopter flight—arrive NWSR	Yes	Absent
28–Feb	9:53 PST	Helicopter flight—depart NWSR	Yes	Absent
28–Feb	10:15 PST	Helicopter flight—arrive NWSR	Yes	Absent
28–Feb	10:17 PST	Helicopter flight—depart NWSR	Yes	Absent
28–Feb	10:45 PST	Helicopter flight—arrive NWSR	Yes	Absent
28–Feb	10:47 PST	Helicopter flight—depart NWSR	Yes	Absent
28–Feb	11:15 PST	Helicopter flight—arrive NWSR	Yes	Absent
28–Feb	11:17 PST	Helicopter flight—depart NWSR	Yes	Absent
28–Feb	11:45 PST	Helicopter flight—arrive NWSR	Yes	Absent
28–Feb	11:47 PST	Helicopter flight—depart NWSR	Yes	Absent
28–Feb	12:30 PST	Helicopter flight—arrive NWSR	Yes	Absent
28–Feb	12:35 PST	Helicopter flight—depart NWSR	Yes	Absent

TABLE 2—SUMMARY OF AIRCRAFT OPERATIONS CONDUCTED IN APRIL 2010

Date	Time	Activity	Monitoring conducted	Animals present
9–Apr	8:00 PST	Helicopter flight—arrived NWSR	Yes	Absent
9–Apr	8:01 PST	Helicopter flight—departed NWSR	Yes	Absent
9–Apr	8:21 PST	Helicopter flight—arrived NWSR	Yes	Absent
9–Apr	8:22 PST	Helicopter flight—departed NWSR	Yes	Absent
9–Apr	8:42 PST	Helicopter flight—arrived NWSR	Yes	Absent
9–Apr	8:43 PST	Helicopter flight—departed NWSR	Yes	Absent
9–Apr	9:15 PST	Helicopter flight—arrived NWSR	Yes	Absent
9–Apr	9:16 PST	Helicopter flight—departed NWSR	Yes	Absent
9–Apr	9:35 PST	Helicopter flight—arrived NWSR	Yes	Absent
9–Apr	9:36 PST	Helicopter flight—departed NWSR	Yes	Absent
9–Apr	10:00 PST	Helicopter flight—arrived NWSR (sling load operations)	Yes	Absent
9–Apr	10:01 PST	Helicopter flight—departed NWSR	Yes	Absent
9–Apr	10:20 PST	Helicopter flight—arrived NWSR (sling load operations)	Yes	Absent
9–Apr	10:21 PST	Helicopter flight—departed NWSR	Yes	Absent
9–Apr	10:40 PST	Helicopter flight—arrived NWSR (sling load operations)	Yes	Absent
9–Apr	10:41 PST	Helicopter flight—departed NWSR	Yes	Absent
11–Apr	9:05 PST	Helicopter flight—arrive NWSR	Yes	Absent
11–Apr	9:10 PST	Helicopter flight—depart NWSR	Yes	Absent
11–Apr	9:31 PST	Helicopter flight—arrive NWSR	Yes	Absent
11–Apr	9:36 PST	Helicopter flight—depart NWSR	Yes	Absent
11–Apr	9:57 PST	Helicopter flight—arrive NWSR	Yes	Absent
11–Apr	10:02 PST	Helicopter flight—depart NWSR	Yes	Absent
11–Apr	10:23 PST	Helicopter flight—arrive NWSR	Yes	Absent
11–Apr	10:28 PST	Helicopter flight—depart NWSR	Yes	Absent

In order to issue an ITA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must set forth "requirements pertaining to the monitoring and reporting of such taking". The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for IHAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

At least once during the period between February 15, 2011, through April 30, 2011, or during the period of November 1, 2011, through December 31, 2011 a qualified biologist shall be present during all three workdays at the Station. The biologist hired will be subject to approval of NMFS and this requirement may be modified depending on the results of the second year of monitoring.

The qualified biologist shall document use of the island by the pinnipeds, frequency, (i.e., dates, time, tidal height, species, numbers present, and any disturbances), and note any responses to potential disturbances. In the event of any observed Steller sea lion injury, mortality, or the presence of newborn pup, the SGRLPS will notify the NMFS SWRO Administrator and the NMFS Director of Office of Protected Resources immediately.

Aerial photographic surveys may provide the most accurate means of documenting species composition, age and sex class of pinnipeds using the project site during human activity periods. Aerial photo coverage of the island shall be completed from the same helicopter used to transport the SGRLPS personnel to the island during restoration trips. Photographs of all marine mammals hauled out on the island shall be taken at an altitude greater than 300 m (984 ft) by a skilled photographer, prior to the first landing on each visit included in the monitoring program. Photographic documentation of marine mammals present at the end of each three-day work session shall also be made for a before and after comparison. These photographs will be forwarded to a biologist capable of discerning marine mammal species. Data shall be provided to NMFS in the form of a report with a data table, any other significant observations related to marine mammals, and a report of restoration activities (*see* Reporting). The original photographs can be made available to NMFS or other marine mammal experts for inspection and further analysis.

Proposed Reporting

The SGRLPS personnel will record data to document the number of marine mammals exposed to helicopter noise and to document apparent disturbance reactions or lack thereof. SGRLPS and NMFS will use the data to estimate numbers of animals potentially taken by Level B harassment.

Interim Monitoring Report

The SGRLPS will submit interim monitoring reports to the NMFS SWRO Administrator and the NMFS Director of Office of Protected Resources no later than 30 days after the conclusion of each monthly session. The interim report will describe the operations that were conducted and sightings of marine mammals near the proposed project. The report will provide full documentation of methods, results, and interpretation pertaining to all monitoring.

Each interim report will provide:

(i) A summary and table of the dates, times, and weather during all helicopter operations, and restoration and maintenance activities.

(ii) Species, number, location, and behavior of any marine mammals, observed throughout all monitoring activities.

(iii) An estimate of the number (by species) of marine mammals that are known to have been exposed to acoustic stimuli associated with the helicopter operations, restoration and maintenance activities.

(iv) A description of the implementation and effectiveness of the monitoring and mitigation measures of the IHA and full documentation of methods, results, and interpretation pertaining to all monitoring.

Final Monitoring Report

In addition to the interim reports, the SGRLPS will submit a draft Final Monitoring Report to NMFS no later than 90 days after the project is completed to the Regional Administrator and the Director of Office of Protected Resources at NMFS Headquarters. Within 30 days after receiving comments from NMFS on the draft Final Monitoring Report, the SGRLPS must submit a Final Monitoring Report to the Regional Administrator and the NMFS Director of Office of Protected Resources. If the SGRLPS receives no comments from NMFS on the draft Final Monitoring Report, the draft Final Monitoring Report will be considered to be the Final Monitoring Report.

The final report will provide:

(i) A summary and table of the dates, times, and weather during all helicopter operations, and restoration and maintenance activities.

(ii) Species, number, location, and behavior of any marine mammals, observed throughout all monitoring activities.

(iii) An estimate of the number (by species) of marine mammals that are known to have been exposed to acoustic stimuli associated with the helicopter operations, restoration and maintenance activities.

(iv) A description of the implementation and effectiveness of the monitoring and mitigation measures of the IHA and full documentation of methods, results, and interpretation pertaining to all monitoring.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Only take by Level B harassment is anticipated and authorized as a result of the helicopter operations and restoration and maintenance activities on NWSR.

Based on pinniped survey counts conducted by CCR on NWSR in the spring of 1997, 1998, 1999, and 2000 (CCR, 2001), NMFS estimates that approximately 204 California sea lions (calculated by multiplying the average monthly abundance of California sea lions (zero in April, 1997 and 34 in April,1998) present on NWSR by six months of the proposed restoration and maintenance activities), 172 Steller sea lions (NMFS' estimate of the maximum number of Steller sea lions that could be present on NWSR with a 95-percent confidence interval), 36 Pacific harbor seals (calculated by multiplying the maximum number of harbor seals present on NWSR (6) by six months), and 6 northern fur seals (calculated by multiplying the maximum number of northern fur seals present on NWSR (1) by six months) could be potentially affected by Level B behavioral harassment over the course of the proposed IHA. Estimates of the numbers of marine mammals that might be affected are based on consideration of the number of marine mammals that could be disturbed appreciably by approximately 51 hrs of aircraft operations during the course of the proposed activity. These incidental harassment take numbers represent approximately 0.14 percent of the U.S. stock of California sea lion, 0.42 percent of the eastern U.S. stock of Steller sea lion, 0.11 percent of the California stock of Pacific harbor seals, and 0.06 percent of the San Miguel Island stock of northern fur seal.

All of the potential takes are expected to be Level B behavioral harassment only. Because of the mitigation measures that will be required and the

likelihood that some pinnipeds will avoid the area, no injury or mortality to pinnipeds is expected or requested.

Negligible Impact and Small Numbers Analysis and Determination

NMFS has defined "negligible impact" in 50 CFR 216.103 as " * * * an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival." In making a negligible impact determination, NMFS considers:

(1) The number of anticipated mortalities;

(2) The number and nature of anticipated injuries;

(3) The number, nature, and intensity, and duration of Level B harassment; and

(4) The context in which the takes occur.

As mentioned previously, NMFS estimates that four species of marine mammals could be potentially affected by Level B harassment over the course of the IHA. For each species, these numbers are small (each, less than one percent) relative to the population size.

No takes by Level A harassment, serious injury, or mortality are anticipated to occur as a result of the SGRLPS' proposed activities, and none are authorized. Only short-term behavioral disturbance is anticipated to occur due to the brief and sporadic duration of the proposed activities; the availability of alternate areas near NWSR for marine mammals to avoid the resultant acoustic disturbance; and limited access to NWSR during the pupping season. Due to the nature, degree, and context of the behavioral harassment anticipated, the activities are not expected to impact rates of recruitment or survival.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS preliminarily finds that the SGRLPS' planned helicopter operations and restoration/maintenance activities, will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the helicopter operations and restoration/maintenance activities will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action.

Endangered Species Act (ESA)

The Steller sea lion, eastern Distinct Population Segment (DPS) is listed as threatened under the ESA and occurs in the planned action area. NMFS Headquarters' Office of Protected Resources, Permits, Conservation, and Education Division conducted a formal section 7 consultation under the ESA with the Southwest Region, NMFS. On January 27, 2010, the Southwest Region issued a BiOp and concluded that the issuance of IHAs are likely to adversely affect, but not likely to jeopardize the continued existence of Steller sea lions. NMFS has designated critical habitat for the eastern Distinct Population Segment of Steller sea lions in California at Año Nuevo Island, Southeast Farallon Island, Sugarloaf Island and Cape Mendocino, California pursuant to section 4 of the ESA (*see* 50 CFR 226.202(b)). Northwest Seal Rock is neither within nor nearby these designated areas. Finally, the BiOp included an ITS for Steller sea lions. The ITS contains reasonable and prudent measures implemented by terms and conditions to minimize the effects of this take.

NMFS has reviewed the 2010 BiOp and determined that there is no new information regarding effects to Stellar sea lions; the action has not been modified in a manner which would cause adverse effects not previously evaluated; there has been no new listing of species or designation of critical habitat that could be affected by the action; and, the action will not exceed the extent or amount of incidental take authorized in the 2010–2012 ITS. Therefore, the proposed IHA does not require the reinitiation of Section 7 consultation under the ESA.

National Environmental Policy Act (NEPA)

To meet NMFS' NEPA requirements for the issuance of an IHA to the SGRLPS, NMFS prepared an Environmental Assessment (EA) in 2010 that was specific to conducting aircraft operations and restoration and maintenance work on the St. George Reef Light Station. The EA, titled "Issuance of an Incidental Harassment Authorization to Take Marine Mammals by Harassment Incidental to Conducting Aircraft Operations, Lighthouse Restoration and Maintenance Activities on St. George Reef Lighthouse Station in Del Norte County, California," evaluated the impacts on the human environment of NMFS' authorization of incidental Level B harassment resulting from the specified activity in the specified geographic region. At that time, NMFS concluded that issuance of an IHA November 1 through April 30, annually would not significantly affect the quality of the human environment and issued a Finding of No Significant Impact (FONSI) for the 2010 EA regarding the SGRLPS' activities. In conjunction with the SGRLPS' 2011 application, NMFS has again reviewed the 2010 EA and determined that there are no new direct, indirect or cumulative impacts to the human and natural environment associated with the IHA requiring evaluation in a supplemental EA and NMFS, therefore, intends to reaffirm the 2010 FONSI. A copy of the EA and the FONSI for this activity is available upon request (*see* **ADDRESSES**).

Dated: December 16, 2010.

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–32164 Filed 12–21–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Availability of the Final Environmental Impact Statement (FEIS) for Disposal and Reuse of Fort McPherson, GA

AGENCY: Department of the Army, DoD.

ACTION: Notice of Availability (NOA).

SUMMARY: The Department of the Army announces the availability of the FEIS, which evaluates the potential environmental impacts associated with the disposal and reuse of Fort McPherson, Georgia.

DATES: The waiting period for the FEIS will end 30 days after publication of an NOA in the **Federal Register** by the U. S. Environmental Protection Agency.

ADDRESSES: To obtain a copy of the FEIS contact Mr. Larry Gissentanna, McPherson BRAC Environmental Coordinator, 1508 Hood Ave., Building 714, Fort Gillem, GA 30297 or *larry.gissentanna@us.army.mil.*

FOR FURTHER INFORMATION CONTACT: Mr. Larry Gissentanna at (404) 469–3559.

SUPPLEMENTARY INFORMATION: The FEIS covers activities associated with the disposal and reuse of Fort McPherson, Georgia. In accordance with the 2005 Base Closure and Realignment (BRAC)

Commission Report, the Army is required to close Fort McPherson and relocate certain tenant organizations to Pope Air Force Base, North Carolina; Shaw Air Force Base, South Carolina; Fort Eustis, Virginia; and Fort Sam Houston, Texas. The tenant relocation actions were the subject of separate National Environmental Policy Act (NEPA) analyses. After tenants are relocated and all non-caretaking operations have ceased on the installation, the Army will close Fort McPherson. Closure is required no later than 15 September 2011.

Following closure, the property (approximately 487 acres) will be excess to Army needs. Accordingly, the Army proposes to dispose of its real property interests at Fort McPherson. The DoD and the Army have recognized the McPherson Planning Local Redevelopment Agency (MPLRA) as the local reuse authority for reuse planning associated with Fort McPherson. The MPLRA developed the Fort McPherson Reuse Plan, which is pending notification from the U.S. Department of Housing and Urban Development required under the BRAC Act and the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11301 *et seq.*). The plan is available electronically at *http://www.mcphersonredevelopment.com/*. On 9 September 2009, Governor Purdue authorized the establishment of the McPherson Implementing Local Redevelopment Authority, which will be responsible for overseeing the implementation of the Reuse Plan.

Four alternatives were analyzed in the FEIS: (1) A No Action Alternative, under which the Army would continue operations at Fort McPherson at levels similar to those occurring prior to the BRAC Commission's recommendation for closure; (2) an Early Transfer Alternative, under which transfer and reuse of the property would occur before environmental remedial actions have been completed (but consistent with protection of human health and the environment); (3) a Traditional Disposal Alternative, under which transfer and reuse of the property would occur once environmental remediation is complete for individual parcels of the installation; and (4) a Caretaker Status Alternative, which begins following the closure of the installation in the event that the Army is unable to dispose of the property, after which time the maintenance of the property would be reduced to minimal activities necessary to ensure security, health, and safety, and to avoid physical deterioration of facilities. Alternative 2 (Early Transfer) is the Army's preferred alternative, which would make the property available for reuse sooner than under the traditional disposal alternative. Three reuse scenarios, based on medium, medium-high, and high intensity levels of reuse are also evaluated as secondary actions of disposal of Fort McPherson. These reuse scenarios encompass the level of reuse expected under the Reuse Plan, which is considered the medium-high intensity reuse scenario.

For early transfer and traditional disposal alternatives, moderate adverse effects would be expected to occur to aesthetics and visual resources, noise, water resources, biological resources, cultural resources (to include the historic district at Fort McPherson), transportation, and utilities. Reuses analyzed in the EIS could result in significant adverse effects in the areas of land use, air quality, and transportation. Disposal of the property for reuse in accordance with the Reuse Plan would mitigate to less than significant the direct and cumulative impacts of disposal and reuse.

A Record of Decision stating which alternative the Army has selected will not be issued earlier than 30 days after this notice.

An electronic version of the FEIS can be viewed or downloaded from the following Web site: *http://www.hqda.army.mil/acsim/brac/nepa_eis_docs.htm.*

Dated: December 13, 2010.

Hershell E. Wolfe,

Acting Deputy Assistant Secretary of the Army (Environment, Safety and Occupational Health).

[FR Doc. 2010–32174 Filed 12–21–10; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF EDUCATION

Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities

AGENCY: U. S. Department of Education, Office of Special Education and Rehabilitative Services, Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities.

ACTION: Notice of an Open Meeting via Conference Call.

SUMMARY: The notice sets forth the schedule and agenda of the meeting of the Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities. The notice also describes the functions of the Commission. Notice of the meeting is required by section 10 (a) (2) of the Federal Advisory Committee Act and is intended to notify the public of its opportunity to attend.

DATES: January 7, 2011.

TIME: 11 a.m.–5 p.m.

ADDRESSES: The Commission will meet via conference call on January 7, 2011. The Executive Director of the Commission will serve as the "host" of the meeting and will initiate the teleconference meeting at approximately 10:45 a.m. EST on January 7, 2011. The Dial-In number for members of the public for the call is 1–800–860–2442 or 1–412–858–4600 for individuals calling in from outside of the United States.

FOR FURTHER INFORMATION, CONTACT: Elizabeth Shook, Program Specialist, Office of Special Education and Rehabilitative Services, United States Department of Education, 550 12th Street, SW., Washington, DC 20202; *telephone:* (202) 245–7642, *fax:* 202–245–7638.

SUPPLEMENTARY INFORMATION: The Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities (the Commission) is established under Section 772 of the Higher Education Opportunity Act, Public Law 110–315, dated August 14, 2008. The Commission is established to (a) conduct a comprehensive study, which will—(I) assess the barriers and systemic issues that may affect, and technical solutions available that may improve, the timely delivery and quality of accessible instructional materials for postsecondary students with print disabilities, as well as the effective use of such materials by faculty and staff; and (II) make recommendations related to the development of a comprehensive approach to improve the opportunities for postsecondary students with print disabilities to access instructional materials in specialized formats in a time frame comparable to the availability of instructional materials for postsecondary nondisabled students.

In making recommendations for the study, the Commission shall consider—(I) how students with print disabilities may obtain instructional materials in accessible formats within a time frame comparable to the availability of instructional materials for nondisabled students; and to the maximum extent practicable, at costs comparable to the costs of such materials for nondisabled students; (II) the feasibility and technical parameters of establishing standardized electronic file formats, such as the National Instructional Materials Accessibility Standard as defined in Section 674(e)(3) of the

Individuals with Disabilities Education Act, to be provided by publishers of instructional materials to producers of materials in specialized formats, institutions of higher education, and eligible students; (III) the feasibility of establishing a national clearinghouse, repository, or file-sharing network for electronic files in specialized formats and files used in producing instructional materials in specialized formats, and a list of possible entities qualified to administer such clearinghouse, repository, or network; (IV) the feasibility of establishing market-based solutions involving collaborations among publishers of instructional materials, producers of materials in specialized formats, and institutions of higher education; (V) solutions utilizing universal design; and (VI) solutions for low-incidence, high-cost requests for instructional materials in specialized formats.

The purpose of the meeting is to receive updates from two of the Commission's task force groups. The Commission will receive updates from the Technology and Legal task force groups. The Commission will also review its upcoming meeting schedule and the timeline for completing its report.

Given the limited meeting time, the Commission does not anticipate that there will be an opportunity for public comment during the teleconference meeting. Members of the public are encouraged to submit written comments to the AIM Commission Web site at *aimcommission@ed.gov*. Members of the public may also join the Commission's list serv at *PSCpublic@lists.cast.org*.

Detailed minutes of the meeting, including summaries of the activities of the closed sessions and related matters that are informative to the public and consistent with the policy of section 5 U.S.C. 552b(c) will be available to the public. Records are kept of all Commission proceedings and are available for public inspection at the Office of Special Education and Rehabilitative Services, United States Department of Education, 550 12th Street, SW., Washington, DC 20202, Monday—Friday during the hours of 8 a.m. to 4:30 p.m.

ADDITIONAL INFORMATION: Individuals who will need accommodations for a disability in order to listen to the meeting (*e.g.,* interpreting services, assistive listening devices, or material in alternative format) should notify Elizabeth Shook at (202) 245–7642, no later than January 4, 2011. We will make every attempt to meet requests for accommodations after this date, but, cannot guarantee their availability. The conference call will be accessible to individuals with disabilities.

Electronic Access to this Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister/index.html*. To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free at 1–866–512–1800; or in the Washington, DC area at 202–512–0000.

Dated: December 16, 2010.

Alexa Posny,

Assistant Secretary, Office of Special Education and Rehabilitative Services.

[FR Doc. 2010–32094 Filed 12–21–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[OE Docket No. EA–262–C]

Application To Export Electric Energy; TransCanada Power Marketing Ltd.

AGENCY: Office of Electricity Delivery and Energy Reliability, DOE.

ACTION: Notice of Application.

SUMMARY: TransCanada Power Marketing Ltd. (TCPM) has applied to renew its authority to transmit electric energy from the United States to Canada pursuant to section 202(e) of the Federal Power Act (FPA).

DATES: Comments, protests, or requests to intervene must be submitted to DOE and received on or before January 21, 2011.

ADDRESSES: Comments, protests, or requests to intervene should be addressed to: Christopher Lawrence, Office of Electricity Delivery and Energy Reliability, Mail Code: OE–20, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0350. Because of delays in handling conventional mail, it is recommended that documents be transmitted by overnight mail, by electronic mail to *Christopher.Lawrence@hq.doe.gov,* or by facsimile to 202–586–8008.

FOR FURTHER INFORMATION CONTACT: Christopher Lawrence (Program Office) 202–586–5260.

SUPPLEMENTARY INFORMATION: Exports of electricity from the United States to a foreign country are regulated by the Department of Energy (DOE) pursuant to sections 301(b) and 402(f) of the Department of Energy Organization Act (42 U.S.C. 7151(b), 7172(f)) and require authorization under section 202(e) of the FPA (16 U.S.C. 824a(e)).

On June 4, 2002 the Department of Energy (DOE) issued Order No. EA–262, which authorized TCPM to transmit electric energy from the United States to Canada as a power marketer for a two-year term using existing international transmission facilities. DOE renewed the TCPM export authorization two additional times: on May 19, 2004 in Order No. EA–262–A and again on May 17, 2011 in Order No. EA–262–B. Order No. EA–262–B will expire on May 17, 2011. On December 13, 2010, TCPM filed an application with DOE for renewal of the export authority contained in Order No. EA–262 for a ten-year term.

The electric energy that TCPM proposes to export to Canada would be surplus energy purchased from electric utilities, Federal power marketing agencies, and other entities within the United States. The existing international transmission facilities to be utilized by TCPM have previously been authorized by Presidential permits issued pursuant to Executive Order 10485, as amended, and are appropriate for open access transmission by third parties.

Procedural Matters: Any person desiring to become a party to these proceedings or to be heard by filing comments or protests to this application should file a petition to intervene, comment, or protest at the address provided above in accordance with §§ 385.211 or 385.214 of the Federal Energy Regulatory Commission's Rules of Practice and Procedures (18 CFR 385.211, 385.214). Fifteen copies of each petition and protest should be filed with DOE and must be received on or before the date listed above.

Comments on the TCPM application to export electric energy to Canada should be clearly marked with Docket No. 262–C. An additional copy is to be filed directly with Frank Karabetsos, Legal Counsel, TransCanada Power Marketing Ltd., 450–1st Street, SW., Calgary Alberta, Canada T2P 5H1. A final decision will be made on this application after the environmental impacts have been evaluated pursuant to DOE's National Environmental Policy Act Implementing Procedures (10 CFR Part 1021) and after a determination is made by DOE that the proposed action will not adversely impact on the reliability of the U.S. electric power supply system.

Copies of this application will be made available, upon request, for public inspection and copying at the address provided above, by accessing the

program Web site at *http://www.oe.energy.gov/permits_pending.htm,* or by e-mailing Odessa Hopkins at *Odessa.Hopkins@hq.doe.gov.*

Issued in Washington, DC, on December 16, 2010.

Anthony J. Como,

Director, Permitting and Siting, Office of Electricity Delivery and Energy Reliability.

[FR Doc. 2010–32123 Filed 12–21–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP11–49–000]

Tennessee Gas Pipeline Company; Notice of Application

December 15, 2010.

Take notice that on December 13, 2010, Tennessee Gas Pipeline Company (Tennessee), 1001 Louisiana Street, Houston, Texas 77002, filed in Docket Number CP09–444–000, pursuant to section 7(b) of the Natural Gas Act (NGA) and the Commission's regulations, an application for authority to convey its ownership interest in approximately 400 feet of 24-inch interconnecting pipe to Rockies Express Pipeline L.L.C. (REX). This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Any questions regarding this application should be directed to James D. Johnston, Associate General Counsel, Tennessee Gas Pipeline Company, 1001 Louisiana Street, Houston, Texas 77002, phone (713) 420–4998, fax (713) 420–1601, e-mail *james.johnston@elpaso.com*; to Thomas G. Joyce, Manager, Certificates, Tennessee Gas Pipeline Company, 1001 Louisiana Street, Houston, Texas, 77002, phone (713) 420–3299, fax (713) 420–1605, e-mail *tom.joyce@elpaso.com*; or to Juan Eligio, Regulatory Analyst, Rates and Regulatory Affairs, Tennessee Gas Pipeline Company, 1001 Louisiana Street, Houston, Texas 77002, phone (713) 420–3294, fax (713) 445–8589, e-mail *juan.eligio@elpaso.com*.

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding, or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify Federal and State agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all Federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the below listed comment date, file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

Motions to intervene, protests and comments may be filed electronically via the Internet in lieu of paper; see, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "e-Filing" link. The Commission strongly encourages electronic filings.

Comment Date: January 5, 2011.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32068 Filed 12–21–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–100–001; Docket No. PR10–68–001; Not Consolidated]

American Midstream (Louisiana Intrastate), LLC; Atmos Energy—Kentucky/Mid-States Division; Notice of Baseline Filings

December 15, 2010.

Take notice that on December 10, 2010, and December 13, 2010, respectively the applicants listed above submitted a revised baseline filing of their Statement of Operating Conditions for services provided under Section 311 of the Natural Gas Policy Act of 1978 ("NGPA").

Any person desiring to participate in this rate proceeding must file a motion to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be

taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov*, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov*, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 22, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32070 Filed 12–21–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

December 15, 2010.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG11–34–000.

Applicants: Hatchet Ridge Wind 2010–B.

Description: Notice of self certification of exempt wholesale generator status re Hatchet Ridge Wind 2010–B.

Filed Date: 12/14/2010.

Accession Number: 20101214–0204.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 04, 2011.

Docket Numbers: EG11–35–000.

Applicants: Hatchet Ridge Wind 2010–B, Hatchet Ridge Wind 2010–A.

Description: Notice of self certification of exempt wholesale generator status re Hatchet Ridge Wind 2010–A.

Filed Date: 12/14/2010.

Accession Number: 20101214–0203.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 04, 2011.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1533–001.

Applicants: Macquarie Energy LLC.

Description: Macquarie Energy LLC Notice of Non-Material Change in Status and Letters of Concurrence.

Filed Date: 12/14/2010.

Accession Number: 20101214–5189.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 04, 2011.

Docket Numbers: ER10–3031–001.

Applicants: Streator-Cayuga Ridge Wind Power LLC.

Description: Streator-Cayuga Ridge Wind Power LLC submits tariff filing per 35: Compliance Filing to Baseline MBR Tariff to be effective 9/27/2010.

Filed Date: 12/14/2010.

Accession Number: 20101214–5153.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 04, 2011.

Docket Numbers: ER10–3032–001.

Applicants: Trimont Wind I LLC.

Description: Trimont Wind I LLC submits tariff filing per 35: Compliance Filing to Baseline MBR Tariff to be effective 9/27/2010.

Filed Date: 12/14/2010.

Accession Number: 20101214–5154.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 04, 2011.

Docket Numbers: ER11–2011–001.

Applicants: Harvest Windfarm, LLC.

Description: Harvest Windfarm, LLC submits tariff filing per 35: Harvest Wind LLC MBR to be effective 12/16/2010.

Filed Date: 12/15/2010.

Accession Number: 20101215–5088.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 05, 2011.

Docket Numbers: ER11–2352–000.

Applicants: PJM Interconnection, L.L.C.

Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii): Original Service Agreement 2712 among PJM, Exelon and Commonwealth Edison to be effective 11/12/2010.

Filed Date: 12/13/2010.

Accession Number: 20101213–5197.

Comment Date: 5 p.m. Eastern Time on Monday, January 03, 2011.

Docket Numbers: ER11–2353–000.

Applicants: ConocoPhillips Company.

Description: ConocoPhillips Company submits tariff filing per 35.13(a)(2)(iii): Ancillary Services to be effective 1/1/2011.

Filed Date: 12/13/2010.

Accession Number: 20101213–5203.

Comment Date: 5 p.m. Eastern Time on Monday, January 03, 2011.

Docket Numbers: ER11–2354–000.

Applicants: Sustainable Star.

Description: Sustainable Star submits tariff filing per 35.13(a)(2)(iii): Market Based Initial Application to be effective 12/14/2010.

Filed Date: 12/13/2010.

Accession Number: 20101213–5215.

Comment Date: 5 p.m. Eastern Time on Monday, January 03, 2011.

Docket Numbers: ER11–2355–000.

Applicants: Accent Energy Midwest LLC.

Description: Accent Energy Midwest LLC submits a Notice of Cancellation of its Original Sheet No 1–2, First Revised FERC Electric Rate Tariff, Original Volume No 1.

Filed Date: 12/13/2010.

Accession Number: 20101214–0201.

Comment Date: 5 p.m. Eastern Time on Monday, January 03, 2011.

Docket Numbers: ER11–2356–000.

Applicants: Florida Power & Light Company.

Description: Florida Power & Light Company submits tariff filing per 35.12: FPL and Reedy Creek TSA No. 291 FINAL_12_13_2010 to be effective 1/1/2011.

Filed Date: 12/13/2010.

Accession Number: 20101213–5220.

Comment Date: 5 p.m. Eastern Time on Monday, January 03, 2011.

Docket Numbers: ER11–2357–000.

Applicants: Accent Energy Midwest LLC, Accent Energy New Jersey LLC.

Description: Accent Energy New Jersey, LLC submits a Notice of Cancellation of its Rate Schedule FERC No 1.

Filed Date: 12/13/2010.

Accession Number: 20101214–0202.

Comment Date: 5 p.m. Eastern Time on Monday, January 03, 2011.

Docket Numbers: ER11–2358–001.

Applicants: Westar Energy, Inc.

Description: Westar Energy, Inc. submits tariff filing per 35.17(b): Amendment Mid-Kansas Electric Company, LLC to be effective 8/31/2010.

Filed Date: 12/14/2010.

Accession Number: 20101214–5182.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 04, 2011.

Docket Numbers: ER11–2366–000.

Applicants: Lincoln Generating Facility, LLC.

Description: Lincoln Generating Facility, LLC submits tariff filing per 35.13(a)(2)(iii): Reactive Service Rate Schedule to be effective 1/1/2011.

Filed Date: 12/14/2010.

Accession Number: 20101214–5152.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 04, 2011.

Docket Numbers: ER11–2367–000.

Applicants: Safe Harbor Water Power Corporation.

Description: Safe Harbor Water Power Corporation submits tariff filing per 35.15: Cancellation of Safe Harbor MBR Under Incorrect Company ID to be effective 12/14/2010.

Filed Date: 12/14/2010.

Accession Number: 20101214–5155.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 04, 2011.

Docket Numbers: ER11–2368–000.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corporation submits tariff filing per 35.13(a)(2)(iii): 2010–12–14 CAISO Service Agreement 1750 Mojave Solar LGIA to be effective 1/30/2011.

Filed Date: 12/14/2010.

Accession Number: 20101214–5172.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 04, 2011.

Docket Numbers: ER11–2369–000.

Applicants: California Independent System Operator Corporation.

Description: California Independent System Operator Corporation submits tariff filing per 35.13(a)(2)(iii): 2010–12–14 CAISO Service Agreement 1748 Granite Mountain Wind Farm LGIA to be effective 11/24/2010.

Filed Date: 12/14/2010.

Accession Number: 20101214–5186.

Comment Date: 5 p.m. Eastern Time on Tuesday, January 04, 2011.

Docket Numbers: ER11–2370–000.

Applicants: Cambria CoGen Company.

Description: Cambria CoGen Company submits tariff filing per 35.12: Cambria CoGen Company FERC Electric Tariff No. 1 to be effective 2/14/2011.

Filed Date: 12/15/2010.

Accession Number: 20101215–5041.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 05, 2011.

Docket Numbers: ER11–2371–000.

Applicants: PJM Interconnection, L.L.C.

Description: Notice of Cancellation of PJM Interconnection, L.L.C. of Original Service Agreement No. 2143.

Filed Date: 12/15/2010.

Accession Number: 20101215–5065.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 05, 2011.

Docket Numbers: ER11–2372–000.

Applicants: ISO New England Inc., New England Power Pool Participants Committee.

Description: ISO New England Inc. submits tariff filing per 35.13(a)(2)(iii: Revisions to Attachment C of Open Access Transmission Tariff to be effective 4/1/2011.

Filed Date: 12/15/2010.

Accession Number: 20101215–5076.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 05, 2011.

Docket Numbers: ER11–2373–000.

Applicants: PJM Interconnection, L.L.C., PPL Electric Utilities Corporation.

Description: PJM Interconnection, L.L.C. submits tariff filing per 35.13(a)(2)(iii): PPL Electric submits Construction Agreement 2709 between PECO and PPL Electric to be effective 10/1/2010.

Filed Date: 12/15/2010.

Accession Number: 20101215–5077.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 05, 2011.

Docket Numbers: ER11–2374–000.

Applicants: Southwestern Public Service Company.

Description: Southwestern Public Service Company submits tariff filing per 35.13(a)(2)(iii): 12–15–10 RS138 SPS–LPL to be effective 2/14/2011.

Filed Date: 12/15/2010.

Accession Number: 20101215–5087.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 05, 2011.

Docket Numbers: ER11–2375–000.

Applicants: Consolidated Edison Company of New York.

Description: Consolidated Edison Company of New York, Inc. submits tariff filing per 35: Consolidated Edison Order 697 Compliance Filing to be effective 1/1/2011.

Filed Date: 12/15/2010.

Accession Number: 20101215–5091.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 05, 2011.

Docket Numbers: ER11–2376–000.

Applicants: Orange and Rockland Utilities, Inc.

Description: Orange and Rockland Utilities, Inc. submits tariff filing per 35: Orange and Rockland Utilities Order 697 Compliance Filing to be effective 1/1/2011 under ER11–02376–000 Filing Type: 80.

Filed Date: 12/15/2010.

Accession Number: 20101215–5122.

Comment Date: 5 p.m. Eastern Time on Wednesday, January 05, 2011.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–32063 Filed 12–21–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–112–002]

ONEOK Field Services Company, L.L.C.; Notice of Compliance Filing

December 15, 2010.

Take notice that on December 9, 2010, ONEOK Field Services Company, L.L.C. (OFS) filed pursuant to a November 23, 2010, Letter Order issued in Docket Nos. PR10–53–000 and PR10–53–001 which required OFS to file a revised Statement of Operating Conditions (SOC) to reflect the new maximum and minimum rates, and revised General Terms and Conditions.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 22, 2010

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32071 Filed 12–21–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR11–76–000]

Corning Natural Gas Corporation; Notice of Filing

December 15, 2010.

Take notice that on December 13, 2010, Corning Natural Gas Corporation resubmitted marked and clean versions to correct data errors contained in its October 18, 2010, filing in Docket No. PR11–7–000.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on Wednesday, December 22, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32072 Filed 12–21–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2354–000]

Sustainable Star, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 15, 2010.

This is a supplemental notice in the above-referenced proceeding of Sustainable Star, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 4, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the

Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–32064 Filed 12–21–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2370–000]

Cambria CoGen Company; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 15, 2010.

This is a supplemental notice in the above-referenced proceeding of Cambria CoGen Company's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 4, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–32066 Filed 12–21–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER11–2365–000]

Paradise Solar Urban Renewal, L.L.C.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

December 15, 2010.

This is a supplemental notice in the above-referenced proceeding of Paradise Solar Urban Renewal, L.L.C.'s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is January 4, 2011.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–32065 Filed 12–21–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13809–000; Project No. 13814–000]

Lock+ Hydro Friends Fund XLVIII; FFP Missouri 15, LLC;

Notice Announcing Preliminary Permit Drawing

December 15, 2010.

On July 12, 2010, at 8:30 a.m., the Commission received two preliminary permit applications for proposed projects to be located at the Mississippi River Lock and Dam No. 14, near Hampton, Illinois.[1] The applications

[1] The Commission is open each day from 8:30 a.m. to 5 p.m., except Saturdays, Sundays, and

Continued

were filed by Lock+ Hydro Friends Fund XLVIII, for Project No. 13809–000, and FFP Missouri 15, LLC, for Project No. 13814–000.

Where all permit applicants are municipalities or all permit applicants are non-municipalities, and no applicant's plans are better adapted than the others' to develop, conserve, and utilize in the public interest the water resources of a region, the Commission issues a permit to the applicant who filed first in time.[2] In this case, because two applications from entities not claiming municipal preference are deemed filed at the same time, the Commission will conduct a random tie breaker to determine priority. In the event that the Commission concludes that neither applicant's plans are better adapted than the other, priority will be determined accordingly.

On December 29, 2010, at 11 a.m. (Eastern Standard Time), the Secretary of the Commission, or her designee, will, by random drawing, determine the filing priority for the two applicants identified in this notice. The drawing is open to the public and will be held in room 2C, the Commission Meeting Room, located at 888 First St. NE., Washington, DC 20426. The results of the drawing will be recorded by the Secretary or her designee. A subsequent notice will be issued by the Secretary announcing the results of the drawing.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32069 Filed 12–21–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP11–1435–000]

Columbia Gulf Transmission Company; Notice of Technical Conference

December 15, 2010.

On October 28, 2010, Columbia Gulf Transmission Company (Columbia Gulf) filed a request under section 4 of the Natural Gas Act (NGA) to implement a general rate increase. Columbia Gulf submitted two sets of proposed tariff records with alternative rate structures for consideration by the Commission: actual tariff rates as its Primary Case and *pro forma* tariff rates as its Preferred Case. On November 30, 2010, the Commission issued an order that, among other things, directed the Staff to convene a technical conference to explore the non-rate issues raised by the filing.

Take notice that a technical conference to discuss non-rate issues raised by Columbia Gulf's filing will be held on Tuesday, January 18, 2011 at 10 a.m. (EST) and Wednesday, January 19, 2011 at 10 a.m. (EST), in a room to be designated at the offices of the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Federal Energy Regulatory Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations please send an e-mail to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–208–1659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

All parties and staff are permitted to attend. For further information please contact Sebrina M. Greene at (202) 502–6309 or *sebrina.greene@ferc.gov*.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–32073 Filed 12–21–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Western Area Power Administration

Notice of Cancellation of Environmental Impact Statement for the Proposed NextGen Project Near Selby, Walworth County, SD (DOE/EIS–0401)

AGENCY: Western Area Power Administration, DOE.

ACTION: Cancellation of Environmental Impact Statement.

SUMMARY: The U.S. Department of Energy (DOE), Western Area Power Administration (Western) is issuing this notice to advise the public that it is cancelling the preparation of an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) on an interconnection request by the Basin Electric Power Cooperative (BEPC). BEPC proposed to design, construct, operate, and maintain a 500- to 700-megawatt base load, coal-fired generation facility near Selby, Walworth County, South Dakota, and interconnect it with Western's transmission system, thus triggering a NEPA review of Western's action to allow the interconnection. BEPC has notified Western it is suspending further action on its proposed project.

FOR FURTHER INFORMATION CONTACT: For further information on the cancellation of this EIS process, contact Matt Marsh, Upper Great Plains Regional Office, Western Area Power Administration, P.O. Box 35800, Billings, MT 59107–5800, e-mail *MMarsh@wapa.gov,* telephone (800) 358–3415. For general information on the DOE's NEPA review process, contact Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance, GC–54, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0119, telephone (202) 586–4600 or (800) 472–2756, facsimile (202) 586–7031.

SUPPLEMENTARY INFORMATION: The U.S. Department of Energy (DOE), Western Area Power Administration (Western) is cancelling the preparation of an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) on an interconnection request by the Basin Electric Power Cooperative (BEPC). BEPC proposed to design, construct, operate, and maintain a 500- to 700-megawatt base load, coal-fired generation facility near Selby, Walworth County, South Dakota. BEPC's proposed NextGen Project would have been entirely owned and operated by BEPC, and would have been constructed on private land. Western received a request for interconnection from BEPC, which triggered a NEPA process on Western's proposed action to approve or deny BEPC's request to interconnect their proposed project with Western's transmission system. If the interconnection were to be approved, Western would have needed to construct and operate an interconnection facility at the point of interconnection.

A Notice of Intent to Prepare an Environmental Impact Statement was published in the **Federal Register** on July 27, 2007 (72 FR 41307). Public scoping meetings were held subsequent to the Notice of intent, but a Draft EIS was not produced. BEPC has notified Western that it is suspending further action on its proposed project; accordingly Western is terminating the NEPA review process on its interconnection decision.

Dated: December 10, 2010.

Timothy J. Meeks,

Administrator.

[FR Doc. 2010–32121 Filed 12–21–10; 8:45 am]

BILLING CODE 6450–01–P

holidays. 18 CFR 375.101(c) (2010). The applications were filed between 5:00 p.m. on Friday July 9, 2010, and 8:30 a.m. on Monday July 12, 2010. Under the Commission's Rules of Practice and Procedure, any document received after regular business hours is considered filed at 8:30 a.m. on the next regular business day. 18 CFR 385.2001(a)(2) (2010).

[2] 18 CFR 4.37 (2010). *See, e.g., BPUS Generation Development, LLC,* 126 FERC ¶ 61,132 (2009).

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0012; FRL–8857–8]

Notice of Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the Agency's receipt of several initial filings of pesticide petitions proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before January 21, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) of interest as shown in the body of this document, by one of the following methods:

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

Instructions: Direct your comments to the docket ID number and the pesticide petition number of interest as shown in the body of this document. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: A contact person, with telephone number and e-mail address, is listed at the end of each pesticide petition summary. You may also reach each contact person by mail at Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What action is the agency taking?

EPA is announcing its receipt of several pesticide petitions filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 174 or part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petitions described in this notice contain the data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. Additional data may be needed before EPA can make a final determination on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions that are the subject of this notice, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available on-line at *http://www.regulations.gov.*

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

New Tolerance

PP 9E7517. (EPA–HQ–OPP–2005–0477). Dow AgroSciences LLC, 9330 Zionsville Road, Indianapolis, IN 46268, proposes to establish a permanent tolerance in 40 CFR part 180 for residues of the herbicide safener dichlormid, acetamide, 2,2-dichloro-*N,N*-di-2-propenyl- (CAS Reg. No. 37764–25–3) in or on corn, field, forage; corn, field, grain; corn, field, stover; corn, pop, grain; corn, pop, stover; corn, sweet, forage; corn, sweet, kernel plus cob with husks removed; and corn, sweet, stover at 0.05 parts per million (ppm). Dichlormid (R–25788) is an herbicide safener that is used in the Dow AgroSciences LLC, acetochlor product line that is used for the control of grasses and broadleaf weeds in field corn, pop corn and sweet corn. Currently, time-limited tolerances on corn commodities are established with an expiration/revocation date of December 31, 2010. An adequate enforcement method for residues of dichlormid in corn has been developed and validated by the Analytical Chemical Laboratory (ACL) of EPA. Analysis is carried out using gas chromatography (GC) with nitrogen selective thermionic detection. A revised method was resubmitted to the EPA on October 29, 1999. Contact: Susan Stanton, (703) 305–5218, e-mail address: *stanton.susan@epa.gov.*

New Tolerance Exemptions

1. PP 9E7654. (EPA–HQ–OPP–2010–1004). Thro GmbH, c/o Thor Specialties, Inc., Trumbull, CT 06611, proposes to establish an exemption from the requirement of a tolerance for residues of 5-chloro-2-methyl-4-isothiazolin-3-one (in combination with 2-methyl-4-isothiazolin-3-one) (CAS Reg. Nos. 26172–55–4 and 2682–20–4) under 40 CFR 180.910 and under 40 CFR 180.930 when used as an inert ingredient as an "in-can" materials preservative with a maximum concentration of 50 parts per million (ppm) in pesticide formulations. The petitioner believes no analytical method is needed because requirements for an analytical method are not applicable to a request to establish an exemption from the requirement of a tolerance. Contact: Kerry Leifer, (703) 308–8811; e-mail address: *leifer.kerry@epa.gov.*

2. *PP* 9F7653. (EPA–HQ–OPP–2010–1005). Thor GmbH, c/o Thor Specialties, Inc, Trumbull, CT 06611, proposes to establish an exemption from the requirement of a tolerance for residues of 2-methyl-4-isothiazolin-3-one (CAS Reg. No. 2682–20–4) under 40 CFR 180.910 and under 40 CFR 180.930 when used as an inert ingredient as an "in-can" materials preservative with a maximum concentration of 250 parts per million (ppm) in pesticide formulations. The petitioner believes no analytical method is needed because requirements for an analytical method are not applicable to a request to establish an exemption from the requirement of a tolerance. Contact: Kerry Leifer, (703) 308–8811; e-mail address: *leifer.kerry@epa.gov.*

3. *PP* 0E7811. (EPA–HQ–OPP–2007–1077). Whitmire Micro-Gen Research Laboratories, Inc., c/o Landis International, Inc., P.O. Box 5126, Valdosta, GA 31603–5126, proposes to establish an exemption from the requirement of a tolerance for residues of carbon dioxide (CAS Reg. No. 124–38–9) under 40 CFR 180.910 and under 40 CFR 180.930 when used as an inert ingredient as a propellant in pesticide formulations. The petitioner believes no analytical method is needed because requirements for an analytical method are not applicable to a request to establish an exemption from the requirement of a tolerance. Contact: Karen Samek, (703) 347–8825; e-mail address: *samek.karen@epa.gov.*

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 9, 2010.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2010–31872 Filed 12–21–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0889; FRL–8856–8]

Pesticide Products; Registration Applications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to register pesticide products containing active ingredients not included in any previously registered pesticide products. Pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on these applications.

DATES: Comments must be received on or before January 21, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0889, by one of the following methods:

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

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2010–0889. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: Kable Bo Davis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 306–0415; e-mail address: *davis.kable@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Registration Applications

EPA has received applications to register pesticide products containing active ingredients not included in any previously registered pesticide products. Pursuant to the provisions of section 3(c)(4) of FIFRA, EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications.

File symbol: 62719–AGR. *Applicant:* Dow AgroSciences, 9330 Zionsville Rd., Indianapolis, IN 46268. *Product name:* Sulfoxaflor Technical. *Active ingredient:* Insecticide and sulfoxaflor at 97.9%. *Proposed classification/Use:* Food and nonfood uses on the following use sites: Barly, Brassica (cole) leafy vegetables, bulb vegetables, canola (rapeseed), citrus, cotton, cucurbit vegetables, fruiting vegetables, leafy vegetables (except Brassica), leaves of root and

tuber vegetables, low growing berry, okra, ornamentals (herbaceous and woody), pistachio, pome fruits, root and tuber vegetables, small fruit vine climbing (except fuzzy kiwifruit), soybean, stone fruits, succulent, edible podded, and dry beans, tree nuts, triticale, turfgrass, watercress and wheat. Contact: Kable Bo Davis, (703) 306–0415, *davis.kable@epa.gov*.

File symbol: 62719–AEL. *Applicant:* Dow AgroSciences, 9330 Zionsville Rd., Indianapolis, IN 46268. *Product name:* Transform WG. *Active ingredient:* Insecticide and sulfoxaflor at 50%. *Proposed classification/Use:* Food and nonfood uses on the following use sites: Barly, Brassica (cole) leafy vegetables, bulb vegetables, canola (rapeseed), citrus, cotton, cucurbit vegetables, fruiting vegetables, leafy vegetables (except Brassica), leaves of root and tuber vegetables, low growing berry, okra, ornamentals (herbaceous and woody), pistachio, pome fruits, root and tuber vegetables, small fruit vine climbing (except fuzzy kiwifruit), soybean, stone fruits, succulent, edible podded, and dry beans, tree nuts, triticale, turfgrass, watercress and wheat. Contact: Kable Bo Davis, (703) 306–0415, *davis.kable@epa.gov*.

File symbol: 62719–AEG. *Applicant:* Dow AgroSciences, 9330 Zionsville Rd., Indianapolis, IN 46268. *Product name:* GF–2032 SC. *Active ingredient:* Insecticide and sulfoxaflor at 21.8%. *Proposed classification/Use:* Food and nonfood uses on the following use sites: Barly, Brassica (cole) leafy vegetables, bulb vegetables, canola (rapeseed), citrus, cotton, cucurbit vegetables, fruiting vegetables, leafy vegetables (except Brassica), leaves of root and tuber vegetables, low growing berry, okra, ornamentals (herbaceous and woody), pistachio, pome fruits, root and tuber vegetables, small fruit vine climbing (except fuzzy kiwifruit), soybean, stone fruits, succulent, edible podded, and dry beans, tree nuts, triticale, turfgrass, watercress and wheat. Contact: Kable Bo Davis, (703) 306–0415, *davis.kable@epa.gov*.

List of Subjects

Environmental protection, Pesticides and pest.

Dated: December 9, 2010.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2010–32033 Filed 12–21–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0854; FRL–8851–3]

Petition for Rulemaking To Establish Procedures Consistent With Section 1010 of the 1988 Amendments to the Endangered Species Act; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is announcing the availability of a September 16, 2010 petition from Growers for ESA Transparency ("GET"). GET is a coalition of growers throughout the western United States. GET is committed to improving the consultation process for, the transparency of, and accessibility to the Endangered Species Act (ESA). GET is requesting EPA to take immediate action to establish, by rulemaking, clear and equitable procedures for notice and comment on the Agency's pesticide effects determinations for endangered species and subsequent actions, including draft biological opinions and potential product restrictions consistent with section 1010 of the 1988 amendments to the ESA. This petition is similar to the petition filed on January 19, 2010 by DOW AgroSciences LLC, Makhteshim Agan of North America, and Cheminova, Inc. USA requesting EPA to promulgate a rule for amending Endangered Species Protection Bulletins (EPA–HQ–OPP–2010–0474).

DATES: Comments must be received on or before February 22, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0854, by one of the following methods:

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

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2010–0854. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: Catherine Eiden, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–

0001; telephone number: (703) 305–7887; fax number: (703) 308–8005; e-mail address: *eiden.catherine@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111)
- Animal production (NAICS code 112)
- Food manufacturing (NAICS code 311)
- Pesticide manufacturing (NAICS code 32532)

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

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. What action is the agency taking?

EPA is announcing the availability of a petition from Growers for ESA Transparency under docket ID number EPA–HQ–OPP–2010–0854.

List of Subjects

Environmental protection, Endangered Species Act, Endangered Species, Pesticides, Public Input Process.

Dated: December 8, 2010.

Stephen A. Owens,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2010–32035 Filed 12–21–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9242–1]

Public Water System Supervision Program Approval for the State of Wisconsin

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of tentative approval.

SUMMARY: Notice is hereby given that the State of Wisconsin submitted a primacy application for its approved Public Water System Supervision Program. Wisconsin is applying its Interim Enhanced Surface Water Treatment Regulations to all Wisconsin water systems that use surface water and ground water under the influence of surface water as a source, thereby satisfying the requirements of the Long-Term 1 Enhanced Surface Water Treatment Rule.

EPA has determined that the State regulations and procedures submitted by the State to EPA for review are no less stringent than the corresponding Federal regulations. Therefore, EPA intends to award primacy to Wisconsin for Long-Term 1 Enhanced Surface Water Treatment Rule implementation. This approval action does not extend to public water systems (PWSs) in Indian Country, as the term is defined in 18 U.S.C. 1151. By approving these rules, EPA does not intend to affect the rights of Federally recognized Indian Tribes in Wisconsin, nor does it intend to limit existing rights of the State of Wisconsin. Any interested party may request a public hearing. A request for a public hearing must be submitted by January 21, 2011, to the Regional Administrator at the EPA Region 5 address shown below. The Regional Administrator may deny frivolous or insubstantial requests for a hearing. However, if a substantial request for a public hearing is made by January 21, 2011, EPA Region 5 will hold a public hearing. If EPA Region 5 does not receive a timely and appropriate request for a hearing and the Regional Administrator does not elect to hold a hearing on his own motion, this determination shall become final and effective on January 21, 2011. Any request for a public hearing shall include the following information: The name, address, and telephone number of the individual, organization, or other entity requesting a hearing; a brief statement of the requesting person's interest in the Regional Administrator's determination and a brief statement of the information that the requesting person intends to submit at such hearing; and the signature of the individual making the request, or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

ADDRESSES: All documents relating to this determination are available for inspection at the following offices: Wisconsin Department of Natural Resources, Bureau of Drinking Water and Groundwater, 5th Floor, 101 S. Webster Street, Madison, Wisconsin, between the hours of 7:45 a.m. and 4:30 p.m., Monday through Friday, and the United States Environmental Protection Agency, Region 5, Ground Water and Drinking Water Branch (WG–15J), 77 West Jackson Boulevard, Chicago, Illinois 60604, between the hours of 9 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Joseph Janczy, EPA Region 5, Ground Water and Drinking Water Branch, at the address given above, by telephone at (608) 267–2763, or at *janczy.joseph@epa.gov.*

Authority: Section 1413 of the Safe Drinking Water Act, as amended, 42 U.S.C. 3006–2 (1996), and 40 CFR part 142 of the National Primary Drinking Water Regulations.

Dated: November 29, 2010.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2010–32137 Filed 12–21–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0983; FRL–8855–9]

Busan 74 (HPMTS); and Nithiazine; Registration Review Proposed Decisions; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's proposed registration review decisions for the pesticides listed in the table in Unit II.A. and opens a public comment period on the proposed decisions. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, that the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

DATES: Comments must be received on or before February 22, 2011.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number for the specific pesticide of interest provided in the table in Unit II.A., by one of the following methods:

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

Instructions: Direct your comments to the docket identification (ID) number for the specific pesticide of interest provided in the table in Unit II.A. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: *For pesticide-specific information, contact:* The Chemical Review Manager for the pesticide of interest identified in the table in Unit II.A.

For general information on the registration review program, contact: Kevin Costello, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5026; fax number: (703) 308–8090; e-mail address: *costello.kevin@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the Chemical Review Manager listed under **FOR FURTHER INFORMATION CONTACT**.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

A. What action is the agency taking?

Pursuant to 40 CFR 155.58, this notice announces the availability of EPA's proposed registration review decisions for the pesticides shown in the following table, and opens a 60-day public comment period on the proposed decisions.

Nithiazine, (case # 7415) is an insecticide belonging to the neonicotinoid class of pesticides, which have been synthesized based on the structure of the naturally occurring pesticide nicotine (present in tobacco). Nithiazine was first registered by EPA in 1995. It is registered for use primarily for house fly control in animal housing facilities (especially poultry facilities; also feed lots, dairy barns, loafing sheds, and stables), and in industrial and other locations (such as garbage chutes, dumpsters, loading docks, grease pits, rest areas, and outdoor restrooms).

Busan 74 (HPMTS) (case # 3033) was first registered in the United States in 1968 and a Reregistration Eligibility Decision (RED) for Busan 74 (HPMTS) was issued in 1995. There are currently no registered end-use products for HPMTS. There is one registered manufacturing use product (MUP) (EPA Reg. No.1448–31) that contains HPMTS as the active ingredient. The MUP is for formulating use only and the labeling prohibits the product's sale, distribution, or use.

TABLE—REGISTRATION REVIEW PROPOSED FINAL DECISIONS

Registration review case name and number	Pesticide docket ID number	Chemical review manager, telephone number, E-mail address, mail code
Nithiazine (Case No. 7415)	EPA–HQ–OPP–2008–0847	Yan Donovan, (703) 605–0194, *donovan.yan@epa.gov*, Mail Code: 7508P.
Busan 74 (HPMTS) (Case No. 3053)	EPA–HQ–OPP–2010–0241	Rebecca von dem Hagen, (703) 305–6785, *vondem-hagen.rebecca@epa.gov*, Mail Code: 7510P.

The registration review docket for a pesticide includes earlier documents related to the registration review of the case. For example, the review opened with the posting of a Summary Document, containing a Preliminary Work Plan, for public comment. For Nithiazine, a Final Work Plan was posted to the docket following public comment on the initial docket. For Busan 74 (HPMTS), a Preliminary Work Plan was posted to the docket followed by a public comment period. Because no additional data are required and a "no effect" on any federally listed threatened or endangered species determination has been made, the Agency is publishing a combined Final Work Plan and Proposed Final Decision for HPMTS.

The documents in the dockets describe EPA's proposed registration review decisions of the pesticides included in the table in Unit II.A. These proposed registration review decisions are supported by the rationales included in those documents. Following public comment, the Agency will issue final registration review decisions for products containing the pesticides listed in the table in Unit II.A.

The registration review program is being conducted under congressionally mandated time frames, and EPA recognizes the need both to make timely decisions and to involve the public. Section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, required EPA to establish by regulation procedures for reviewing pesticide registrations, originally with a goal of reviewing each pesticide's registration every 15 years to ensure that a pesticide continues to meet the FIFRA standard for registration. The Agency's final rule to implement this program was issued in August 2006 and became effective in October 2006, and appears at 40 CFR part 155, subpart C. The Pesticide Registration Improvement Act of 2003 (PRIA) was amended and extended in September 2007. FIFRA, as amended by PRIA in 2007, requires EPA to complete registration review decisions by October 1, 2022, for all pesticides registered as of October 1, 2007.

The registration review final rule at 40 CFR 155.58(a) provides for a minimum 60-day public comment period on all proposed registration review decisions. This comment period is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the proposed decision. All comments should be submitted using the methods in **ADDRESSES**, and must be received by EPA on or before the closing date. These comments will become part of the docket for the pesticides included in the table in Unit II.A. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

The Agency will carefully consider all comments received by the closing date and will provide a "Response to Comments Memorandum" in the docket. The final registration review decision will explain the effect that any comments had on the decision and provide the Agency's response to significant comments.

Background on the registration review program is provided at: *http://www.epa.gov/oppsrrd1/registration_review.* Links to earlier documents related to the registration review of Busan 74 (HPMTS) and Nithiazine are provided at *http://www.epa.gov/oppsrrd1/registration_review/reg_review_status.htm.*

B. What is the agency's authority for taking this action?

Section 3(g) of FIFRA and 40 CFR part 155, subpart C, provide authority for this action.

List of Subjects

Environmental protection, Administrative practice and procedure, Busan 74, Nithiazine, Pesticides and pests.

Dated: December 15, 2010.

Joan Harrigan-Farrelly,

Director, Antimicrobials Division, Office of Pesticide Programs.

[FR Doc. 2010–32151 Filed 12–21–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0977; FRL–8857–6]

Registration Review; Pesticide Dockets Opened for Review and Comment and Other Docket Actions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has established registration review dockets for the pesticides listed in the table in Unit III.A. With this document, EPA is opening the public comment period for these registration reviews. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. Registration review dockets contain information that will assist the public in understanding the types of information and issues that the Agency may consider during the course of registration reviews. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment. This document also announces the Agency's intent not to open registration review dockets for bitrex, calcium carbonate, diethyl-2-(4-methylbenzyloxy)ethylamine (PT807-HCl), lindane, oleic acid sulfonates, potassium permanganate, and zinc silicate. These pesticides do not currently have any actively registered pesticide products and are not, therefore, scheduled for review under the registration review program. EPA is also announcing the availability of an amended final work plan for the registration review of the pesticide azoxystrobin; this work plan has been amended to incorporate revisions to the data requirements.

DATES: Comments must be received on or before February 22, 2011.

ADDRESSES: Submit your comments identified by the docket identification (ID) number for the specific pesticide of interest provided in the table in Unit III.A., by one of the following methods:

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

Instructions: Direct your comments to the docket ID numbers listed in the table in Unit III.A., for the pesticides you are commenting on. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: *For pesticide specific information contact:* The Chemical Review Manager or Regulatory Action Leader (RAL) identified in the table in Unit III.A., for the pesticide of interest.

For general information contact: Kevin Costello, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5026; fax number: (703) 308–8090; e-mail address: *costello.kevin@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farmworker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not

contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticide(s) discussed in this document, compared to the general population.

II. Authority

EPA is initiating its reviews of the pesticides identified in this document pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be reviewed every 15 years. Under FIFRA, a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

III. Registration Reviews

A. What action is the agency taking?

As directed by FIFRA section 3(g), EPA is reviewing the pesticide registrations identified in the table in this unit to assure that they continue to satisfy the FIFRA standard for registration—that is, they can still be used without unreasonable adverse effects on human health or the environment. A pesticide's registration review begins when the Agency establishes a docket for the pesticide's registration review case and opens the docket for public review and comment. At present, EPA is opening registration review dockets for the cases identified in the following table.

TABLE—REGISTRATION REVIEW DOCKETS OPENING

Registration review case name and No.	Docket ID No.	Chemical Review Manager or RAL, Telephone Number, E-mail Address
Benzoic acid, 5107	EPA–HQ–OPP–2010–0692	Seiichi Murasaki, (703) 347–0163, *murasaki.seiichi@epa.gov*.
Calcium oxides, 5104	EPA–HQ–OPP–2010–0693	Rebecca Vondem Hagen, (703) 305–6785, *vondem-hagen.rebecca@epa.gov*.
Chlorimuron, 7403	EPA–HQ–OPP–2010–0478	Wilhelmena Livingston, (703) 308–8025 *living-ston.wilhelmena@epa.gov*.
Chlorpropham, 271	EPA–HQ–OPP–2010–0923	Eric Miederhoff, (703) 347–8028 *miederhoff.eric@epa.gov*.
Cinnamaldehyde, 6032	EPA–HQ–OPP–2010–0918	Menyon Adams, (703) 347–8496 *adams.menyon@epa.gov*.
Cloransulam methyl, 7243	EPA–HQ–OPP–2010–0855	James Parker, (703) 306–0469 *parker.james@epa.gov*.
Diethylene glycol monomethyl ether, 5010.	EPA–HQ–OPP–2010–0694	Eliza Blair, (703) 308–7279, *blair.eliza@epa.gov*.
Dimethoxane, 3064	EPA–HQ–OPP–2010–0686	Rebecca Vondem Hagen, (703) 305–6785, *Vondem-hagen.rebecca@epa.gov*.
Dioctyl Sodium Sulfosuccinate, 4029	EPA–HQ–OPP–2010–1006	Yan Donovan, (703) 605–0194 *donavan.yan@epa.gov*.
Formetanate HCl, 0091	EPA–HQ–OPP–2010–0939	James Parker, (703) 306–0469 *parker.james@epa.gov*.
Gamma-Cyhalothrin, 7437	EPA–HQ–OPP–2010–0479	Wilhelmena Livingston, (703) 308–8025 *living-ston.wilhelmena@epa.gov*.
Lambda-Cyhalothrin, 7408	EPA–HQ–OPP–2010–0480	Wilhelmena Livingston, (703) 308–8025 *living-ston.wilhelmena@epa.gov*.
Muscalure Fly Attractant (cis-9-Tricosene), 4112.	EPA–HQ–OPP–2010–0925	John Fournier, (703) 308–0169 *fournier.john@epa.gov*.
Oryzalin, 0186	EPA–HQ–OPP–2010–0940	Christina Scheltema, (703) 308–2201, *scheltema.christina@epa.gov*.
Piperonyl butoxide, 2525	EPA–HQ–OPP–2010–0498	Jose Gayoso, (703) 347–8652, *gayoso.jose@epa.gov*.
Prodiamine, 7201	EPA–HQ–OPP–2010–0920	Katie Weyrauch, (703) 308–0166, *weyrauch.katie@epa.gov*.
Tau-fluvalinate, 2295	EPA–HQ–OPP–2010–0915	Molly Clayton, (703) 603–0522, *clayton.molly@epa.gov*.

EPA is also announcing that it will not be opening a docket for bitrex, calcium carbonate, diethyl-2-(4-methylbenzyloxy)ethylamine, lindane, oleic acid sulfonates, potassium permanganate, and zinc silicate because these pesticides are not included in any products actively registered under FIFRA section 3. The Agency will take separate actions to cancel any remaining FIFRA section 24(c) Special Local Needs registrations with these active

ingredients and to propose revocation of any affected tolerances that are not supported for import purposes only.

Lastly, EPA is announcing the availability of an amended final work plan for the registration review of azoxystrobin. The work plan was revised to incorporate changes to the data requirements for registration review. The revised work plan has removed a leaching/migration (non-guideline) special study and requires six new data requirements following additional review of available data for the antimicrobial uses of azoxystrobin. The azoxystrobin amended work plan may be found in registration review docket EPA–OPP–2009–0835, which is available on-line at *http://www.regulations.gov*.

B. Docket Content

1. *Review dockets.* The registration review dockets contain information that the Agency may consider in the course of the registration review. The Agency may include information from its files including, but not limited to, the following information:

- An overview of the registration review case status.
- A list of current product registrations and registrants.
- **Federal Register** notices regarding any pending registration actions.
- **Federal Register** notices regarding current or pending tolerances.
- Risk assessments.
- Bibliographies concerning current registrations.
- Summaries of incident data.
- Any other pertinent data or information.

Each docket contains a document summarizing what the Agency currently knows about the pesticide case and a preliminary work plan for anticipated data and assessment needs. Additional documents provide more detailed information. During this public comment period, the Agency is asking that interested persons identify any additional information they believe the Agency should consider during the registration reviews of these pesticides. The Agency identifies in each docket the areas where public comment is specifically requested, though comment in any area is welcome.

2. *Other related information.* More information on these cases, including the active ingredients for each case, may be located in the registration review schedule on the Agency's Web site at *http://www.epa.gov/oppsrrd1/registration_review/schedule.htm.* Information on the Agency's registration review program and its implementing regulation may be seen at *http://www.epa.gov/oppsrrd1/registration_review.*

3. *Information submission requirements.* Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

- To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. The Agency may, at its discretion, consider data or information submitted at a later date.
- The data or information submitted must be presented in a legible and useable form. For example, an English translation must accompany any material that is not in English and a written transcript must accompany any information submitted as an audiographic or videographic record. Written material may be submitted in paper or electronic form.
- Submitters must clearly identify the source of any submitted data or information.
- Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.

As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: December 14, 2010.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2010–32152 Filed 12–21–10; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Renewal of Currently Approved Collection (3064–0175); Submission for OMB Review; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of information collection to be submitted to OMB for review and approval under the Paperwork Reduction Act, and Request for Comment.

SUMMARY: The FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). On September 27, 2010 (75 FR 59263), the FDIC solicited public comment for a 60-day period on renewal of the following information collection: Interagency Guidance on Sound Incentive Compensation Practices. (3064–0175). No comments were received. Therefore, the FDIC hereby gives notice of its submission of its request for renewal to OMB for review.

DATES: Comments must be submitted on or before January 21, 2011.

ADDRESSES: Interested parties are invited to submit written comments. All comments should refer to the name and number of the collection. Comments may be submitted by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*
- *E-mail: comments@fdic.gov.*
- *Mail:* Gary A. Kuiper (202.898.3877), Federal Deposit Insurance Corporation, 550 17th Street NW., F–1086, Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

A copy of the comments may also be submitted to the OMB Desk Officer for the FDIC, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Gary A. Kuiper (at the FDIC address above).

SUPPLEMENTARY INFORMATION: The FDIC is proposing to renew this information collection.

Title: Interagency Guidance on Sound Incentive Compensation Practices.

OMB Number: 3064–0175.

Form Number: None.

Frequency of Response:

Implementation: Once.

Maintenance: Annual.

Affected Public: Insured state nonmember banks.

Estimated Number of Responses:

Implementation: Large Banks: 20. Small Banks: 4870.

Maintenance: All Banks: 4890.

Estimated Time per Response: Implementation: Large Banks: 480 hours. Small Banks: 80 hours.

Maintenance: Large Banks: 40 hours. Small Banks: 40 hours.

Total Annual Burden: Large Banks: 20 × 480 + 20 × 40 = 10,400 hours. Small Banks: 4870 × 80 + 4870 × 40 = 389,600 hours.

Total: 594,800 hours (399,200 hours for implementing policies and procedures is a one-time burden).

General Description of Collection: The Guidance would help ensure that incentive compensation policies at insured state non-member banks do not encourage excessive risk-taking and are consistent with the safety and soundness of the organization. Under the Guidance, banks would be required to: (i) Have policies and procedures that identify and describe the role(s) of the personnel and units authorized to be involved in incentive compensation arrangements, identify the source of significant risk-related inputs, establish appropriate controls governing these inputs to help ensure their integrity, and identify the individual(s) and unit(s) whose approval is necessary for the establishment or modification of incentive compensation arrangements; (ii) create and maintain sufficient documentation to permit an audit of the organization's processes for incentive compensation arrangements; (iii) have any material exceptions or adjustments to the incentive compensation arrangements established for senior executives approved and documented by its board of directors; and (iv) have its board of directors receive and review, on an annual or more frequent basis, an assessment by management of the effectiveness of the design and operation of the organization's incentive compensation system in providing risk-taking incentives that are consistent with the organization's safety and soundness.

Request for Comment

Comments are invited on: (a) Whether this collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimate of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 17th day of December, 2010.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2010–32158 Filed 12–21–10; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Notices

AGENCY: Federal Election Commission.

DATE AND TIME: Thursday, December 16, 2010, at 10 a.m.

PLACE: 999 E Street, NW., Washington, DC (Ninth Floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Correction and Approval of Minutes.
Draft Advisory Opinion 2010–29:
  Working Families Party of Oregon by its counsel, Cathy Highet, Esq.
Draft Advisory Opinion 2010–30:
  Citizens United by its counsel, Michael Boos, Esq.
Election of Officers.
2011 Meeting Dates.
Management and Administrative Matters.

Individuals who plan to attend and require special assistance, such as sign language interpretation or other reasonable accommodations, should contact Shawn Woodhead Werth, Commission Secretary and Clerk, at (202) 694–1040, at least 72 hours prior to the hearing date.

PERSON TO CONTACT FOR INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Shawn Woodhead Werth,

Secretary and Clerk of the Commission.

[FR Doc. 2010–31895 Filed 12–21–10; 8:45 am]

BILLING CODE 6715–01–M

FEDERAL MARITIME COMMISSION

Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984. Interested parties may submit comments on the agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. A copy of the agreement is available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202)–523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 012108–001.

Title: The World Liner Data Agreement.

Parties: ANL Container Line Pty Ltd.; A.P. Moller-Maersk A/S; CMA CGM S.A.; Compania Chilena de Navegacion Interoceanica S.A.; Hamburg-Sud; Hapag-Lloyd AG; Mediterranean Shipping Company S.A.; Orient Overseas Container Line Ltd.; and United Arab Shipping Company S.A.G.

Filing Party: Wayne Rohde, Esq.; Cozen O'Connor; 627 I Street, NW.; Suite 1100; Washington, DC 20006.

Synopsis: The amendment adds Compania Sud Americana de Vapores S.A. as a party to the Agreement.

By Order of the Federal Maritime Commission.

Dated: December 17, 2010.

Karen V. Gregory,

Secretary.

[FR Doc. 2010–32167 Filed 12–21–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for a license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF)—Ocean Transportation Intermediary (OTI) pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR 515). Notice is also hereby given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a license.

Interested persons may contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

A & J Cargo Logistics Inc. (OFF), 8245 NW. 36th Street, #5, Miami, FL 33166. Officers: Jose L. Iglesias, President, (Qualifying Individual), Alice Iglesias, Secretary. Application Type: New OFF License.

Alaska Seavan, Inc. dba Mitchell Moving & Storage (OFF), 18800 Southcenter Parkway, Seattle, WA 98188. Officer: Charles K. Behrens, President, (Qualifying Individual), Todd L. Halverson, CEO. Application Type: New NVO License.

American Lamprecht Transport, Inc. (NVO & OFF), 700 Rockaway Turnpike, #303A, Lawrence, NY

11559. Officers: Alain Tiercy, CFO/Secretary/Treasurer, (Qualifying Individual), Hans-Peter Widmer, President. Application Type: QI Change.

Americas Cargo Express, Inc. (NVO), 2704 Temple Avenue, Long Beach, CA 90806. Officers: Jose J. Castano, Sr., President, (Qualifying Individual), Evangeline A. Castano, Vice President. Application Type: Business Structure Change.

Bellville Rodair International Inc. (NVO & OFF), 105 Fieldcrest Avenue, Suite 205, Edison, NJ 08837–3628. Officers: Chris Matthews, Vice President, (Qualifying Individual), Jeffrey Cullen, President. Application Type: QI Change.

Cala Distribution, LLC (NVO), 2705 NW. 109 Avenue, Miami, FL 33172. Officers: Pedro Salcedo, Manager, (Qualifying Individual), E. Bensadon, Manager. Application Type: License Transfer.

CTC Logistics (L.A.) Inc. (NVO), 5250 W. Century Blvd., Suite 660, Los Angeles, CA 90045. Officers: Ruonan Mowia, Secretary, (Qualifying Individual), Yon L. Li, President. Application Type: QI Change.

Dart Global Logistics Inc. dba Dart Global Logistics (NVO), 147–60 175th, 2nd Floor, Jamaica, NY 11434. Officers: Ananda L. Jayasekara, COO/Managing Director, (Qualifying Individual), Charles Wijesundera, President/CEO. Application Type: Name Change.

Dawn Freight, Inc. (NVO & OFF), 4430 NW. 74th Avenue, Miami, FL 33166. Officers: Alba L. Gallo, President/Secretary, (Qualifying Individual), Gustavo Gallo, Vice President. Application Type: Add NVO Service.

Efreightsolutions LLC (NVO), 5021 Statesman Drive, Suite 200, Irving, TX 75063. Officers: Stephen T. Russ, Assistant Secretary, (Qualifying Individual), William S. Askew, Manager. Application Type: New NVO License.

Encar Trading, Corp. (NVO), 8556 NW. 64th Street, Miami, FL 33166. Officer: Carlos Cardona, President (Qualifying Individual). Application Type: New NVO License.

F.L. Investment Group, Inc. dba Quivas Cargo Express (NVO), 4101 Alverado Street, Orlando, FL 32812. Officers: Tanya Quiroz, Treasurer/Secretary, (Qualifying Individual), Eddy A. Quiroz, President. Application Type: New NVO License.

FPS Logistic (USA) Inc. dba Famous Pacific Lines dba Famous Container Lines (NVO), 879 W. 190th Street, #905, Gardena, CA 90248. Officer: Quincy H. Tan, President/CEO/CFO/Secretary. Application Type: Trade Name Change.

G & G Auto Sales dba W8Shipping (OFF), 140 Aviation Court, Savannah, GA 33133. Officers: Darius Ziulpa, Member/Manager, (Qualifying Individual), Gedeminas Garmus, Member/Manager. Application Type: New OFF License.

J & S Transportation, LLC. (OFF), 380 South Union Street, Lawrence, MA 01843. Officer: Samson Eboigbe, Manager, (Qualifying Individual). Application Type: New OFF License.

New Vista International LLC (NVO & OFF), 14939 Sugar Mist Lane, Sugar Land, TX 77498. Officer: Susan S. Tao, President, (Qualifying Individual). Application Type: New NVO & OFF License.

OC International Freight, Inc. (NVO & OFF), 4458 NW. 74th Avenue, Miami, FL 33166. Officer: Omar Collado, President/Secretary, (Qualifying Individual). Application Type: New NVO & OFF License.

Ocean Link Forwarding, Inc. (OFF), 582 W. Huntington Drive, #M, Arcadia, CA 91007. Officers: Wei Jiang, President/CFO, (Qualifying Individual), Peixin Li, Vice President/Secretary. Application Type: New OFF License.

Ochi Logistics Inc. (NVO), 68–30 Burns Street, #F3, Forest Hills, NY 11375. Officer: Shiro Ochi, President/Secretary/Treasurer, (Qualifying Individual). Application Type: New NVO License.

Ryan Global Logistics, Corp. (NVO), 16801 Gale Avenue, Suite D, City of Industry, CA 91745. Officer: Leslie W. Fung, CEO/CFO/Secretary, (Qualifying Individual). Application Type: New NVO License.

Swan Container Line L.L.C. (NVO), 627 Summit Avenue, Jersey City, NJ 07306. Officers: Fawwad Mohammad, Operations Manager, (Qualifying Individual), Magued Abdallah, Managing Partner. Application Type: New NVO License.

TDS Logistics LLC (NVO & OFF), 10102 Cedar Creek, Houston, TX 77042. Officers: Reina G. Louden, Vice President, (Qualifying Individual), Timothy B. Tarrilion, President. Application Type: New NVO & OFF License.

Tito Global Trade Services USA LLC (NVO & OFF), 1315 NW. 98th Court, Miami, FL 33172. Officers: Victor Blanco, Manager, (Qualifying Individual), Luiz F. Bermudez, Managing Manager. Application Type: New NVO & OFF License.

Transouth Marine Cargo, LLC (NVO & OFF), 2190 NW. 2nd Street, Miami, FL 33125. Officer: Roberto Ruiz, Manager, (Qualifying Individual). Application Type: New NVO & OFF License.

Dated: December 17, 2010.

Karen V. Gregory,

Secretary.

[FR Doc. 2010–32169 Filed 12–21–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Revocations

The Federal Maritime Commission hereby gives notice that the following Ocean Transportation Intermediary licenses have been revoked pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515, effective on the corresponding date shown below:

License Number: 1519F.
Name: J. Astengo Co.
Address: 8062 Clover Way, Buena Park, CA 90620.
Date Revoked: November 30, 2010.
Reason: Surrendered license voluntarily.

License Number: 8952N.
Name: Ace Consolidators Corp.
Address: 147–19 Springfield Lane, Suite D, Jamaica, NY 11413.
Date Revoked: November 10, 2010.
Reason: Failed to maintain a valid bond.

License Number: 14036N.
Name: Joong Ho Kim dba Total Airfreight Systems.
Address: 19401 S. Vermont Avenue, Suite J–100, Torrance, CA 90502.
Date Revoked: November 17, 2010.
Reason: Failed to maintain valid bond.

License Number: 016090F.
Name: Universal Relocation Systems, Inc.
Address: 24 Commerce Road, Unit Q, Fairfield, NJ 07004.
Date Revoked: November 1, 2010.
Reason: Surrendered license voluntarily.

License Number: 017747N.
Name: Tomcar Investment USA, Inc.
Address: 8369 North Coral Circle, N. Lauderdale, FL 33068.

Date Revoked: November 6, 2010.
Reason: Failed to maintain a valid bond.
License Number: 018456N.
Name: Trico Forwarding-USA, Inc.
Address: 172 East Manville Street, Compton, CA 90220.
Date Revoked: November 1, 2010.
Reason: Surrendered license voluntarily.
License Number: 018487N.
Name: Quality One International Shipping, Inc.
Address: 3913 Dyre Avenue, Bronx, NY 10466.
Date Revoked: November 7, 2010.
Reason: Failed to maintain a valid bond.
License Number: 019871NF.
Name: WLG (USA) LLC dba Kay O'Neill (USA) LLC dba WLG Line.
Address: 920 East Algonquin Road, Suite 120, Schaumburg, IL 60173.
Date Revoked: August 31, 2010.
Reason: Surrendered license voluntarily.
License Number: 020264F.
Name: Empire Shipping Co. Inc.
Address: 100 East Peddie Street, Newark, NJ 07114.
Date Revoked: November 6, 2010.
Reason: Failed to maintain a valid bond.
License Number: 020667F.
Name: Atlas Logistics (U.S.A.), Inc.
Address: 2401 E. Atlantic Blvd., Suite 310, Pompano Beach, FL 33062.
Date Revoked: November 18, 2010.
Reason: Failed to maintain a valid bond.
License Number: 020883NF.
Name: Zai Cargo, Inc. dba Zai Ocean Services dba Zai Container Line dba Zai Cargo, Inc.
Address: 6324 NW 97th Avenue, Doral, FL 33178.
Date Revoked: November 19, 2010.
Reason: Failed to maintain valid bonds.
License Number: 021351F.
Name: Cil Forwarding, LLC.
Address: 1420 Vantage Way, Suite 112, Jacksonville, FL 32218.
Date Revoked: November 18, 2010.
Reason: Failed to maintain a valid bond.
License Number: 021407NF.
Name: Smartex Corp. dba Smartex.
Address: 5055 NW 74th Avenue, Suite 5, Miami, FL 33166.
Date Revoked: November 18, 2010.
Reason: Failed to maintain valid bonds.
License Number: 021885F.
Name: SeaForward Logistics, LLC.
Address: 2769 S. Oakland Circle West, Aurora, CO 80014.
Date Revoked: November 30, 2010.
Reason: Surrendered license voluntarily.
License Number: 022244F.
Name: Golden Freight, Inc. dba Saigon Express.
Address: 510 Parrott Street, Suite 2, San Jose, CA 95112.
Date Revoked: November 15, 2010.
Reason: Failed to maintain a valid bond.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. 2010–32171 Filed 12–21–10; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 18, 2011.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Vice President) 33 Liberty Street, New York, New York 10045–0001:

1. Chuo Mitsui Trust Holding, Inc., Tokyo, Japan; to become a bank holding Company by acquiring The Sumitomo Trust and Banking Co., Ltd, Osaka, Japan, and thereby acquire Sumitomo Trust and Banking Co. (USA), Hoboken, New Jersey.

In connection with this application, Applicant also has applied to acquire Nikko Am Americas Holding Co., Inc., Nikko Asset Management Americas, Inc., and Cho Mitsui Investment, all in New York, New York, and thereby engage in investment advisory activities, pursuant to section 225.24(b)(6) of Regulation Y.

Board of Governors of the Federal Reserve System, December 17, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–32092 Filed 12–21–10; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Adjustments for Disaster-Recovery States to the Fourth Quarter of Fiscal Year 2011 and Fiscal Year 2012 Federal Medical Assistance Percentage (FMAP) Rates for Federal Matching Shares for Medicaid and Title IV–E Foster Care, Adoption Assistance and Guardianship Assistance Programs

AGENCY: Office of the Secretary, DHHS.

ACTION: Notice.

SUMMARY: This notice describes the methodology for calculating the higher federal matching funding that is made available under section 1905(aa) of the Social Security Act, as amended by section 2006 of the Patient Protection and Affordable Care Act of 2010 ("Affordable Care Act") and provides the adjusted Federal Medical Assistance Percentage (FMAP) rates for the fourth quarter of Fiscal Year 2011 and Fiscal Year 2012 for disaster-recovery FMAP adjustment states. Section 1905(aa) of the Social Security Act provides for an increase in the FMAP rate for qualifying states that have experienced a major, statewide disaster.

DATES: *Effective Date:* The percentages listed are for the fourth quarter of Fiscal Year 2011 beginning July 1, 2011 and ending September 30, 2011, and for Fiscal Year 2012.

A. Background

The Federal Medical Assistance Percentage (FMAP) is used to determine the amount of Federal matching for specified State expenditures for assistance payments under programs under the Social Security Act. Sections 1905(b) and 1101(a)(8)(B) of the Social Security Act ("the Act") require the Secretary of Health and Human Services to publish the FMAP rates each year. The Secretary calculates the percentages, using formulas set forth in

sections 1905(b) and 1101(a)(8)(B), from the Department of Commerce's statistics of average income per person in each State and for the Nation as a whole. The percentages must be within the upper and lower limits given in section 1905(b) of the Act. The percentages to be applied to the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands are specified in statute, and thus are not based on the statutory formula that determines the percentages for the 50 States.

Section 1905(b) of the Social Security Act specifies the formula for calculating FMAP as follows:

> The FMAP for any State shall be 100 per centum less the State percentage; and the State percentage shall be that percentage which bears the same ratio to 45 per centum as the square of the per capita income of such State bears to the square of the per capita income of the continental United States (including Alaska) and Hawaii; except that (1) the FMAP shall in no case be less than 50 per centum or more than 83 per centum, and (2) the FMAP for Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa shall be 50 per centum. Section 4725 of the Balanced Budget Act of 1997 amended section 1905(b) to provide that the FMAP for the District of Columbia for purposes of titles XIX (Medicaid) and XXI (CHIP) shall be 70 percent.

Section 2006 of the Patient Protection and Affordable Care Act of 2010 ("Affordable Care Act") amended section 1905 of the Social Security Act by adding section (aa) to provide for an increase in the FMAP rate for qualifying states for Medicaid and title IV–E Foster Care, Adoption Assistance and Guardianship Assistance programs. The purpose of the increase to the FMAP rate is to provide increased Federal financial participation for qualifying states that have experienced a major, statewide disaster.

B. Definition of a Disaster-Recovery FMAP Adjustment State

Section 1905(aa) of the Social Security Act, as added by section 2006 of the Affordable Care Act specifies that the annual FMAP rate shall be increased for a "disaster-recovery FMAP adjustment state." The statute defines a "disaster-recovery FMAP adjustment state" as one of the 50 states or District of Columbia for which, at any time during the preceding 7 fiscal years, the President has declared a major disaster under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act under which every county or parish in the state is eligible for individual and public or public assistance from the federal government, and for which the FMAP as determined for the fiscal year is less than the FMAP for the preceding fiscal year by at least three percentage points. For Fiscal Year 2011 (FY11), the first fiscal year in which a state can qualify for the disaster adjustment, the FMAP for FY11 must be less than the FMAP for the preceding fiscal year after the application of the "hold harmless" provision under subsection (a) of Section 5001 of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111–5), by at least three percentage points. For Fiscal Year 2012 (FY12) and beyond, the FMAP rate for the state for the fiscal year, as determined based on the annual FMAP calculation (without regard to section 1905(aa)), must be less than the preceding year FMAP rate, including the applicable disaster-recovery adjustment, by at least three percentage points.

C. Calculation of the Increased FMAP Rates for Disaster-Recovery FMAP Adjustment States

For the first year in which a state qualifies for the disaster-recovery FMAP adjustment, the FMAP shall be equal to the FMAP as determined for the fiscal year, plus 50% of the number of percentage points by which the FMAP is less than the preceding fiscal year FMAP. For FY11, the preceding fiscal year FMAP includes the application of the "hold harmless" provision under subsection (a) of Section 5001 of the ARRA. In year two or any succeeding fiscal year in the qualifying 7-year period, the FMAP shall be equal to the FMAP as determined for the preceding fiscal year, including any disaster-recovery adjustment for that year, plus 25% of the number of percentage points by which the FMAP as determined for the fiscal year (without any disaster-recovery adjustment) is less than the FMAP for the previous year (including any applicable disaster-recovery adjustments).

Expenditures for which the increased FMAP is not available under title XIX include expenditures for disproportionate share hospital payments and expenditures that are paid at an enhanced FMAP rate, as well as any payments made under Title XXI. The increased FMAP is available for expenditures under part E of title IV only.

Disaster-recovery FMAP adjustments will be included in the annual publication of the FMAP rates for the succeeding fiscal year. Beginning in the fall of 2011, the annual **Federal Register** Notice will include the FMAP rates for the succeeding fiscal year, as well as disaster-recovery adjustments to the FMAP rates.

D. Disaster-Recovery FMAP Adjustments for the Fourth Quarter of Fiscal Year 2011 and Fiscal Year 2012

The application of the disaster-recovery FMAP adjustment is effective January 1, 2011. Due to the extension of the ARRA FMAP adjustments, which extended the recession adjustment period to June 30, 2011 (the end of the third quarter of FY11), no state will qualify for the disaster-recovery adjustment until the fourth quarter of FY11. As such, any adjustments that are made to the FY11 FMAP rates are effective for the fourth fiscal quarter only. Disaster-recovery FMAP adjustments made in future fiscal years will be applicable for all four quarters of the year.

Based on the criteria for a qualifying state, only three states meet the requirement that the FMAP as determined for FY11 is less than the previous year FMAP, after the application of subsection (a) of Section 5001 of the ARRA, by at least three percentage points. Of the three states, only one state, Louisiana, has had a presidential disaster declaration that applies to all counties and parishes within the state in the preceding 7 fiscal years. Therefore, this notice only provides a disaster-recovery FMAP adjustment for the state of Louisiana for fourth quarter of FY11. The disaster-recovery adjusted FMAP rate is shown in the accompanying table.

Based on the criteria for a qualifying state, only two states meet the requirement that the FMAP as determined for FY12 is less than the previous year FMAP by at least three percentage points. Of the two states, only one state, Louisiana, has had a presidential disaster declaration that applies to all counties and parishes within the state in the preceding 7 fiscal years. Therefore, this notice only provides a disaster-recovery FMAP adjustment for the state of Louisiana for FY12. The disaster-recovery adjusted FMAP rate is shown in the accompanying table. This is the second fiscal year for which Louisiana has qualified for the disaster-recovery adjustment; the adjusted FMAP rate for FY12 reflects the calculation as prescribed in statute for succeeding qualifying years.

FOR FURTHER INFORMATION CONTACT: Carrie Shelton, Office of Health Policy, Office of the Assistant Secretary for Planning and Evaluation, Room 447D—Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, (202) 690–6870.

(Catalog of Federal Domestic Assistance Program Nos. 93.658: Foster Care; 93.659:

Adoption Assistance; 93.090: Guardianship Assistance; 93.778: Medical Assistance Program)

Dated: November 12, 2010.

Kathleen Sebelius,

Secretary.

FISCAL YEAR 2011 (Q4) DISASTER-RECOVERY ADJUSTED FMAP RATES

State	FY11 FMAP	ARRA Hold harmless FY 08–10 FMAP	Decrease in FMAP	Disaster-recovery adjusted FMAP FY11 (Q4)
Louisiana	63.61	72.47	8.86	68.04

FISCAL YEAR 2012 DISASTER-RECOVERY ADJUSTED FMAP RATES

State	FY12 FMAP	FY11 FMAP/Disaster recovery adjusted FMAP	Decrease in FMAP	Disaster-recovery adjusted FMAP FY12
Louisiana	61.09	68.04	6.95	69.78

[FR Doc. 2010–32054 Filed 12–21–10; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier CMS–10321]

Emergency Clearance; Public Information Collection Requirements Submitted to the Office of Management and Budget (OMB)

AGENCY: Office of Consumer Information and Insurance Oversight, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of Consumer Information and Insurance Oversight (OCIIO), the U.S. Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden. We are, however, requesting an emergency review of the information requested below. In compliance with the requirement of Section 3506(c)(2)(a) of the Paperwork Reduction Act of 1995, we have submitted to the Office of Management and Budget (OMB) the following requirements for emergency review. In accordance with 5 CFR 1320.13, we are requesting an emergency review to ensure compliance with an initiative of the Administration.

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Early Retiree Reinsurance Program; *Use:* Under the Section 1102 of the Affordable Care Act and implementing regulations at 45 CFR Part 149, employment-based plans that offer health benefits to early retirees and their spouses, surviving spouses and dependents are eligible under a temporary program to receive a tax-free reimbursement for the costs of certain health benefits for such individuals. In order to qualify, plan sponsors must submit a complete application to the HHS. In order to receive reimbursement under the program, they must also submit documentation of actual costs for health care benefits, which consists of documentation of actual costs for the items and services involved, and a list of individuals to whom the documentation applies. Once HHS reviews and analyzes the information on the application, notification will be sent to the plan sponsor about its eligibility to participate in the program. Once HHS reviews and analyzes each reimbursement request, reimbursement under the program will be made to the sponsor, as appropriate. *Form Number:* CMS–10321 (OMB–0938–1087); *Frequency:* Occasionally; *Affected Public:* Private Sector: Business or other for-profits and Not-for-profit institutions; State, Local, or Tribal Governments; *Number of Respondents:* 13,200; *Number of Responses:* 71,330; *Total Annual Hours:* 1,927,575. (For policy questions regarding this collection, contact Dave Mlawsky at (410) 786–6851. For all other issues call (410) 786–1326.)

OCIIO is requesting OMB approval by *January 3, 2011,* with a 180-day approval period. Written comments and recommendations will be considered from the public if received by the individuals designated below by *January 3, 2011.*

To obtain copies of the supporting statement and any related forms for the proposed paperwork collections references above, access CMS' Web site address at *http://www.cms.hhs.gov/PaperworkReductionActof1995* or E-mail your request, including your address, phone number, OMB Number, and CMS document identifier to *Paperwork@cms.hhs.gov,* or call the Reports Clearance Office on (410) 786–1326.

Interested parties are invited to send comments regarding the burden or any other aspect of these collections of information requirements. To be assured consideration, comments and recommendations must be submitted in one of the following ways by *January 3, 2011:*

1. *Electronically.* You may submit your comments electronically to *http://Regulations.gov.* Follow the instructions for "Comment or Submission" or "More Search Options" to find the information collection document(s) accepting comments.

2. *By regular mail.* Office of Consumer Information and Insurance Oversight, Department of Health and Human Services, Attention: Paperwork Reduction Act, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201. Please allow sufficient time for mailed comments to be received before the close of the comment period. (Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the OCIIO drop slots located in the

main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

3. *By facsimile or E-mail to OMB.* OMB, Office of Information and Regulatory Affairs, *Attention:* CMS Desk Officer, Fax Number (202) 395–6974, *E-mail: OIRA_submission@omb.eop.gov.*

Dated: December 20, 2010.

Kenneth Cohen,

Director, Executive Secretariat & Regulatory Affairs, Office of Consumer Information and Insurance Oversight.

[FR Doc. 2010–32265 Filed 12–20–10; 4:15 pm]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

[Document Identifier: OS–0990–New; 60-day Notice]

Agency Information Collection Request. 60-Day Public Comment Request

AGENCY: Office of the Secretary, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of a proposed information collection request for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the agency's functions; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden. To obtain copies of the supporting statement and any related forms for the proposed paperwork collections referenced above, e-mail your request, including your address, phone number, OMB number, and OS document identifier, to *Sherette.funncoleman@hhs.gov,* or call the Reports Clearance Office on (202) 690–6162. Written comments and recommendations for the proposed information collections must be directed to the OS Paperwork Clearance Officer at the above e-mail address within 60-days.

Proposed Project: Comparative Effectiveness Research Inventory—OMB No. 0990–New–Assistant Secretary for Planning and Evaluation (ASPE).

Abstract: The Office of the Assistance Secretary for Planning and Evaluation (ASPE) is requesting approval by OMB for the collection of information submitted by content users directly to a web-based inventory of comparative effectiveness research (CER). The CER Inventory will categorize and catalogue Federal and non-Federal CER outputs and activities across four main domains: research, human & scientific capital (*e.g.,* training/education, methods development), data infrastructure, and dissemination & translation. The CER inventory will serve as a valuable tool for researchers, providers, patients, policymakers, and other users.

The CER inventory will draw upon primary data sources, including PubMed, HSRProj, ClinicalTrials.gov, and NIH RePORTER. Working with these four major sources and using the Federal Coordinating Council for CER's definition of CER and strategic framework, selection criteria and tools to select and extract the appropriate subsets of these datasets for inclusion in the CER inventory will be identified. In addition, content owners wishing to submit CER records to the CER inventory will be directed first to submit such records to one of these main primary source databases, as appropriate. This method will not only help to augment these existing databases, it will enable efficient and effective capture of CER information for the CER Inventory via CER search filters, etc., that have been developed for those respective source databases. If candidate CER records under consideration are not suitable for submission to one of these main databases, an alternative method that allows for direct submissions to the CER inventory will be made available to content users. Examples include reports and published articles or projects and programs that focus on areas of CER outside of primary research (*e.g.,* training and education). The pilot inventory tool will provide a Web form that may be used by content owners to submit CER records, subject to validation. This process for direct submission will draw from the experience with content owner submissions for such established databases as HSRProj and ClinicalTrials.gov.

ESTIMATED ANNUALIZED BURDEN TABLE

Form	Type of respondent	Number of respondents	Number of responses per respondent	Total responses	Average burden hours per response	Total burden hours
CER Inventory Direct Submission Form for Reports or Other Publications	Researchers/ Research Assistants	400	1	400	25/60	167
CER Inventory Direct Submission Form for Projects	Researchers/ Research Assistants	100	1	100	28/60	47
Total						214

Seleda M. Perryman,

Office of the Secretary, Paperwork Reduction Act Reports Clearance Officer.

[FR Doc. 2010–32057 Filed 12–21–10; 8:45 am]

BILLING CODE 4150–05–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30 Day–11–10GQ]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

The Evaluation of Ordinances to Prevent Workplace Violence in Convenience Stores—NEW—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention,(CDC).

Background and Brief Description

Workplace violence (WPV) is a significant concern for employers and employees alike; every year in the U.S., WPV results in hundreds of deaths, nearly two million nonfatal injuries, and billions of dollars in costs. Historically, retail establishments have been the focus of WPV research. In 1997–2008, there were 1,800 homicides of retail workers of which 1,572 were due to robbery or assaults.

Situational Crime Prevention programs to reduce robbery and violent crime have been proven to be successful in reducing robbery and robbery-related injury risk to both employees and customers in retail settings. These programs incorporate a criminological concept called Crime Prevention Through Environmental Design (CPTED) which theorizes that environments can be modified to make potential criminals feel they are being watched, *i.e.* under surveillance and thus vulnerable, resulting in avoidance of the target by increasing the robber's perception that a robbery is not worth the risk.

NIOSH is requesting approval to conduct an evaluation of the effectiveness of convenience store safety ordinances in Dallas and Houston, Texas. The goals of this research are to (1) determine if the ordinances effectively increase the frequency of implementation of CPTED components in stores and decrease robbery and assaults to workers and customers; (2) determine the benefits to stores from compliance to the city ordinance; (3) determine the process the cities used for ordinance development and their recommendations to other cities, and (4) develop evidence-based recommendations to provide to other cities and retail companies considering CPTED programs. Recommendations about the process used by Houston and Dallas may be helpful to other communities considering ordinances. Additionally, benefits to the stores with regard to return on investment, increased quality of customers, increased sales, and decreases in employee stress due to risk of workplace violence may be useful to other cities and their retailers considering ordinances.

The proposed NIOSH study will be a population based follow-up study of convenience stores which are operating 1-year after the effective date of their ordinance. A sample of 300 stores in Dallas and 300 stores in Houston will be selected. Each store will be visited by a survey interviewer who will evaluate the store environment and interview the store managers in person. Data will be collected on compliance with the safety ordinance, reasons for non-compliance, and benefits to the store from compliance including return on investment, increased sales, increased quality of customers, decreased crime, and decreased employee stress.

The participation of the store manager will be voluntary. Data from the store evaluation will be recorded on a checklist form and will take approximately 15 minutes of the store interviewer's time. The store evaluation will be conducted independently of the managers and will not require their time or assistance thus; they will not be incurring burden. The interview of the store manager will require approximately 30 minutes of the manager's time. From previous studies of convenience stores, over a 90% response rate is expected. Prior to the survey NIOSH will contact those companies in the sample who own two or more stores that can be identified based on the company or store name, and obtain approval from the store owners/upper management for their store manager's participation. Permission to participate will be obtained from the remainder of the store managers at the time of the survey. If a store manager refuses to participate, another store will be selected from the sampling frame to ensure a sample of 600 stores. The survey interviewer will first visit the store and leave the questionnaire with the manager and then return 1–2 days later for the interview. This leaves time for the manager to obtain approval to participate from owners and upper management. The store manager's participation will be voluntary and consent to participate will be obtained from the manager.

A burden of 3 hours is estimated for each of approximately 35 owners/managers to review the questionnaire and survey protocol, and to discuss their store managers' participation with NIOSH project officers by conference call.

Once the study is completed, NIOSH will provide a copy of the final report to each participating store, the participating city Mayor's Task force for Convenience Store Safety, the police department, and the industry and community partners.

Approximately 3 industry leaders in each city who participate on the Mayor's Task Force for Convenience Store Safety will provide support and voluntarily contact approximately 90 stores and recommend they participate. There is no cost to respondents other than their time. The total estimated annual burden hours are 495.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hrs)
Store manager Screening/interviews	600	1	30/60
Store owners/upper management approve manager interviews	35	1	3

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hrs)
Stakeholders			
Industry leader recommend stores	3	30	30/60
Community leader recommend stores	3	30	30/60

Shari Steinberg,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–32077 Filed 12–21–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30 Day–11–10GX]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 639–5960 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Persistence of Viable Influenza Virus in Aerosols—New—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The National Institute for Occupational Safety and Health (NIOSH) is authorized to conduct research to advance the health and safety of workers under Section 20(a) (1) of the 1970 Occupational Safety and Health Act. Influenza continues to be a major public health concern because of the substantial health burden from seasonal influenza and the potential for a severe pandemic. Although influenza is known to be transmitted by infectious secretions, these secretions can be transferred from person to person in many different ways, and the relative importance of the different pathways is not known. The likelihood of the transmission of influenza virus by small infectious airborne particles produced during coughing and breathing is particularly unclear. The question of airborne transmission is especially important in healthcare facilities, where influenza patients tend to congregate during influenza season, because it directly impacts the infection control and personal protective measures that should be taken by healthcare workers. The purpose of this study is to measure the amount of viable influenza virus in airborne particles that are produced by patients when they cough, and the size and quantity of the particles carrying the virus. A better understanding of the amount of potentially infectious material released by patients and the size of the particles carrying the virus will assist in determining the possible role of airborne transmission in the spread of influenza and in devising measures to prevent it.

Volunteer participants will be recruited by a test coordinator using a flyer describing the study. Interested potential participants will be screened using a short health questionnaire to verify that they have influenza-like symptoms and that they do not have any medical conditions that would preclude their participation. Based on a previous study using similar forms, we estimate that the health questionnaire will require about 5 minutes to complete. Qualified participants who agree to participate in the study will be asked to read and sign an informed consent form. Based on the previous study, we estimate that the informed consent form will take about 10 minutes to read and sign. Once the informed consent form is signed, the participant will have their oral temperature measured, two nasopharyngeal swabs will be collected, and the participant will be asked to cough into an aerosol particle collection system. These steps will take about 25 minutes. The airborne particles produced by the participant during coughing will be collected and tested.

There are no costs to the respondents other than their time. The total estimated annual burden hours are 84.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden hours
Initial participants (phase 1)	Health questionnaire	44	1	5/60	4
Qualified participants (phase 1)	Informed Consent form	40	1	10/60	7
	No form; Time required for testing.	40	1	25/60	17
Initial participants (phase 2)	Health questionnaire	44	1	5/60	4
Qualified participants (phase 2)	Informed Consent form	40	1	10/60	7
	No form; Time required for testing.	40	1	25/60	17
Initial participants (phase 3)	Health questionnaire	44	1	5/60	4
Qualified participants (phase 3)	Informed Consent form	40	1	10/60	7
	No form; Time required for testing.	40	1	25/60	17

Dated: December 16, 2010.

Catina Conner,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–32076 Filed 12–21–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–11–11BF]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instrument, call 404–639–5960 and send comments to Carol E. Walker, Acting CDC Reports Clearance Officer, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30333; or send an e-mail to *omb@cdc.gov.*

Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have a practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Contact Investigation Outcome Reporting Forms—New—National Center for Emerging, Zoonotic and Infectious Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

CDC proposes to collect passenger-level, epidemiologic, demographic, and health status data from State/local Health Departments and maritime operators at the conclusion of contact investigations of individuals believed to have been exposed to a communicable disease during travel. The information requested by CDC would be obtained by the health departments or maritime operators while conducting the contact investigation according to their established policies and procedures, and would be reported to CDC on a voluntary basis. This information will assist CDC in fulfilling its regulatory responsibility to prevent the importation of communicable diseases from foreign countries (42 CFR part 71) and interstate control of communicable diseases in humans (42 CFR part 70). To perform these tasks in a streamlined manner and ensure that all relevant information is collected in the most efficient and timely manner possible, Quarantine Stations use a number of forms: Contact Investigation Outcome Reporting Forms: (1) Optional TB Air/Land Contact Investigation Outcome Reporting, (2) Optional Measles, Mumps, or Rubella Air/Land Contact Investigation Outcome Reporting, (3) Optional General Air/Land Contact Investigation Outcome Reporting Form, (4) Optional TB Maritime Contact Investigation Outcome Reporting Form, (5) Optional Measles, Mumps or Rubella Maritime Contact Investigation Outcome Reporting Form, (6) Optional General Maritime Contact Investigation Outcome Reporting Form.

Section 361 of the Public Health Service (PHS) Act (42 USC 264) authorizes the Secretary of Health and Human Services to make and enforce regulations necessary to prevent the introduction, transmission or spread of communicable diseases from foreign countries into the United States. The regulations that implement this law, 42 CFR parts 70 and 71, require conveyances to report an "ill person" or any death onboard to authorized quarantine officers and other personnel to inspect and undertake necessary control measures with respect to conveyances (*e.g.,* airplanes, cruise ships), persons, and shipments of animals and etiologic agents in order to protect the public health. The notification is made possible by contacting individuals who may have been exposed to a communicable disease during travel and their contacts, and investigating this exposure so that the necessary medical or public health interventions can be implemented.

CDC provides state and local health departments and maritime conveyance operators with information to notify and contact individuals and further investigate this exposure by contacting others who may have been potentially exposed to disease. However, there currently is no standardized tool or form to collect pertinent information regarding the outcome of such investigations.

To address the need to inform CDC of additional actions that may be needed to further protect public health based on the outcome of the contact investigations, CDC has developed six forms to assist health departments and maritime conveyance operators in reporting back to CDC. The forms are specific to the nature of the investigation; Tuberculosis (TB), Measles, Mumps, and Rubella or the General forms specific to other diseases of public health concern. The purpose of the forms is the same: To collect information to help CDC quarantine officials to fully understand the extent of disease spread and transmission during travel and to inform the development and or refinement of investigative protocols, aimed at reducing the spread of communicable disease.

All six forms collect the following categories of information: Heath status of traveler, clinical history including diagnosis, and interventions related to exposure.

Respondents are state and local health departments and maritime conveyance operators. Respondents will use these standardized forms to submit data to CDC for each individual contacted via a secure means of their choice, *e.g.,* Web-based application, fax or e-mail.

The estimated total burden on the public, included in the chart below, can vary a great deal depending on the number of flights and the number of individuals identified as contacts that are assigned to a given health jurisdiction in the U.S. There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Forms	Number of respondents	Number of responses/ respondent	Average burden/ response (in hours)	Total burden hours
State/Local health department staff ..	Optional TB Air/Land Contact Investigation Outcome Reporting Form.	2154	1	5/60	180
State/Local health department staff ..	Optional Measles, Mumps or Rubella Air/Land Contact Investigation Outcome Reporting Form.	367	1	5/60	31
State/Local health department staff ..	Optional General Air/Land Contact Investigation Outcome Reporting Form.	456	1	5/60	38
Maritime Operators	Optional TB Maritime Contact Investigation Outcome Reporting Form.	190	1	5/60	16
Maritime Operators	Optional Measles, Mumps or Rubella Maritime Contact Investigation Outcome Reporting Form.	140	1	5/60	12
Maritime Operators	Optional General Maritime Contact Maritime Operators Investigation Outcome Reporting Form.	40	1	5/60	3
Total	.....	.....	.....	.....	280

Dated: December 16, 2010.

Catina Conner,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–32078 Filed 12–21–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Enabling Bioanalytical and Imaging Technologies.

Date: December 29, 2010.

Time: 2 p.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Allen Richon, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6181, MSC 7892, Bethesda, MD 20892. 301–435–2902. *allen.richon@nih.hhs.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Vascular and Hematology SEP.

Date: January 10–11, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting)

Contact Person: Bukhtiar H. Shah, DVM, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4120, MSC 7802, Bethesda, MD 20892. (301) 301 806–7314. *shahb@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Diabetes, Obesity and Nutrition.

Date: January 10, 2011.

Time: 1p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: John Bleasdale, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6170, MSC 7892, Bethesda, MD 20892. 301–435–4514. bleasdaleje@csr.nih.gov.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business: Devices for the NICU. RFA HD10–012 and 013.

Date: January 21, 2011.

Time: 11 a.m. to 7 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Bethesda North Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

Contact Person: John Firrell, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5213, MSC 7854, Bethesda, MD 20892. 301–435–2598. *firrellj@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 15, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32100 Filed 12–21–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material,

and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflicts: Cellular and Molecular Immunology.

Date: January 7, 2011.

Time: 9 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting.)

Contact Person: Stephen M., Nigida, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4212, MSC 7812, Bethesda, MD 20892. 301–435–1222. *nigidas@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: Biobehavioral Regulations, Learning and Memory.

Date: January 7, 2011.

Time: 9 a.m. to 9 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting.)

Contact Person: Biao Tian, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3089B, MSC 7848, Bethesda, MD 20892. (301) 402–4411. *tianbi@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, NHLBI Systems Biology,

Date: January 20–21, 2011.

Time: 11 a.m. to 9 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting.)

Contact Person: Ai-Ping Zou, MD, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892. 301–435–1777. *zouai@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Special Topic: Bioanalytical Chemistry Reviews.

Date: January 27–28, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Palomar Hotel, 2121 P Street, NW., Washington, DC 20037.

Contact Person: Ross D Shonat, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6172, MSC 7892, Bethesda, MD 20892. 301–435–2786. *ross.shonat@nih.hhs.gov.*

Name of Committee: Interdisciplinary Molecular Sciences and Training Integrated Review Group, Enabling Bioanalytical and Imaging Technologies Study Section.

Date: January 27–28, 2011.

Time: 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Palomar Hotel, 2121 P Street, NW., Washington, DC 20037.

Contact Person: Vonda K Smith, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4148, MSC 7801, Bethesda, MD 20892. 301–435–1789. *smithvo@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 15, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32110 Filed 12–21–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Deafness and Other Communication Disorders Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Deafness and Other Communication Disorders Advisory Council.

Date: January 28, 2011.

Closed: 8:30 a.m. to 10:30 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

Open: 10:30 a.m. to 2:30 p.m.

Agenda: Staff reports on divisional, programmatic, and special activities.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

Contact Person: Craig A. Jordan, PhD, Director, Division of Extramural Activities, NIDCD, NIH, Executive Plaza South, Room 400C, 6120 Executive Blvd., Bethesda, MD 20892–7180. 301–496–8693. *jordanc@nidcd.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.nidcd.nih.gov/about/groups/ndcdac/,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: December 16, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32126 Filed 12–21–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Human Genome Research Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant

applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Inherited Disease Research Access Committee.

Date: January 7, 2011.

Time: 11:30 a.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Camilla E. Day, PhD, Scientific Review Officer, CIDR, National Human Genome Research Institute, National Institutes of Health, 5635 Fishers Lane, Suite 4075, Bethesda, MD 20892, 301–402–8837, *camilla.day@nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.172, Human Genome Research, National Institutes of Health, HHS)

Dated: December 16, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32124 Filed 12–21–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer Institute; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Cancer Institute Special Emphasis Panel; Novel Digital X-ray Sources for Cancer Imaging Applications.

Date: January 11, 2011.

Time: 11 a.m. to 3 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6116 Executive Boulevard, Room 210, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Shamala K. Srinivas, PhD, Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 8123, Bethesda, MD 20892, 301–594–1224, *ss537t@nih.gov.*

Name of Committee: National Cancer Institute Special Emphasis Panel; Low-Field Electron Paramagnetic Resonance Imaging Device to Optimize Development of Anti-Angiogenic Therapeutics in Cancer Animal Models.

Date: January 18, 2011.

Time: 11 a.m. to 1 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6116 Executive Boulevard, Room 210, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Shamala K. Srinivas, PhD, Scientific Review Officer, Research Programs Review Branch, Division of Extramural Activities, National Cancer Institute, 6116 Executive Boulevard, Room 8123, Bethesda, MD 20892, 301–594–1224, *ss537t@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: December 16, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32122 Filed 12–21–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Neurological Disorders and Stroke Council.

Date: February 3–4, 2011.

Open: February 3, 2011, 10 a.m. to 5:15 p.m.

Agenda: Report by the Director, NINDS; Report by the Associate Director for Extramural Research, NINDS; Associate Director for Translational Research, NINDS; and other administrative and program developments.

Place: National Institutes of Health, Building 31, 31 Center Drive, C Wing, Conference Room 10, Bethesda, MD 20892.

Closed: February 4, 2011, 8 a.m. to 11:30 a.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, C Wing, Conference Room 10, Bethesda, MD 20892.

Contact Person: Robert Finkelstein, PhD, Associate Director for Extramural Research, National Institute of Neurological Disorders and Stroke, NIH, 6001 Executive Blvd., Suite 3309, MSC 9531, Bethesda, MD 20892, (301) 496–9248.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http:// www.ninds.nih.gov,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS).

Dated: December 15, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32101 Filed 12–21–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflicts: Cognition and Perception.

Date: January 19–20, 2011.

Time: 12 p.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Weijia Ni, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3184, MSC 7848, Bethesda, MD 20892, (301) 237–9918, *niw@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: December 16, 2010.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32103 Filed 12–21–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse And Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of a meeting of the National Advisory Council on Alcohol Abuse and Alcoholism.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council on Alcohol Abuse and Alcoholism.

Date: February 16–17, 2011.

Closed: February 16, 2011, 5:30 p.m. to 7:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Bethesda, MD 20892.

Open: February 17, 2011, 9 a.m. to 3 p.m.

Agenda: Presentations and other business of the council.

Place: National Institutes of Health, 5635 Fishers Lane, Bethesda, MD 20892.

Contact Person: Abraham P. Bautista, PhD, Executive Secretary, National Institute on Alcohol Abuse and Alcoholism, National Institutes of Health, 5635 Fishers Lane, Room 2085, Rockville, MD 20892. 301–443–9737. *bautistaa@mail.nih.gov.*

Information is also available on the Institute's/Center's home page: *http:///www.silk.nih.gov/silk/niaaa1/about/roster.htm*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos.: 93.271, Alcohol Research Career Development Awards for Scientists and Clinicians; 93.272, Alcohol National Research Service Awards for Research Training; 93.273, Alcohol Research Programs; 93.891, Alcohol Research Center Grants; 93.701, ARRA Related Biomedical Research and Research Support Awards, National Institutes of Health, HHS)

Dated: December 14, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32022 Filed 12–21–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Development of Alternate Drug Delivery Dosage Forms for Drug Abuse Studies.

Date: January 7, 2011.

Time: 1 p.m. to 4:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Jose F. Ruiz, PhD, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 213, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892, (301) 451–3086, *ruizjf@nida.nih.gov.*

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Screening Characterizations and Validation Assays for Protein Capture Reagents (7778).

Date: January 11, 2011.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Gerald L. McLaughlin, PhD, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, (301) 402–6626, *gm145a@nih.gov.*

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; Development of New Methods and Approaches to Monitor Medication Compliance in Clinical Trials (8897).

Date: January 14, 2011.

Time: 1 p.m. to 4 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive

Boulevard, Rockville, MD 20852 (Telephone Conference Call).

Contact Person: Jose F. Ruiz, PhD, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 213, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892, (301) 451–3086, *ruizjf@nida.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 15, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32113 Filed 12–21–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; NIDA Cutting-Edge Basic Research Award (SEP).

Date: December 29, 2010.

Time: 9 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Scott A Chen, PhD, Scientific Review Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Blvd., Bethesda, MD 20892–8401, 301–443–9511, *chensc@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel; P30 Centers of Excellence.

Date: February 24, 2011.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road, NW., Washington, DC 20015.

Contact Person: Eliane Lazar-Wesley, PhD, Health Scientist Administrator, Office of Extramural Affairs, National Institute on Drug Abuse, NIH, DHHS, Room 220, MSC 8401, 6101 Executive Boulevard, Bethesda, MD 20892–8401, 301–451–4530, *elazarwe@nida.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos.: 93.279, Drug Abuse and Addiction Research Programs, National Institutes of Health, HHS)

Dated: December 15, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32111 Filed 12–21–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Library of Medicine; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App), notice is hereby given of a meeting of the Biomedical Library and Informatics Review Committee.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Biomedical Library and Informatics Review Committee.

Date: March 3–4, 2011.

Time: March 3, 2011, 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: National Library of Medicine, Building 38, 2nd Floor, Board Room, 8600 Rockville Pike, Bethesda, MD 20892.

Time: March 4, 2011, 8 a.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Contact Person: Arthur A. Petrosian, PhD, Chief Scientific Review Officer, Division of Extramural Programs, National Library of Medicine, 6705 Rockledge Drive, Suite 301, Bethesda, MD 20892–7968, 301–496–4253, *petrosia@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.879, Medical Library Assistance, National Institutes of Health, HHS)

Dated: *December 16, 2010.*

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–32102 Filed 12–21–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2010–0853]

Collection of Information Under Review by Office of Management and Budget: OMB Control Numbers: 1625–0062, 1625–0078, and 1625–0082

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this request for comments announces that the U.S. Coast Guard is forwarding three Information Collection Requests (ICRs), abstracted below, to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB) requesting an extension of its approval for the following collections of information: (1) 1625–0062, Approval of Alterations to Marine Portable Tanks; Approval of Non-Specification Portable Tanks; (2) 1625–0078, Licensing and Manning Requirements for Officers of Towing Vessels; and (3) 1625–0082, Navigation Safety Information and Emergency Instructions for Certain Towing Vessels. Our ICRs describe the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: Please submit comments on or before January 21, 2011.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2010–0853] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT) or to OIRA. To avoid duplication, please submit your comments by only one of the following means:

(1) Electronic submission. (a) To Coast Guard docket at *http://www.regulations.gov.* (b) To OIRA by e-mail via: *oira_submission@omb.eop.gov.*

(2) Mail or Hand delivery. (a) DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–

0001. Hand deliver between the hours of 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329. (b) To OIRA, 725 17th Street, NW., Washington, DC 20503, attention Desk Officer for the Coast Guard.

(3) Fax. (a) To DMF, 202–493–2251. (b) To OIRA at 202–395–5806. To ensure your comments are received in a timely manner, mark the fax, attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov*.

Copies of the ICRs are available through the docket on the Internet at *http://www.regulations.gov*. Additionally, copies are available from: Commandant (CG–611), Attn Paperwork Reduction Act Manager, U.S. Coast Guard, 2100 2nd St, SW., Stop 7101, Washington DC 20593–7101.

FOR FURTHER INFORMATION CONTACT: Ms. Kenlinishia Tyler, Office of Information Management, telephone 202–475–3652 or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION: The Coast Guard invites comments on whether these ICRs should be granted based on it being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility, and clarity of information subject to the collections; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology.

Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICRs. They must also contain the docket number of this request, [USCG 2010–0853]. For your comments to OIRA to be considered, it is best if they are received on or before January 21, 2011.

Public participation and request for comments: We encourage you to respond to this request by submitting comments and related materials. We will post all comments received, without change, to *http://www.regulations.gov*. They will include any personal information you provide. We have an agreement with DOT to use their DMF. *Please see* the "Privacy Act" paragraph below.

Submitting comments: If you submit a comment, please include the docket number [USCG–2010–0853], indicate the specific section of the document to which each comment applies, providing a reason for each comment. We recommend you include your name, mailing address, an e-mail address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission. You may submit comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8–1/2 by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. In response to your comments, we may revise the ICR or decide not to seek an extension of approval for this collection. The Coast Guard and OIRA will consider all comments and material received during the comment period.

Viewing comments and documents: Go to *http://www.regulations.gov* to view documents mentioned in this Notice as being available in the docket. Click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2010–0853" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the DMF in room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (75 FR 59278, September 27, 2010) required by 44 U.S.C. 3506(c)(2). That Notice elicited no comments.

Information Collection Requests

1. *Title:* Approval of Alterations to Marine Portable Tanks; Approval of Non-Specification Portable Tanks.

OMB Control Number: 1625–0062.

Type of Request: Extension of a currently approved collection.

Respondents: Owners of marine portable tanks and owners/designers of non-specification portable tanks.

Abstract: Approval by the Coast Guard of alterations to marine portable tanks under 46 CFR part 64 ensures the altered tank retains the level of safety to which it was originally designed. In addition, rules allowing for the approval of non-specification portable tanks ensure innovation and new designs are not impeded by the regulation.

Forms: None.

Burden Estimate: The estimated burden remains unchanged at 18 hours a year.

2. *Title:* Licensing and Manning Requirements for Officers of Towing Vessels.

OMB Control Number: 1625–0078.

Type of Request: Revision of a currently approved collection.

Respondents: Owners and operators of towing vessels.

Abstract: Title 46 CFR part 10 prescribes regulations for the licensing of maritime personnel. This collection is necessary to ensure a mariner's training information is available to assist in determining the mariner's overall qualifications to hold certain licenses.

Forms: None.

Burden Estimate: The estimated burden has decreased from 19,746 hours to 16,770 hours a year.

3. *Title:* Navigation Safety Information and Emergency Instructions for Certain Towing Vessels.

OMB Control Number: 1625–0082.

Type of Request: Revision of a currently approved collection.

Respondents: Owners, operators, and masters of vessels.

Abstract: The purpose of the regulations is to improve the safety of towing vessels and the crews that operate them.

Forms: None.

Burden Estimate: The estimated burden has increased from 362,908 hours to 410,465 hours a year.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: December 15, 2010.

R.E. Day,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2010–32059 Filed 12–21–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2010–0858]

Collection of Information Under Review by Office of Management and Budget: OMB Control Numbers: 1625–0002, 1625–0017, 1625–0019, and 1625–0030

AGENCY: Coast Guard, DHS.

ACTION: Thirty-day notice requesting comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this request for comments announces that the U.S. Coast Guard is forwarding four Information Collection Requests (ICRs), abstracted below, to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget (OMB) requesting an extension of its approval for the following collections of information: (1) 1625–0002, Applications for Vessel Inspection, Waiver, and Continuous Synopsis Record; (2) 1625–0017, Various International Agreement Safety Certificates and Documents; (3) 1625–0019, Alternative Compliance for International and Inland Navigation Rules—33 CFR Parts 81 and 89; (4) and 1625–0030, Oil and Hazardous Materials Transfer Procedures. Our ICRs describe the information we seek to collect from the public. Review and comments by OIRA ensure we only impose paperwork burdens commensurate with our performance of duties.

DATES: Please submit comments on or before January 21, 2011.

ADDRESSES: You may submit comments identified by Coast Guard docket number [USCG–2010–0858] to the Docket Management Facility (DMF) at the U.S. Department of Transportation (DOT) or to OIRA. To avoid duplication, please submit your comments by only one of the following means:

(1) Electronic submission. (a) To Coast Guard docket at *http://www.regulations.gov.* (b) To OIRA by e-mail via: *oira_submission@omb.eop.gov.*

(2) Mail or Hand delivery. (a) DMF (M–30), DOT, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001. Hand deliver between the hours of 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329. (b) To OIRA, 725 17th Street, NW., Washington, DC 20503, attention Desk Officer for the Coast Guard.

(3) Fax. (a) To DMF, 202–493–2251. (b) To OIRA at 202–395–5806. To ensure your comments are received in a timely manner, mark the fax, attention Desk Officer for the Coast Guard.

The DMF maintains the public docket for this Notice. Comments and material received from the public, as well as documents mentioned in this Notice as being available in the docket, will become part of the docket and will be available for inspection or copying at room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find the docket on the Internet at *http://www.regulations.gov.*

Copies of the ICRs are available through the docket on the Internet at *http://www.regulations.gov.* Additionally, copies are available from: Commandant (CG–611), Attn: Paperwork Reduction Act Manager, U.S. Coast Guard, 2100 2nd St. SW., Stop 7101, Washington, DC 20593–7101.

FOR FURTHER INFORMATION: Contact Ms. Kenlinishia Tyler, Office of Information Management, telephone 202–475–3652 or fax 202–475–3929, for questions on these documents. Contact Ms. Renee V. Wright, Program Manager, Docket Operations, 202–366–9826, for questions on the docket.

SUPPLEMENTARY INFORMATION: The Coast Guard invites comments on whether these ICRs should be granted based on it being necessary for the proper performance of Departmental functions. In particular, the Coast Guard would appreciate comments addressing: (1) The practical utility of the collections; (2) the accuracy of the estimated burden of the collections; (3) ways to enhance the quality, utility, and clarity of information subject to the collections; and (4) ways to minimize the burden of collections on respondents, including the use of automated collection techniques or other forms of information technology.

Comments to Coast Guard or OIRA must contain the OMB Control Number of the ICRs. They must also contain the docket number of this request, [USCG–2010–0858]. For your comments to OIRA to be considered, it is best if they are received on or before the January 21, 2011.

Public participation and request for comments: We encourage you to respond to this request by submitting comments and related materials. We will post all comments received, without change, to *http://www.regulations.gov.* They will include any personal information you provide. We have an agreement with DOT to use their DMF. Please see the "Privacy Act" paragraph below.

Submitting comments: If you submit a comment, please include the docket number [USCG–2010–0858], indicate the specific section of the document to which each comment applies, providing a reason for each comment. We recommend you include your name, mailing address, an e-mail address, or other contact information in the body of your document so that we can contact you if we have questions regarding your submission. You may submit comments and material by electronic means, mail, fax, or delivery to the DMF at the address under **ADDRESSES**; but please submit them by only one means. If you submit them by mail or delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit them by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. In response to your comments, we may revise the ICR or decide not to seek an extension of approval for this collection. The Coast Guard and OIRA will consider all comments and material received during the comment period.

Viewing comments and documents: Go to *http://www.regulations.gov* to view documents mentioned in this Notice as being available in the docket. Click on the "read comments" box, which will then become highlighted in blue. In the "Keyword" box insert "USCG–2010–0858" and click "Search." Click the "Open Docket Folder" in the "Actions" column. You may also visit the DMF in room W12–140 on the West Building Ground Floor, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

Previous Request for Comments

This request provides a 30-day comment period required by OIRA. The Coast Guard published the 60-day notice (75 FR 57809, September 22, 2010) required by 44 U.S.C. 3506(c)(2). That Notice elicited no comments.

Information Collection Request

1. *Title:* Applications for Vessel Inspection, Waiver, and Continuous Synopsis Record.

OMB Control Number: 1625–0002.

Type of Request: Extension of a currently approved collection.

Respondents: Vessel owner, operator, agent, master or interested U.S. Government agency.

Abstract: Title 46 U.S.C. 3306 and 3309 authorize the Coast Guard to establish regulations to protect life, property, and the environment. These reporting requirements are part of the Coast Guard's Marine Safety Program.

Forms: CG–2633, CG–3752, CG–3752A, CG–6039.

Burden Estimate: The estimated burden has increased from 848 hours to 1,315 hours a year.

2. *Title:* Various International Agreement Safety Certificates and Documents.

OMB Control Number: 1625–0017.

Type of Request: Extension of a currently approved collection.

Respondents: Owners and operators of Safety of Life at Sea (SOLAS) vessels.

Abstract: SOLAS applies to all mechanically propelled cargo vessels of 500 or more gross tons (GT), and to all mechanically propelled passenger vessels carrying more than 12 passengers that engage in international voyages. SOLAS and title 46 CFR 2.01–25 list certificates and documents that may be issued to vessels.

Forms: CG–967, CG–968, CG–968A, CG–969, CG–3347, CG–3347B, CG–4359, CG–4360, CG–4361, CG–5643, CG–5679, CG–5679A, CG–5680, CG–6038, CG–6038A.

Burden Estimate: The estimated burden has increased from 127 hours to 169 hours a year.

3. *Title:* Alternative Compliance for International and Inland Navigation Rules—33 CFR Parts 81 and 89.

OMB Control Number: 1625–0019.

Type of Request: Extension of a currently approved collection.

Respondents: Vessel owners, operators, builders and agents.

Abstract: Certain vessels cannot comply with the International Navigation Rules (see 33 U.S.C. 1601 through 1608; 28 U.S.T. 3459, and T.I.A.S. 8587) and Inland Navigation Rules (33 U.S.C. 2001 through 2073). The Coast Guard thus provides an opportunity for alternative compliance. However, it is not possible to determine whether appropriate, or what kind of alternative procedures might be necessary, without this collection.

Forms: None.

Burden Estimate: The estimated burden has decreased from 122 hours to 50 hours a year.

4. *Title:* Oil and Hazardous Materials Transfer Procedures.

OMB Control Number: 1625–0030.

Type of Request: Extension of a currently approved collection.

Respondents: Operators of certain vessels.

Abstract: Title 33 U.S.C. 1231 authorizes the Coast Guard to prescribe regulations related to the prevention of pollution. Title 33 CFR Part 155 prescribes pollution prevention regulations including those related to transfer procedures.

Forms: None.

Burden Estimate: The estimated burden has increased from 133 hours to 164 hours a year.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended.

Dated: December 15, 2010.

R.E. Day,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Command, Control, Communications, Computers and Information Technology.

[FR Doc. 2010–32060 Filed 12–21–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2010–0164]

National Boating Safety Advisory Council

AGENCY: Coast Guard, DHS.

ACTION: Notice of meeting.

SUMMARY: The National Boating Safety Advisory Council (NBSAC) and its subcommittees will meet on January 14–16, 2011, in Orlando, Florida. NBSAC discusses issues relating to recreational boating safety. The meetings will be open to the public.

DATES: NBSAC will meet Friday, January 14, 2011, from 9 a.m. to 12:15 p.m. and Sunday, January 16, 2011, from 9 a.m. to 12 p.m. The Boats and Associated Equipment Subcommittee will meet on Friday, January 14, 2011 from 1:45 p.m. to 5 p.m. The Prevention through People Subcommittee will meet on Saturday, January 15, 2011, from 9 a.m. to 12 p.m., and the Recreational Boating Safety Strategic Planning Subcommittee will meet on Saturday, January 15, 2011, from 1:30 p.m. to 5:30 p.m. Please note that the meetings may conclude early if NBSAC has completed all business.

All written materials, comments, and requests to make oral presentations at the meetings should reach Mr. Jeff Ludwig, Assistant Designated Federal Officer (ADFO) for NBSAC by December 30, 2010, via one of the methods described in **ADDRESSES**. Requests to have a copy of your material distributed to each member of the Council prior to the meeting should reach Mr. Ludwig by December 30, 2010.

ADDRESSES: The meetings will be held in the San Juan Ballroom of the Embassy Suites Orlando—Downtown, 191 East Pine Street, Orlando, FL 32801.

Please send written material, comments, and requests to make oral presentations to Mr. Jeff Ludwig, ADFO for NBSAC, by one of the submission methods described below. All materials, comments, and requests must be identified by docket number USCG–2010–0164.

Submission Methods: Please use only one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *E-mail: jeffrey.a.ludwig@uscg.mil.* Include the docket number in the subject line of the message.
- *Fax:* (202) 372–1932.
- *Mail:* Mr. Jeff Ludwig, COMDT (CG–54221), 2100 2nd Street, SW., Stop 7581, Washington, DC 20593.

Instructions: All submissions received must include the words "U.S. Coast Guard" and docket number USCG–2010–0164. All submissions received will be posted without alteration at *http://www.regulations.gov,* including any personal information provided. Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.) You may review a Privacy Act notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

Docket: For access to the docket to read background documents or submissions received by the NBSAC, go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Mr. Jeff Ludwig, ADFO for NBSAC, COMDT (CG–54221), 2100 2nd Street, SW., Stop 7581, Washington, DC 20593; (202) 372–1061; *jeffrey.a.ludwig@uscg.mil.*

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. (Pub. L. 92–463). Congress established NBSAC in the Federal Boat Safety Act of 1971 (Pub. L. 92–75). NBSAC currently operates under the authority of 46 U.S.C. 13110, which requires the Secretary of Homeland Security, and the Commandant of the Coast Guard by delegation, to consult with NBSAC in prescribing regulations for recreational vessels and associated equipment, and on other major boating safety matters. *See* 46 U.S.C. 4302(c) and 13110(c).

Tentative Agendas of Meetings

The agenda for the January 14, 2011 NBSAC meeting is as follows:

(1) Opening Remarks—Mr. James P. Muldoon, NBSAC Chairman.

(2) Receipt and discussion of the following reports:

(a) Chief, Office of Auxiliary and Boating Safety Update on NBSAC Resolutions and Recreational Boating Safety Program report.

(b) Executive Secretary's report.

(c) Towing Safety Advisory Committee (TSAC) Liaison's report.

(d) Navigation Safety Advisory Council (NAVSAC) Liaison's report.

(e) National Association of State Boating Law Administrators (NASBLA) report.

(f) Boating Industry Risk Management Council (BIRMC) Liaison's report.

(3) Boats and Associated Equipment Subcommittee meeting to discuss current regulatory projects, grants, contracts, and new issues affecting boats and associated equipment.

Saturday, January 15, 2011:

(4) Prevention through People Subcommittee meeting to discuss current regulatory projects, grants, contracts, and new issues affecting the prevention of boating accidents through outreach and education of boaters.

(5) Recreational Boating Safety Strategic Planning Subcommittee meeting to discuss current status of the strategic planning process and any new issues or factors that could impact, or contribute to, the development of the strategic plan for the recreational boating safety program.

Sunday, January 16, 2011:

(6) Recreational Boating Safety Strategic Planning Subcommittee meeting (Cont.).

(7) Receipt and discussion of the following reports:

(a) Prevention through People Subcommittee report.

(b) Boats and Associated Equipment Subcommittee report.

(c) Recreational Boating Safety Strategic Planning Subcommittee report.

(8) Closing remarks.

A more detailed agenda can be found at: *http://homeport.uscg.mil/NBSAC,* after January 5, 2011.

Procedural

These meetings are open to the public. Please note that the meeting may conclude early if all business is finished. Members of the public may make oral presentations during the meetings concerning the matters being discussed. Public comments will be limited to three minutes per speaker. If you would like to make an oral presentation at the meetings, please notify Mr. Jeff Ludwig as described in the **ADDRESSES** section above by December 30, 2010. If you would like a copy of your material distributed to each member of the Council in advance of the meetings, please submit thirty (30) copies to Mr. Jeff Ludwig as described in the **ADDRESSES** section above by December 30, 2010.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact Mr. Jeff Ludwig as described in the **ADDRESSES** section above as soon as possible.

Dated: December 16, 2010.

K.S. Cook,

Rear Admiral, U.S. Coast Guard, Director of Prevention Policy.

[FR Doc. 2010–32058 Filed 12–21–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5376–N–125]

Notice of Submission of Proposed Information Collection to OMB; Lender Qualifications for Multifamily Accelerated Processing (MAP)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

To participate in MAP, lenders will be required to show that they have an experienced multifamily underwriter on staff, a satisfactory record on lending on multifamily housing properties, and an acceptable Quality Control Plan. Qualified lenders can then take advantage of a mortgage application-processing plan that will take substantially less processing time than traditional processing.

DATES: *Comments Due Date:* January 21, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB approval Number (2502–0541) and should be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503; fax: 202–395–5806.

FOR FURTHER INFORMATION CONTACT: Colette Pollard, Reports Management Officer, QDAM, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; e-mail Colette Pollard at *Colette.Pollard@hud.gov;* or telephone (202) 402–3400. This is not a toll-free number. Copies of available documents submitted to OMB may be obtained from Ms. Pollard.

SUPPLEMENTARY INFORMATION: This notice informs the public that the Department of Housing and Urban Development has submitted to OMB a request for approval of the Information collection described below. This notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Lender Qualifications for Multifamily Accelerated Processing (MAP).

OMB Approval Number: 2502–0541.

Form Numbers: None.

Description of the Need for the Information and Its Proposed Use: To participate in MAP, lenders will be required to show that they have an experienced multifamily underwriter on staff, a satisfactory record on lending on

multifamily housing properties, and an acceptable Quality Control Plan. Qualified lenders can then take advantage of a mortgage application-processing plan that will take substantially less processing time than traditional processing.

Frequency of Submission: On-occasion, Annually.

	Number of respondents	Annual responses	x	Hours per response	=	Burden hours
Reporting Burden	90	11.61		401.69		419,775

Total Estimated Burden Hours: 419,775.

Status: Revision of a currently approved collection.

Authority: Section 3507 of the Paperwork Reduction Act of 1995, 44 U.S.C. 35, as amended.

Dated: December 17, 2010.

Colette Pollard,

Departmental Reports Management Officer, Office of the Chief Information Officer.

[FR Doc. 2010–32161 Filed 12–21–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5354–N–02]

HUD Multifamily Rental Project Closing Documents—Revisions and Updates Notice of Information Collection; 30-Day Notice

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: On January 21, 2010, and consistent with the Paperwork Reduction Act of 1995, HUD published for public comment, for a period of 60 days, a notice advising that HUD was updating and revising a set of closing documents used in Federal Housing Administration (FHA) multifamily rental projects. The 60-day notice published on January 21, 2010, started anew the process for updating the multifamily rental project closing documents, and obtaining approval of these documents under the Paperwork Reduction Act, a process that had originally commenced on August 2, 2004.

This 30-day notice published today will complete the public comment process required by the Paperwork Reduction Act of 1995. With the issuance of this notice, HUD will submit the information collection for the closing documents to the Office of Management and Budget (OMB) for review and approval, and assignment of OMB control numbers. In accordance with the Paperwork Reduction Act, the closing documents will undergo the public comment process every three years to retain OMB approval.

While complying with the Paperwork Reduction Act of 1995, this 30-day notice, as was the case with the 60-day notice, provides information beyond that normally provided in such notices. The 60-day notice published on January 21, 2010, responded to the public comments submitted on the proposed closing documents issued for comment on August 2, 2004, and summarized and responded to the public comments. Similarly, this notice issued today identifies substantive changes that HUD has made to the closing documents in response to public comment submitted on the January 21, 2010, notice, and responds to significant issues raised by commenters on the closing documents.

The multifamily closing documents that HUD is submitting to OMB are posted on HUD's Web site at *http://www.hud.gov/offices/hsg/mfh/mfhclosingdocuments.cfm*.

DATES: *Comment Due Date:* January 21, 2011.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the Notice.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service at 800–877–8339. Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: John J. Daly, Associate General Counsel for Insured Housing, Office of the General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 9226, Washington, DC 20410–0500; telephone number 202–708–1274 (this is not a toll-free number). Persons with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Background

On June 1, 2009, HUD announced, on its Web site, that it would commence review of the multifamily rental project closing documents, for which review had started but was not completed

under the prior Administration. HUD posted the documents on its Web site and welcomed the public to review these documents as HUD began its internal review prior to commencement of formal review and solicitation of public comment under the Paperwork Reduction Act of 1995 (PRA). (*See http://www.hud.gov/offices/hsg/mfh/mfhclosingdocuments.cfm.*)

Under the prior Administration, HUD published a notice in the **Federal Register** on August 2, 2004 (69 FR 46214) that advised that, consistent with the PRA, it was publishing for public comment a comprehensive set of revised closing forms and documents (closing documents) for use in the FHA multifamily rental project and health care facility (excluding hospitals) programs. In the notice, HUD advised that, in addition to seeking public comment on burden hours, which is the primary focus of the PRA, HUD welcomed input from the lending industry and other interested parties on whether the documents offer the requisite protection to all parties in these FHA-insured mortgage programs, while being consistent with modern real estate practice and mortgage lending laws and procedures. The August 2, 2004, notice, in turn, followed an earlier informal solicitation of public comment on proposed revisions to the closing documents that were posted on HUD's Web site in March 2000. In response to the comments received from the 2000 solicitation of public comment, significant revisions were made to the proposed closing documents, and these revised documents were published in the **Federal Register** on August 2, 2004, for review and public comment. Although HUD reviewed the public comments and advised of initial policy decisions in response to certain comments (*see* HUD's notice published on August 31, 2006, at 71 FR 51842), HUD was unable to complete the updating of the closing documents during the prior Administration.

Consistent with its announcement on June 1, 2009 that HUD would start anew the updating of the closing documents, HUD published a notice in the **Federal Register** on January 21, 2010 (75 FR 3544), which solicited public comment for a period of 60 days on the closing documents. The January 21, 2010, notice commenced the formal review and public input required by the PRA. However, consistent with the approach to updating the documents that HUD took in 2004, the January 21, 2010, notice went beyond the information generally provided in PRA notices. The notice identified changes HUD made to the closing documents since they were last published for comment in August 2004. That January 21, 2010 notice also summarized the significant issues that commenters raised in response to both the 2004 publications and to HUD's posting of documents on its Web site in 2009. In addition to the summary, the January 2010 Notice also provided responses to the significant issues raised by the commenters.

As noted in the Summary portion of this notice, this 30-day notice published today will complete the public comment process required by the PRA for the closing documents. Related to the closing documents is a proposed rule that HUD published on November 12, 2010 (*See* 75 FR 6393, HUD Multifamily Rental Projects: Regulatory Revisions.) The November 12, 2010 proposed rule proposes to amend certain FHA regulations to update regulations to reflect current HUD policy in the area of multifamily rental projects. Similar to HUD's updating of the closing documents, HUD seeks to have its regulations reflect current terminology, lending laws, and practices with respect to multifamily projects.

II. The January 21, 2010 Notice (The 60-Day Notice)

A. The 60-Day Public Comment Process, Generally

While this 30-day notice addresses significant issues raised by the public commenters on the 60-day notice, HUD is not providing the detailed comment and response section as HUD did in the 60-day notice. At the time of the first issuance of proposed updated closing documents in 2004, HUD was not accepting comments electronically through a publicly available Web site, and consequently, the public did not have a readily and easily available mechanism to review public comments on the August 2, 2004, notice. Therefore to compensate for the lack of publicly available Web site where all public comments could be viewed, HUD provided a detailed summary of the comments and HUD's responses to these comments. For the January 21, 2010, notice, however, all the public comments submitted on the proposed updated closing documents can be viewed at *http://www.regulations.gov*, which included proposed mark-ups of several of the closing documents.

B. The Public Comments, Generally

At the close of the public comment period on March 22, 2010, HUD received 47 public comments. The commenters included lenders, home builders, construction companies, attorneys, real estate agencies, and organizations such as the Mortgage Bankers Association and the American Bar Association. Several of the commenters, as noted earlier, submitted with their comments HUD's updated closing documents revised as certain commenters preferred to see the documents structured. HUD also held three public roundtables to obtain input from affected parties; on February 19 and 23, 2010 and March 9, 2010. (*See http://170.97.167.13/offices/hsg/mfh/mfhlcd/roundtableinvitation.pdf.*) HUD carefully reviewed all of the comments and appreciates the thorough review provided by the majority of the commenters as well as the time taken by several commenters to draft and submit for HUD's consideration revised or alternative language. While HUD is not providing a detailed summary of the comments as it did in the January 2010 notice, the following highlights some of the significant issues raised by the commenters.

General Comments

General concerns identified by commenters about the closing documents were as follows: The documents impose greater burdens and legal consequences on HUD borrowers (Borrowers) and lenders (Lenders), thereby potentially discouraging participation in HUD's multifamily programs, especially for nonprofit organizations; the documents would result in fundamental changes in the nature of the mortgage insurance contract and shift additional risk to Lenders and Borrowers alike; the increased burdens on HUD call into question whether HUD staff, because of decreasing HUD personnel resources, can timely perform under the requirements of the new documents; and certain provisions in the documents appear to conflict with existing statutes regulations, and HUD handbooks.

HUD acknowledges that with the updating of the closing documents, the majority of which have not been updated in over 20 years, the changes appear to impose greater burdens on HUD Lenders and Borrowers. However, HUD submits that the changes result in no greater burden than that involved in non-FHA private sector multifamily rental project closings. Further, although Lenders and Borrowers will need some time to become familiar with the updated closing documents, the existing closing documents, which these updated closing documents will replace, often necessitated the development of individual and additional documents for a transaction. Developing unique documents for a transaction frequently caused delays in the processing of the

documents and completion of the closing. The updated closing documents are designed to eliminate much of the need for individual document development, and reduce the time to process and close HUD multifamily rental project transactions.

Multifamily rental project transactions have changed significantly over the last 20 years, and, in certain aspects, are more complex than they were over 20 years ago. HUD has strived to make these closing documents consistent, to the extent feasible, with non-FHA documents in order to minimize differences in transactions, and therefore minimize burden often caused by variations between FHA multifamily rental project closings and non-FHA multifamily rental closings.

The changes to the closing documents appropriately reflect the responsibilities and risk that are to be borne by HUD and the responsibilities and risk that are to borne by Lenders and Borrowers. The changes in responsibilities and risks to all parties, as provided in these documents, correspond to changes in multifamily rental transactions that have taken place over the last two decades. As noted earlier, these transactions are not the same as they were 20 years ago. There have been significant changes, and not only must the documents change to reflect the changes in the transactions, the parties to the transactions must accept the risks and responsibilities that are part of these transactions as these parties do in non-FHA multifamily rental transactions.

HUD appreciates the concerns about whether HUD staffing levels will be sufficient to fulfill HUD's obligations when updated closing documents are approved and ready to be used. HUD assures the industry and the public that sufficient staff will be available and thoroughly familiar with the documents to perform necessary tasks.

Finally, with respect to concerns about the closing documents possibly conflicting with statutes and regulations, HUD notes that the review of these documents, including significant review by industry, has been thorough, with review commencing as early as 2000, continuing through 2004, and 2006, June 2009, and January 2010. (Please see preamble discussion in the January 22, 2010, notice at 75 FR 3545, first column.) Given this process, and with the aid of industry review, HUD believes that any conflicts with existing statutes and regulations that may have been in the documents have been addressed.

In essence, HUD has sought to balance updated legal definitions and terms, and transfers of responsibilities to and between program participants with the government's interest in managing risk. Further, the efficiencies achieved in standardizing and streamlining documents will achieve legal certainty and save time in closings which will benefit all participants.

Comments directed at specific closing documents are addressed in the next section in the context of changes that were made to the closing documents as a result of public comments, and/or further consideration of issues by HUD. However, other overarching issues raised by the commenters follow.

Disclosure of Gains From Trading Ginnie Mae Securities. Commenters noted that the proposed requirement in the loan documents that Lenders disclose gains from trading the Ginnie Mae security would create a substantial, significant and notable new policy. Commenters submitted that such disclosure does not belong in the closing documents nor should it be part of the process for changing loan documents. HUD agrees with this concern and has removed this requirement.

Lender's Determination of Interest Rate. Commenters expressed concern that through the process of rewriting their multifamily loan documents, FHA was attempting to create policy that altered Lender's ability to determine the interest rate. HUD assures that there is no restriction on the Lender's ability to determine the interest rate.

Ability To Charge Origination and Servicing Fees for Increased Obligations Imposed by New Documents. Commenters expressed concerns that the proposed documents impose augmented obligations and liabilities on Lenders with little or no opportunity for Lenders to recoup what are sure to be increased origination and servicing costs. In some instances, commenters say that there is a significant shift of risks and responsibilities from HUD and Borrower's counsel to Lender.

HUD recognizes that the Lender and Borrower will be undertaking new responsibilities and anticipates that there will be negotiations between the parties which will result in a corresponding recognition and adjustment in fees. For example, HUD had included authority in the proposed documents for the Lender to charge the Borrower a fee, in accordance with Program Obligations, for the Lender's increased responsibilities in reviewing a proposed transfer of physical assets. That provision was retained in this document publication. HUD's current guidance recognizes that "reasonable and necessary expenses" can be recovered and anticipates that the Lender and Borrower will negotiate applicable fees which, while they can be expenses of the project, cannot be insured debt. The issue of costs and fees is further discussed later in this preamble.

Emulating Fannie Mae and Freddie Mac Standards for Multifamily Loan Documents. Commenters contended that HUD was seeking to emulate Fannie Mae and Freddie Mac as setting modern standards for multifamily loan documents, yet also contended that HUD's emulation is more selective than rational distinctions justify. They further contended that at the same time other Fannie Mae/Freddie Mac loan documents provisions proposed for adoption by HUD might be problematic.

HUD has not attempted to develop documents that emulate Fannie Mae and Freddie Mac, but has, in contrast, developed documents that are updated for current commercial legal standards, balanced with the public policy role that HUD programs serve. To some extent, HUD's documents may therefore include provisions similar to Fannie Mae's and Freddie Mac's documents, but they do not replicate those documents. While HUD acknowledges that certain features of the FHA programs are unique, such as the payment of the mortgage insurance premium (MIP), execution of the Regulatory Agreement, and surplus cash requirements, these elements are essential to protecting the government's financial interest and limiting unnecessary risk. Inclusion of such provisions is therefore a necessary tradeoff which protects the government's financial interest and minimizes risk while providing the benefit of federally insured real estate financing.

Proposed Changes to Section 232 Health Care Processes Should Be Incorporated. Commenters stated that several potential health care program closing documents innovations were equally appropriate for the rental documents, and urged HUD to examine these potential changes.

HUD is already closely reviewing the current health care program documents in the context of developing a separate rule and updated documents that will be published for public comment.

C. Status of Changes to Documents

1. Documents Not Revised

Of the closing documents published in January 2010, the Surveyor's Report,

and HUD Survey Instructions and Report were not revised.[1]

2. Documents Revised

The remaining documents listed below were revised.

1. Security Instrument
2. Note
3. Multifamily Regulatory Agreement
4. Lender's Certificate
5. Building Loan Agreement
6. Supplement to Building Loan Agreement
7. Construction Contract
8. Supplementary Conditions of the Contract for Construction
9. Guide for Opinion of Borrower's Counsel
10. Instructions to Guide for Opinion of Borrower's Counsel
11. Exhibit A to Opinion of Borrower's Counsel
12. Residual Receipts Note (Non-Profit Borrowers)
13. Residual Receipts Note (Limited Dividend Borrowers)
14. Escrow Agreement for Incomplete Construction
15. Request for Final Endorsement of Credit Instrument
16. Lease Addendum
17. Surplus Cash Note
18. Completion Assurance Agreement
19. Payment Bond
20. Performance Bond
21. Request for Approval of Advance of Escrow Funds
22. Escrow Agreement for Noncritical Deferred Repairs
23. Agreement of Sponsor to Furnish Additional Funds
24. Escrow Agreement for Operating Deficit
25. Bond Guaranteeing Sponsor's Performance
26. Off Site Bond—Dual Obligee
27. Escrow Agreement for Latent Defects
28. Escrow Agreement for Working Capital
29. Agreement and Certification
30. Request for Endorsement of Credit Instrument
31. Borrower's Oath
32. Subordination Agreement[2]

All changes made to the multifamily closing documents are provided in redline/strikeout format on HUD's Web site at *http://www.hud.gov/offices/hsg/mfh/mfhclosingdocuments.cfm.* These changes capture both editorial changes and more substantive changes. The following sections of this preamble address some of the significant issues raised by the commenters in response to the January 2010 notice. Some commenters, however, proposed changes or raised issues that were the same as those proposed or raised in response to publication of the proposed revised closing documents issued in 2004 and to which HUD has already provided responses in the January 2010 notice. In this notice issued today, HUD is not repeating responses to proposed changes or issues that were addressed in the January 2010 notice.

3. Across-the-Board Changes and Significant Policy Determinations

HUD adopted many changes submitted by commenters including the following:

Two-tier default. In 2004, HUD developed a new two-tiered default scheme as part of the revision to the Security Instrument. Regulatory language reflecting these proposed changes were also included in the proposed regulations published in 2004. Specifically, HUD proposed that there should be one class for financial defaults, which would give the lender an immediate right to an insurance fund claim. All other bases for default were grouped into a second class. HUD would require the lender to obtain HUD's prior written approval for a claim in this second category before the lender would be able to make an insurance fund claim. This proposal for a two tier default system was also included in both the revisions to the Security Instrument published in January 2010 and in the proposed changes to the multifamily regulations published November 12, 2010.

Commenters on the changes proposed in 2004 and 2010 suggested that HUD update the foreclosure process for current legal terminology. HUD has adopted commenters' recommendations to provide more details on the two tier default criteria in both the documents and the proposed rule, and accepted several of the commenters' suggestions for technical language changes.

Lender/Owner/Attorney Responsibilities. Several commenters submitted that HUD has placed new and inappropriate responsibilities on them in their respective roles. As an example Borrowers' attorneys stated that they should not have to certify that flood insurance was in place, as the Lender typically undertook that responsibility. With respect to these statements, HUD notes that it has modified certifications to require the Lender to certify that there is flood insurance on a property, and has adopted similar provisions in other documents. The redlined versions of these documents on the web page highlight these changes.

Recourse Liability and Definition of Principals. In the January 2010 notice, HUD noted that the 2004 proposed revisions to the closing documents included certain limited recourse liability for "Key Principals" which was opposed by several public commenters. While HUD's August 31, 2006, notice advising of preliminary decisions on proposed revisions did not include provisions for recourse liability of Principals, the revised closing documents posted on HUD's Web site on June 1, 2009, retained some of the provisions that were questioned. Some of the informal comments submitted in response to HUD's posting in 2009 of proposed changes to the closing documents again opposed inclusion of any recourse liability provisions, arguing that inclusion would dissuade some individuals from participating in HUD insured multifamily housing transactions.

In the January 2010 notice, HUD highlighted its current position that, in light of the consequences that certain insufficiently regulated actions have had on the housing finance markets in recent years, and given that public funds are put at risk in HUD multifamily housing transactions, it is appropriate for principals to be responsible for paying damages for certain "bad boy" acts. Accordingly, these provisions were included in the revised closing documents circulated for public comment, and HUD has determined to retain these provisions.

Commenters on the January proposal expressed concerns that HUD had broadened liability in the proposed documents for principals, for example, for "bad boy" acts. HUD does not agree with this characterization. These documents retain the historic non-recourse nature of FHA-insured financing. Individual principals are not personally liable for payment of the Note as a result of default. However, acts of fraud and misconduct that put the FHA insurance fund at risk will be pursued through contract rights made explicit in these documents and other remedies available to the federal government. As a result, HUD believes that the "bad boy" provisions referred to by commentators merely provide more certain legal mechanisms for enforcing HUD's statutory, regulatory, and program requirements without overburdening those that work hard and play by the rules.

[1] HUD published proposed amendments to American Institute of Architects (AIA) Document B–181 in January 2010 and received comments on that document. However, the AIA is replacing this document with AIA Document B–108 effective May 31, 2011. Given the timing of that document change, HUD will complete the notice and comment requirements of the Paperwork Reduction Act under separate notice.

[2] This document, which was included in the January 21, 2010, notice has not yet been assigned a form number.

In addition, signers generally are attesting only "to the best of their knowledge," and primarily to their own statements and representations. In several instances, principals' liability is limited by the materiality of the certification to the issue in question.

HUD has also referenced a definition of principals in the documents which is included in 24 CFR 200.215 of HUD's regulations. Consequently, any changes to the definition of principals will require regulatory change.

State Specific Provisions. Several commenters suggested that HUD develop and include state specific riders to the documents and publish them for review. HUD recognizes that publication of state specific provisions that are discretionary but not mandatory may be helpful, but believes that it is important to await adoption of this set of documents and allow some time following implementation to see if conflicts of law questions and other state law issues arise in order to determine the timing and substance of the next steps.

Nevertheless, in the meantime, HUD will develop and use those limited state specific riders necessary to meet state law mandates. These latter provisions are recognized as necessary to complete closings and comply with state law requirements. HUD has no authority to modify the required language which fulfills those state law obligations.

Program Obligations/Directives. One of the more significant changes made in revising this set of closing documents was to replace the term "Directives" with the term "Program Obligations." Commenters raised concerns about the use of the term "Directives" in light of its historic meaning. HUD's view is that the term "Program Obligations" better captures what was intended by use of the term "Directives," namely, to advise parties to the closing documents of the program requirements embodied in statute and regulation and other documents issued in accordance with law, and not repeated in the closing documents, to which the parties must adhere. The language now used in the closing documents defines "Program Obligations," as follows:

> Program Obligations means all applicable statutes and regulations, including all amendments to such statutes and regulations, as they become effective; and all applicable requirements in HUD handbooks, HUD guides, notices, and mortgagee letters that apply to the Project, including all updates and changes to such handbooks, guides, notices, and mortgagee letters that apply to the Project, except that updates and changes subject to notice and comment rulemaking shall become effective upon completion of the rulemaking process. Handbooks, guides, notices, and mortgagee letters are available on HUD's official Web site (*http://www.hudclips.org* or a successor location to that site).

This language better identifies what HUD intended in its original use of the term "Directives." The definition of Program Obligations identifies the specific, longstanding, and familiar types of requirements (those in statutes, regulations, handbooks, guides, notices, and mortgagee letters) to which the parties must adhere.

In response to commenters' concerns that HUD has unfettered discretion to make material changes that will have an economic effect on the viability of the project, the definition of "Program Obligations" explicitly recognizes that notice and comment rulemaking will be followed for significant substantive requirements. In fact, HUD has currently proposed rules accompanying these documents which can serve as an example of the type of changes that are made in rulemaking.

Borrowers will be subject, as they are in any other government program, to prospective programmatic changes. Further, Lenders should recognize that they are, to a great extent, protected by and subject to the FHA Contract of Insurance. As described previously, HUD has referenced HUD rules in several places. The revised Security Instrument specifically references the applicable sections of the Code of Federal Regulations to address these concerns. For example, because concerns have been expressed about the potential liability of principals, Section 1(bb) of the new Security Instrument explicitly links to the definition of principal in 24 CFR 200.15, and to the definition of "contract of insurance" in 24 CFR part 207, subpart B.

Additionally, it is important to note that the imposition of new or revised information collection requirements (that is, generally new or revised forms) must undergo the notice and comment processes, including **Federal Register** publication, required by the Paperwork Reduction Act of 1995. From time to time, HUD also uses mortgagee letters or other types of direct notices to announce new binding requirements. These types of documents are used, for example, when new statutes impose requirements that are effective upon enactment and HUD has no discretion in implementation. In such situations, mortgagee letters or other types of direct notices are the best vehicles to advise the industry on implementation dates and provide implementation guidance that may be helpful. HUD may also issue mortgagee letters or direct notices to announce clarifications, interpretations, or certain procedural requirements, such as to which HUD offices or HUD officials certain types of executed documents must be submitted. In brief, HUD will follow the applicable procedures, as directed by statute or regulation that govern issuance of a document, which may announce additional policies, processes, forms, or standards to which parties to the closing documents must comply.

Liability and New Responsibilities. The proposed closing documents reflected a series of changes directed to Lenders assuming a greater role in reviewing documents for the transaction. While commenters expressed concerns about this expanded role and potential liabilities, they also expressed concerns that the proposed closing documents significantly increased burdens on HUD staff at a time of shrinking HUD personnel resources and looming retirements.

Commenters further submitted that the requirement for HUD to review and approve minor modifications to commercial leases, review additional financial statements, additional diligence with regard to the closing documents, and many other requirements all cause significant increases to the cost of doing business for which there is no additional compensation vehicle.

HUD has addressed these comments in several ways. Lender liability is limited by warranty restrictions. For example, while the Borrower grants the Lender a security interest in their Uniform Commercial Code (UCC) collateral, the Borrower also warrants to the Lender that no UCC filings have been made against the Borrower, the Project, or the Project assets. The Borrower makes these warranties to the Lender prior to the initial/final endorsement of the Note by HUD. In further attempting to address these competing concerns, namely the increased due diligence, and transaction specific issues, HUD has provided for modification of Lender fees.

In addition, HUD continues to allow Lenders to recover costs through the interest rate and servicing fees, and recover certain "reasonable and customary" fees as noted in the Lender's Certificate. The Lender may impose reasonable and customary administrative fees and charges (including but not limited to, reimbursements for out-of-pocket expenses) for handling and investing the cash held in the Reserve for Replacement, the Residual Receipts account, if applicable, and any other interest-bearing escrows related to the

Project and for processing, reviewing and approving other matters (Administrative Fees). Further, while Lenders are required to pass on interest earned on escrows to the Borrower, the Lender is allowed to negotiate a reasonable fee with the Borrower based on the particular responsibilities taken on in each transaction by the respective parties in other respects. For example, HUD has allowed Lenders to recoup costs in fees for due diligence related to Transfer of Physical Assets.

Waste. Commenters expressed concerns that HUD was including a definition of "waste" that was broad and exceeded industry standards. Namely, commenters objected to inclusion of standards related to the physical condition of the property, along with the financial condition of the property and the potential for fraud. Commenters suggested as an alternative, to limit the definition of "waste" used in the closing documents to fraud and financial issues such as tax delinquency, unauthorized retention of funds, and actions reducing the value of the property. Commenters also suggested limiting the definition of waste to "Program Obligations" in effect as of the date of HUD's firm commitment to insure the loan.

HUD has the responsibility to ensure that HUD-insured properties are decent, safe, sanitary, and in good repair, and to provide sufficient information regarding the specific items that HUD will review in makings its determination that waste has been committed. Accordingly, HUD has retained language defining waste that includes the general goal of maintaining decent, safe, and sanitary housing, and a list of specific items that provide direction to the Borrower. Within the list of specifics that constitute waste, HUD has modified the proposed language to include "failure to maintain and repair" the property in accordance with Program Obligations. (*See* the preamble section labeled *Program Obligations/Directives* for a discussion of HUD requirements under program obligations).

Transition. Commenters expressed a desire for HUD to coordinate the effective date for these documents with training and updated program guidance. HUD agrees with these comments and carefully considered them in determining an effective date. Updated guidance and a training schedule will be published well in advance of any closings that require use of the new closing documents. Notwithstanding the many opportunities for public comment and input that HUD has provided on revisions to the closing documents, which commenced even before the formal proposal issued in 2004, commenters requested that Lenders be given the option of using current or revised documents for up to three years and suggested different mandated effective dates depending on the program. HUD disagrees with these comments due to the many opportunities already made available to review the proposed documents. HUD recognizes that when these documents are issued in final form and are ready for use in multifamily rental transactions, that time will be needed for parties to adjust practices to use the new documents. As a result, these revised closing documents shall be mandatory with respect to all (i) mortgage insurance applications for refinancing, or (ii) potential applicants that receive a letter of invitation for the submission of an application for new construction or substantial rehabilitation, on or after May 1, 2011.

D. Changes To Highlight Specific Documents

Subordination Agreement

The creation of a new Subordination Agreement is one example of HUD's updates to correspond to current real estate industry practices. The new Subordination Agreement incorporates many of the concepts in a rider that is currently used by HUD and it is more in line with current industry practices for governmental subordinate lenders. The new Subordination Agreement also improves upon notification to the public, including potential purchasers and lenders, of the government's interest as it incorporates, in one recordable document, the specific conditions that will protect the government's first lien security interest in the property.

Security Agreement/Instrument (HUD 9400M)

HUD has adopted several changes to specify Lender responsibilities under the security instrument while allowing entities to legally own properties as single asset entities and limit liability of principals regarding "bad boy" acts. Some of the key changes, some of which have been previously discussed are as follows:

- Provides a contractual definition of waste to provide certainty and national standardization for program participants;
- Clarifies the treatment of interest rates, recovery of costs, and allowance of administrative fees, such as for Transfers of Physical Assets;
- Establishes standards for maintenance of books and records consistent with current HUD guidance;
- Adopts technical recommendations from commenters to clarify categories of defaults;
- Moderates environmental requirements;
- Defers development of specific state law provisions for implementation experience with the current documents, while requiring those riders mandated by state law;
- Updates and modernizes the documents to allow Lenders to pay advances for certain items related to completion and preservation of the property that are added to indebtedness in accordance with statutory authority, the regulations, and current practices.

Note (HUD 949001)

Many of the changes to the Note are the same as those changes made to the Security Instrument. Additional changes to the Note are as follows:

- Provides alternative clauses for construction and refinancing situations;
- Modernizes language to address securitization and bonding requirements that have been adopted since the documents were last revised; and
- Nonrecourse to the Borrower.

Regulatory Agreement (Form 2466M)

The Regulatory Agreement is designed to ensure that Borrowers participating in these programs comply with HUD rules. Several of the definitions of terms used in the Regulatory Agreement were modified in both the Regulatory Agreement and the Security Instrument. Some of the key changes made to the Regulatory Agreement follow:

- Modification of the definitions of Mortgaged Property, Personalty, and Project Assets to address the distinction between project assets and non-project entity assets;
- Limitation of the definition of mortgaged property and allowing owners more flexibility;
- Including revised definitions to provide for receipt and use of financing and revenue sources from for–profit, nonprofit, and charitable sources; and
- Adopting a contractual definition of waste in order to provide certainty and national standardization for program participants.

In addition, the Regulatory Agreement:

- Provides automatic termination provisions if the loan has been repaid and HUD is no longer involved in the property, while maintaining HUD's ability to protect the government's interest to enforce violations of the agreement prior to termination;
- Clarifies the term "construction funds";

• Qualifies owner construction responsibilities;

• Includes a conflicts provision providing that if there is any conflict between the Regulatory Agreement and any other HUD agreement executed by Borrower, the agreement which imposes the more restrictive requirements on Borrower controls;

• Removes Article IX which referenced Section 8 Housing Assistance Payments Contracts;

• Retains restrictions on affiliates;

• Alleviates some restrictions on project management, for example contracts with third party vendors;

• Limits requirements to notify HUD of changes in Borrower organizational structure to only those which have a material effect;

• Continues liability for payment of damages only for certain "bad boy acts";

• Maintains UCC references in order to protect HUD's security interests;

• Includes a new provision in which Borrower agrees that it is not a third-party beneficiary to the Contract of Insurance between HUD and Lender; and

• Provides for limited signatories.

Lender's Certificate (HUD 9243M)

The Lender is required to certify that specific actions have been taken before financing is finalized. Lenders are required to certify to HUD that certain due diligence has been performed and accordingly, will be compensated for these new responsibilities. A key change by HUD in response to public comment is modification of the certification requirement standards to provide that the Lender will be certifying "to the best of the Lender's knowledge" that the statements in the certification are true, accurate and complete."(paragraph 40). Some of the key changes made to the Lender's Certificate are as follows:

• Modifies several provisions regarding fees including:

• Shifting closing fees to a separate attachment in order to allow the parties to the transaction to develop a more comprehensive and transaction specific list of charges;

• Eliminating the declaration to the Borrower of the trading premium earned by Mortgagee upon Sale of Ginnie Mae Securities to allow Lenders and Borrowers to negotiate appropriate compensation;

• Allowing negotiation of reasonable and customary administrative fees for reimbursement for out of pocket expenses, and handling and investing the cash held in reserve for replacement, residual receipts, and other interest bearing accounts;

• Removing the term prepayment penalty and substituting the term prepayment premium;

• Requiring Lenders to notify HUD if payments are not received by the tenth day of the month in which it is due and thus imposing a late charge.

Additional modifications include:

• Adopting limitations on disclosure of future identities of interest, as defined in "Program Obligations," during the construction period or prior to final endorsement;

• Changing the term "off-site components" to "off-site materials" to be more consistent with modern day terminology; and

• Updating and modernizing the documents, consistent with change to the Security Instrument to allow Lenders to pay advances for certain items related to completion and preservation of the property that are added to indebtedness in accordance with statutory authority, the regulations, and current practices.

Opinion (HUD–91725M)

Some of the key changes made to the Opinion are as follows:

• Removes the requirement that attorneys certify that the Borrower has made UCC filings, in response to the comment that financing statements are filed by other parties, such as the title company; in accordance with HUD's decision, announced in the January 21, 2010 notice, to shift UCC responsibilities to Lenders;

• Removes the requirement for certification of flood insurance as that responsibility now rests with the Lender;

• Qualifies with a knowledge standard the conflicts of interest statement e that Borrower's counsel does not represent the Lender or other lenders, investors or other parties involved with the transaction; and

• Limits certification of knowledge of side deals to those that, based upon the certification of the Borrower, and to the best of their knowledge, amend or are inconsistent with the terms of the HUD Form closing document or commitment between Borrower and any other party to the transaction.

E. Miscellaneous Documents

In addition to the foregoing documents HUD has a number of additional closing documents which are used in specific situations, such as escrows for incomplete construction, escrows for latent defects, and a completion assurance agreement. In response to suggestions made by commenters, HUD has adopted several concurring changes across these forms to ensure that there is consistency in all forms. In addition, HUD is seeking to ensure that practices are consistent in all field offices with respect to releases of escrowed funds in order to encourage program participation while providing financing and servicing certainty. As noted earlier in this notice published today, changes to these documents are displayed in redline/strikeout format posted on HUD's Web page.

III. Findings and Certifications

Paperwork Reduction Act

The proposed new information collection requirements contained in this notice have been submitted to OMB for review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). In accordance with 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 currently valid OMB control number.

The public reporting burden for this new collection of information is estimated to include:

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hours per response	Annual burden hours	Hourly cost	Total annual cost
HUD–91710M	600	1	600	0.5	300	$26	$7,800
HUD–91712M	600	1	600	0.5	300	26	7,800
HUD–92023M	600	1	600	1	600	26	15,600
HUD–92070M	600	1	600	0.5	300	26	7,800
HUD–92223M	600	1	600	0.5	300	26	7,800
HUD–92412M	600	1	600	0.5	300	26	7,800
HUD–92414M	600	1	600	0.5	300	26	7,800
HUD–92450M	600	1	600	0.5	300	26	7,800
HUD–92452A–M	600	1	600	0.5	300	26	7,800
HUD–92452M	600	1	600	0.5	300	26	7,800

Information collection	Number of respondents	Frequency of response	Responses per annum	Burden hours per response	Annual burden hours	Hourly cost	Total annual cost
HUD–92455M	600	1	600	1	600	26	15,600
HUD–92456M	600	1	600	0.5	300	26	7,800
HUD–92457A–M	600	1	600	0.5	300	26	7,800
HUD–92457M	600	1	600	0.5	300	26	7,800
HUD–92464M	600	1	600	1	600	46	27,600
HUD–92476.1M	600	1	600	0.5	300	26	7,800
HUD–92476a–M	600	1	600	0.5	300	26	7,800
HUD–92477M	600	1	600	0.5	300	26	7,800
HUD–92478M	600	1	600	0.5	300	26	7,800
HUD–92479M	600	1	600	0.5	300	26	7,800
HUD–91725M	600	1	600	1	600	125	75,000
HUD–91725M–CERT	600	1	600	1	600	46	27,600
HUD–91725M–INST	0	0	0	0	0	0	0
HUD–92434M	600	1	600	1	600	26	7,800
HUD–92441M–SUPP	600	1	600	0.75	450	26	11,700
HUD–92441M	600	1	600	0.75	450	26	11,700
HUD–92442M	600	1	600	1	600	58	34,800
HUD–92466M	600	1	600	1	600	58	34,800
HUD–92554M	600	1	600	0.5	300	26	7,800
HUD–94000M	600	1	600	0.75	450	26	11,700
HUD–94001M	600	1	600	1	600	26	15,600
HUD–93305M	600	1	600	0.5	300	26	7,800
HUD–92476M	600	1	600	0.5	300	26	12,300
HUD–92420M	600	1	600	0.5	300	26	7,800
Totals	600		19,800		13,050.00		457,800.00

The hourly rate is an estimate based on an average annual salary of $62,000 for developers and mortgagees.

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to:

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

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;

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

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

Interested persons are invited to submit comments regarding the information collection requirements in this proposal. Comments must be received by *January 21, 2011.* Comments must refer to the proposal by name and docket number (FR–5354–N–02) and must be sent to: HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, *Fax number:* (202) 395–6947; and Paperwork Reduction Act Program Manager, Office of the Chief Information Officer, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 4178, Washington, DC 20410.

Dated: December 17, 2010.

David H. Stevens,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. 2010–32185 Filed 12–21–10; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–R–2010–N159; 40136–1265–0000–S3]

Watercress Darter National Wildlife Refuge, Jefferson County, AL

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability: Final comprehensive conservation plan and finding of no significant impact.

SUMMARY: We, the Fish and Wildlife Service (Service), announce the availability of our final comprehensive conservation plan (CCP) and finding of no significant impact (FONSI) for the environmental assessment for Watercress Darter National Wildlife Refuge (NWR). In the final CCP, we describe how we will manage this refuge for the next 15 years.

ADDRESSES: You may obtain a copy of the CCP by writing to: Mr. Stephen A. Miller, Refuge Manager, Mountain Longleaf NWR, P.O. Box 54087, Anniston, AL 36205. The CCP may also be accessed and downloaded from the Service's Web site: *http://southeast.fws.gov/planning/* under "Final Documents."

FOR FURTHER INFORMATION CONTACT: Mr. Mike Dawson, Refuge Planner, Jackson, MS; *telephone:* 601/965–4903, ext. 20; *fax:* 601/965–4010; *e-mail: mike_dawson@fws.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we finalize the CCP process for Watercress Darter NWR. We started this process through a notice in the **Federal Register** on March 12, 2007 (72 FR 11048).

Watercress Darter NWR, near the city of Bessemer, Jefferson County, Alabama, was established by the Service in 1980, to provide protection for the endangered watercress darter. The refuge is only about 24 acres of ponds, mixed pine-hardwood forest, and a residence, and contains Thomas Spring. A second pond was constructed on the refuge in 1983, to provide additional watercress darter habitat. The refuge is unstaffed and administered by Mountain Longleaf NWR.

We announce our decision and the availability of the final CCP and FONSI for Watercress Darter NWR in accordance with the National Environmental Policy Act (NEPA) [40 CFR 1506.6(b)] requirements. We completed a thorough analysis of

impacts on the human environment, which we included in the Draft Comprehensive Conservation Plan and Environmental Assessment (Draft CCP/EA).

The CCP will guide us in managing and administering Watercress Darter NWR for the next 15 years. Alternative C, as we described in the final CCP, is the foundation for the CCP.

The compatibility determinations for wildlife observation and photography and environmental education and interpretation are also available in the final CCP.

Background

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee) (Administration Act), as amended by the National Wildlife Refuge System Improvement Act of 1997, requires us to develop a CCP for each national wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation. We will review and update the CCP at least every 15 years in accordance with the Administration Act.

Comments

We made copies of the Draft CCP/EA available for a 30-day public review period as announced in the **Federal Register** on April 16, 2010 (75 FR 19988). We received five comments on the Draft CCP/EA.

Selected Alternative

The Draft CCP/EA identified and evaluated three alternatives for managing the refuge. After considering the comments we received and based on the professional judgment of the planning team, we selected Alternative C for implementation. Under Alternative C, we will optimize habitat management and visitor services throughout the refuge.

Threats to the refuge are becoming more prominent as development activities occur in the city of Bessemer, Alabama. Watercress Darter NWR is a small system that can be greatly compromised by activities a distance away from its boundary. We fully recognize the impact these activities could have on the integrity of the refuge. In addition to our current management, we will extend beyond the immediate neighbors to address issues associated with the aquifer and spring recharge area, watershed, and biota exchange pathways. Extensive resource sharing and networking with other protected areas, state agencies, local governments, organizations, specialists, researchers, and private citizens will expand the knowledge base and assist in developing cooperation between interest groups. Restoration of natural systems, native communities, and healthy environments will be emphasized, promoting regionally a high-quality of life. Monitoring environmental parameters and flora and fauna will be incorporated into an integrated study to gain knowledge on the health of the refuge ecosystem. Education and outreach will be expanded, with an emphasis on cultural and historical resources. Staffing will be developed to meet the needs of partners and the greater number of interest groups and accommodate data and resource sharing. An increase in staff is presented in this alternative so that Watercress Darter NWR can be managed with a greater emphasis on landscape management. Additional staff members needed to fully implement this alternative at the highest quality level includes one position at Watercress Darter NWR and four positions shared between Cahaba River NWR and Watercress Darter NWR.

Authority: This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: September 14, 2010.

Mark J. Musaus,

Acting Regional Director.

[FR Doc. 2010–32080 Filed 12–21–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

[USGS 11 GX11BC009RU0100]

Agency Information Collection Activities: Comment Request

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of extension of an existing information collection (1028–0056).

SUMMARY: We (the U.S. Geological Survey) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act (PRA) of 1995, and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This IC is scheduled to expire on March 31, 2011.

DATES: Submit written comments by February 22, 2011.

ADDRESSES: Please submit a copy of your comments to Phadrea Ponds, Information Collection Clearance Officer, U.S. Geological Survey, 2150–C Centre Avenue, Fort Collins, CO 80526–8118 (mail); 970–226–9445 (phone); 970–226–9230 (fax); or *pondsp@usgs.gov* (e-mail). Please reference Information Collection 1028–0070 in the subject line.

FOR FURTHER INFORMATION CONTACT: Lisa Zolly at 703–648–4277 or by mail at U.S. Geological Survey, Biological Informatics Office, 12201 Sunrise Valley Drive, MS 302, Reston, VA 20192.

SUPPLEMENTARY INFORMATION:

I. Abstract

Beginning in 1997, the U.S. Geological Survey has collected voluntary data regarding amphibian malformations. Sightings are reported via an electronic form (1028–0056). The form is sent to the USGS National Biological Information Infrastructure (NBII) program, which manages the North American Reporting Center for Amphibian Malformations (NARCAM). Each malformation occurrence submitted is carefully reviewed by trained professional herpetologists for quality and accuracy. Data associated with the validated reports, including species, malformation type, and geospatial information, are made accessible to the public via the NARCAM Web site. Information may be used by scientists and resource managers within Federal, State, and local agencies, as well as the general public, to identify areas where malformed amphibians have been reported, and the rates of occurrence. The NARCAM dataset is the only publicly available, national dataset on amphibian malformations.

We will be requesting OMB approval for an extension of the current form used for the NARCAM data collection efforts.

II. Data

OMB Control Number: 1028–0056.

Title: North American Reporting Center for Amphibian Malformations (NARCAM) Data Collection Form.

Type of Request: Extension of a currently approved collection.

Affected Public: General public, individual households.

Respondent Obligation: Voluntary.

Frequency of Collection: On occasion, one-time.

Estimated Number Annual Respondents: 300.

Annual Burden Hours: 150 hours. We estimate the public reporting burden averages 30 minutes per response.

Estimated Reporting and Recordkeeping "*Non-Hour Cost*" *Burden:* We have not identified any "non-hour cost" burdens associated with this collection of information.

III. Request for Comments

We are soliciting comments as to: (a) Whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) how to enhance the quality, usefulness, and clarity of the information to be collected; and (d) how to minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Please note that the comments submitted in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this IC. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask OMB in your comment to withhold your personal identifying information from public review, we cannot guarantee that it will be done.

Dated: December 2, 2010.

Kevin Gallagher,

Associate Director for Core Science Systems, U.S. Geological Survey.

[FR Doc. 2010–32081 Filed 12–21–10; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NCR–CHOH–1210–6273; 3101–241A–SZM]

Chesapeake and Ohio Canal National Historical Park Advisory Commission; Notice of Public Meeting

AGENCY: National Park Service, Interior.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given that a meeting of the Chesapeake and Ohio Canal National Historical Park Advisory Commission will be held at 9:30 a.m., on Friday, January 7, 2011, at C & O Canal National Historical Park, 1850 Dual Highway, Suite 100, Hagerstown, Maryland 21740.

DATES: Friday, January 7, 2011.

ADDRESSES: C & O Canal National Historical Park 1850 Dual Highway Suite 100, Hagerstown, Maryland 21740.

FOR FURTHER INFORMATION CONTACT: Kevin Brandt, Superintendent, Chesapeake and Ohio Canal National Historical Park, 1850 Dual Highway, Suite 100, Hagerstown, Maryland 21740, *telephone:* (301) 714–2201.

SUPPLEMENTARY INFORMATION: The Commission was established by Public Law 91–664 to meet and consult with the Secretary of the Interior on general policies and specific matters related to the administration and development of the Chesapeake and Ohio Canal National Historical Park. This is an open meeting and the Commission welcomes public comment. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

The members of the Commission are as follows:

Mrs. Sheila Rabb Weidenfeld, Chairperson
Mr. Charles J. Weir
Mr. Barry A. Passett
Mr. James G. McCleaf II
Mr. John A. Ziegler
Mrs. Mary E. Woodward
Mrs. Donna Printz
Mrs. Ferial S. Bishop
Ms. Nancy C. Long
Mrs. Jo Reynolds
Dr. James H. Gilford
Dr. George E. Lewis, Jr.
Mr. Charles D. McElrath
Ms. Patricia Schooley
Mr. Jack Reeder
Ms. Merrily Pierce

Topics that will be presented during the meeting include:

1. Update on park operations.
2. Update on major construction development projects.
3. Update on partnership projects.

The meeting will be open to the public. Any member of the public may file with the Commission a written statement concerning the matters to be discussed. Persons wishing further information concerning this meeting, or who wish to submit written statements, may contact Kevin Brandt, Superintendent, Chesapeake and Ohio Canal National Historical Park.

Minutes of the meeting will be available for public inspection six weeks after the meeting at Chesapeake and Ohio Canal National Historical Park Headquarters, 1850 Dual Highway, Suite 100, Hagerstown, Maryland 21740.

Dated: November 8, 2010.

Kevin D. Brandt,

Superintendent, Chesapeake and Ohio Canal, National Historical Park.

[FR Doc. 2010–32028 Filed 12–21–10; 8:45 am]

BILLING CODE 4310–6V–P

DEPARTMENT OF THE INTERIOR

National Park Service

[2280–665]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

Nominations for the following properties being considered for listing or related actions in the National Register were received by the National Park Service before November 27, 2010. Pursuant to sections 60.13 or 60.15 of 36 CFR part 60, written comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation. Comments may be forwarded by United States Postal Service, to the National Register of Historic Places, National Park Service, 1849 C St. NW., MS 2280, Washington, DC 20240; by all other carriers, National Register of Historic Places, National Park Service, 1201 Eye St. NW., 8th floor, Washington, DC 20005; or by fax, 202–371–6447. Written or faxed comments should be submitted by January 6, 2011.

Before including your address, phone number, e-mail address, or other personal identifying information in your

comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

J. Paul Loether,

Chief, National Register of Historic Places/ National Historic Landmarks Program.

CALIFORNIA

Fresno County

Ben Gefvert Ranch Historic District, 4770 W Whites Bridge Rd, Fresno, 10001117

Los Angeles County

Bricker Building, The, 1671 Northern Western Ave, Los Angeles, 10001119
Emery, Katherine, Estate, 1155 Oak Grove Ave, San Marino, 10001118

Riverside County

O'Donnell, Thomas, Residence, 447 Alejo Rd, Palm Springs, 10001123

MASSACHUSETTS

Norfolk County

Front Street Historic District, Roughly bounded by Front, Summer, Kingman, Congress, and Washington Sts, Weymouth, 10001121

Worcester County

Poli's Palace Theater, 2 Southbridge St, Worcester, 10001122

MISSOURI

St. Louis Independent city

Oak Hill Historic District, Roughly bounded by Gustine St, Arsenal St, alley W of Portis Ave, Humphrey St, St. Louis, 10001120

NEW JERSEY

Union County

Summit Downtown Historic District, Roughly bounded by Springfield Ave, the Village Green, Summit Ave, and Waldron Ave, Summit City, 10001116

NEW YORK

Dutchess County

Franklin Delano Roosevelt High School, 23 Haviland Rd, Hyde Park, 10001125

Nassau County

Phipps, John S., Estate (Boundary Increase), 71 Old Westbury Rd, Old Westbury, 10001124

Onondaga County

Carley Onondaga Site, Address Restricted, Pompey, 10001127
Indian Castle Village Site, Address Restricted, Manlius, 10001126

VIRGINIA

Bland County

Wolf Creek Bridge, Old SR 61–Wolf Creek Rd, Rocky Gap, 10001114

Southampton County

Rochelle—Prince House, 22371 Main St, Courtland, 10001115

[FR Doc. 2010–32050 Filed 12–21–10; 8:45 am]

BILLING CODE 4312–51–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–475 (Final) and 731–TA–1177 (Final)]

Aluminum Extrusions From China

AGENCY: United States International Trade Commission.

ACTION: Scheduling of the final phase of countervailing duty and antidumping investigations.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of countervailing duty investigation No. 701–TA–475 (Final) under section 705(b) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)) (the Act) and the final phase of antidumping investigation No. 731–TA–1177 (Final) under section 735(b) of the Act (19 U.S.C. 1673d(b)) to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of subsidized and less-than-fair-value imports from China of aluminum extrusions, primarily provided for in subheadings 7604.21.00, 7604.29.10, 7604.29.30, 7604.29.50, and 7608.20.00 of the Harmonized Tariff Schedule of the United States.[1]

For further information concerning the conduct of this phase of the investigations, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

DATES: Effective Date: November 12, 2010.

FOR FURTHER INFORMATION CONTACT: Edward Petronzio (202–205–3176, *edward.petronzio@usitc.gov*), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—The final phase of these investigations is being scheduled as a result of affirmative preliminary determinations by the Department of Commerce under section 703 of the Act (19 U.S.C. 1671b) that certain benefits which constitute subsidies are being provided to manufacturers, producers, or exporters in China of aluminum extrusions,[2] and under section 733 of the Act (19 U.S.C. 1673b) that such products are being sold in the United States at less than fair value.[3] The investigations were requested in a petition filed on March 31, 2010, by the Aluminum Extrusions Fair Trade Committee ("Committee") [4] and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW").

Participation in the investigations and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of these investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's

[1] The full scope language for these investigations is contained in *Aluminum Extrusions From the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, and Preliminary Determination of Targeted Dumping,* 75 FR 69403, November 12, 2010.

[2] *See Aluminum Extrusions From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination,* 75 FR 54302, September 7, 2010, and *Aluminum Extrusions From the People's Republic of China: Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination,* 75 FR 57441, September 21, 2010.

[3] *See Aluminum Extrusions From the People's Republic of China: Notice of Preliminary Determination of Sales at Less Than Fair Value, and Preliminary Determination of Targeted Dumping,* 75 FR 69403, November 12, 2010, and *Aluminum Extrusions From the People's Republic of China: Postponement of Final Determination of Sales at Less Than Fair Value,* 75 FR 73041, November 29, 2010.

[4] The Committee is comprised of the following members: Aerolite Extrusion Company, Younstown, OH; Alexandria Extrusion Company, Alexandria, MN; Benada Aluminum of Florida, Inc., Medley, FL; William L. Bonnell Company, Inc., Newnan, GA; Frontier Aluminum Corporation, Corona, CA; Futura Industries Corporation, Clearfield, UT; Hydro Aluminum North America, Inc., Linthicum, MD; Kaiser Aluminum Corporation, Foothill Ranch, CA; Profile Extrusion Company, Rome, GA; Sapa Extrusions, Inc., Des Plaines, IL; and Western Extrusions Corporation, Carrollton, TX.

rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigations need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of these investigations available to authorized applicants under the APO issued in the investigations, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigations. A party granted access to BPI in the preliminary phase of the investigations need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the final phase of these investigations will be placed in the nonpublic record on Friday, March 11, 2011, and a public version will be issued thereafter, pursuant to section 207.22 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the final phase of these investigations beginning at 9:30 a.m. on Tuesday, March 29, 2011, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before Friday, March 25, 2011. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on Monday, March 28, 2011, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.23 of the Commission's rules; the deadline for filing is Friday, March 18, 2011. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.25 of the Commission's rules. The deadline for filing posthearing briefs is Wednesday, April 6, 2011; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the investigations may submit a written statement of information pertinent to the subject of the investigations, including statements of support or opposition to the petition, on or before Wednesday, April 6, 2011. On Thursday, April 21, 2011, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before Monday, April 25, 2011, but such final comments must not contain new factual information and must otherwise comply with section 207.30 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002). Even where electronic filing of a document is permitted, certain documents must also be filed in paper form, as specified in II (C) of the Commission's Handbook on Electronic Filing Procedures, 67 FR 68168, 68173 (November 8, 2002).

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

By order of the Commission.

Issued: December 16, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–32030 Filed 12–21–10; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1058 (Review)]

Wooden Bedroom Furniture From China

Determination

On the basis of the record [1] developed in the subject five-year review, the United States International Trade Commission (Commission) determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the antidumping duty order on wooden bedroom furniture from China would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission instituted this review on December 1, 2009 (74 FR 62817) and determined on March 8, 2010 that it would conduct a full review (75 FR 14469, March 25, 2010). Notice of the scheduling of the Commission's review and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on April 26, 2010 (75 FR 21657). The hearing was held in Washington, DC, on October 5, 2010, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determination in this review to the Secretary of Commerce on December 14, 2010. The views of the Commission are

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

contained in USITC Publication 4203 (December 2010), entitled *Wooden Bedroom Furniture from China: Investigation No. 731–TA–1058 (Review).*

By order of the Commission.

Issued: December 15, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–32029 Filed 12–21–10; 8:45 am]

BILLING CODE 7020–02–P

JOINT BOARD FOR ENROLLMENT OF ACTUARIES

Privacy Act of 1974, as Amended

AGENCY: Joint Board for the Enrollment of Actuaries.

ACTION: Notice of proposed alterations to three Privacy Act systems of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, the Joint Board for the Enrollment of Actuaries (Joint Board) gives notice of proposed alterations to three Privacy Act systems of records related to its functions: JBEA–2, Charge Case Inventory Files; JBEA–4, Enrollment Files; and JBEA–6, General Correspondence File.

DATES: Comments must be received no later than January 21, 2011. The proposed altered systems will become effective January 31, 2011, unless the Joint Board receives comments which cause reconsideration of this action.

ADDRESSES: Comments should be sent to: Executive Director, Joint Board for the Enrollment of Actuaries, c/o Internal Revenue Service/Office of Professional Responsibility, SE:OPR, 1111 Constitution Avenue, NW., Washington, DC 20224. Comments will be available for inspection and copying in the Internal Revenue Service Freedom of Information Reading Room (Room 1621) at the above address. The telephone number for the Reading Room is (202) 622–5164 (not a toll-free number).

FOR FURTHER INFORMATION CONTACT: Earl Prater, Senior Counsel, Office of Professional Responsibility, at (202) 622–8018 (not a toll-free number).

SUPPLEMENTARY INFORMATION: Pursuant to section 3041 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1241, the Secretary of Labor and the Secretary of the Treasury established the Joint Board. The Joint Board consists of three members appointed by the Secretary of the Treasury and two members appointed by the Secretary of Labor. A non-voting representative of the Pension Benefit Guaranty Corporation participates in the Joint Board's discussions. The Joint Board, in carrying out its responsibilities under ERISA, is advised and assisted by the Executive Director, a position established within the Office of Professional Responsibility, Internal Revenue Service.

Section 3042 of ERISA provides that the Joint Board shall, by regulations, establish reasonable standards and qualifications for individuals performing actuarial services pertaining to plans covered by ERISA and shall enroll such individuals if the Joint Board finds they satisfy such standards and qualifications. Section 3042 of ERISA also provides that the Joint Board may, after notice and an opportunity for a hearing, suspend or terminate the enrollment of an individual if the Joint Board finds that such individual has failed to discharge his or her duties under ERISA or does not satisfy the requirements for enrollment that were in effect at the time of enrollment. The Joint Board's regulations are set out at 20 CFR parts 900 through 903.

The Joint Board currently maintains nine Privacy Act systems of records related to its functions. As described below, the Joint Board proposes to consolidate the nine current systems into three altered systems: JBEA–2, Enrolled Actuary Disciplinary Records; JBEA–4, Enrolled Actuary Enrollment Records; and JBEA–6, Correspondence and Miscellaneous Records.

(1) JBEA–2—Charge Case Inventory Files

The following alterations to this system of records are proposed:

(a) To change the title of the system to "Enrolled Actuary Disciplinary Records";

(b) To consolidate in this system of records all disciplinary-related records from this system and from the following systems—

JBEA–4, Enrollment Files;

JBEA–8, Suspension and Termination Files;

JBEA–9, Suspension and Termination Roster;

(c) To make necessary additions to Categories of Individuals Covered by the System, Categories of Records in the System, and Retrievability;

(d) To add to the system notice the required data elements of Purpose(s) and Record Source Categories;

(e) To restate, for clarity and specificity, a routine use authorizing disclosure to the Department of Justice for advice or action;

(f) To restate, for clarity and specificity, a routine use authorizing disclosure in response to a court subpoena and for other litigation purposes;

(g) To restate, for clarity and specificity, a routine use authorizing disclosure to a Federal agency in response to its request in connection with the hiring or retaining of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit, and to include in the routine use disclosure to a state, local, tribal, or foreign agency, or other public authority;

(h) To restate, for clarity and specificity, a routine use authorizing disclosure to law enforcement authorities of apparent violations of civil or criminal law;

(i) To add a routine use authorizing disclosure to a contractor to the extent necessary to perform the contract;

(j) To restate, for clarity and specificity, a routine use authorizing disclosure to investigative offices of other agencies for development of facts, and to include in the routine use disclosure to other third parties during an investigation;

(k) To incorporate a routine use from JBEA–1, JBEA–3, JBEA–4, and JBEA–8 authorizing disclosure to the Department of Labor and the Department of the Treasury for purposes of administering ERISA, to include in the routine use disclosure to officers and employees of the Department of Labor, the Department of the Treasury, and the Pension Benefit Guaranty Corporation who have a need for the information in the performance of their duties in connection with administering and enforcing ERISA, ERISA-related programs, or the Joint Board's regulations, or in connection with administering and maintaining standards of integrity, conduct, and discipline on the part of individuals authorized to practice, or who seek authorization to practice, before such agencies, and to restate the routine use for clarity and specificity;

(l) To add a routine use authorizing the Joint Board to make available for public inspection or otherwise disclose to the general public (including via Web sites) the Joint Board's final agency decisions on appeal in disciplinary proceedings and administrative law judges' decisions that have become final agency decisions upon the expiration of the appeal period;

(m) To incorporate a routine use from JBEA–9, Suspension and Termination Roster, authorizing disclosure to the public, pursuant to "5 U.S. Code, Section 552" (the Freedom of Information Act), of the list of actuaries whose enrollment has been suspended

or terminated, to delete the reference to "5 U.S. Code, Section 552," to include in the routine use authority to make available for public inspection or otherwise disclose (including via Web sites) to the general public, after the subject individual has exhausted administrative appeal rights, the name, mailing address, type of disciplinary sanction, effective dates, and information about the conduct that gave rise to the sanction pertaining to individuals who have received disciplinary sanctions, and to restate the routine use for clarity and specificity;

(n) To add a routine use authorizing disclosure of information to a public, quasi-public, or private professional authority, agency, organization, or association, which individuals covered by this system of records may be licensed by, subject to the jurisdiction of, a member of, or affiliated with, including but not limited to state bars and certified public accountancy boards, to assist such authorities, agencies, organizations, or associations in meeting their responsibilities in connection with the administration and maintenance of standards of integrity, conduct, and discipline;

(o) To add a routine use authorizing disclosure of information concerning the status of disciplinary investigations to individuals who send the Joint Board information concerning possible violations of the regulations;

(p) To add a routine use authorizing disclosure to the Office of Personnel Management of the identity and status of disciplinary cases in order for the Office of Personnel Management to process requests for assignment of administrative law judges to conduct disciplinary proceedings;

(q) To add a routine use authorizing disclosure to appropriate agencies, entities, and persons when the Joint Board suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised, the Joint Board has determined that there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs that rely upon the compromised information, and the disclosure is reasonably necessary to assist in connection with the Joint Board's efforts to respond and prevent, minimize, or remedy harm;

(r) To delete, as redundant to section (b)(1) of the Privacy Act, which permits disclosures within an agency, a routine use stated as "Determinations as to whether individuals' enrollment to perform actuarial services with respect to plans to which ERISA applies should be suspended or terminated";

(s) To delete an unnecessary routine use authorizing disclosure to congressional offices in response to inquiries from constituents, who authorize disclosure by consent; and

(t) To make necessary "housekeeping" alterations, such as updating addresses.

(2) JBEA–4—Enrollment Files

The following alterations to this system of records are proposed:

(a) To change the title of the system to "Enrolled Actuary Enrollment Records";

(b) To consolidate in this system of records all enrollment-related records from this system and from the following systems—

JBEA–1, Application Files;
JBEA–2, Charge Case Inventory Files;
JBEA–3, Denied Applications;
JBEA–5, Enrollment Roster;
JBEA–7, General Information;
JBEA–8, Suspension and Termination Files;
JBEA–9, Suspension and Termination Roster;

(c) To make necessary additions to Categories of Individuals Covered by the System, Categories of Records in the System, and Retrievability;

(d) To add to the system notice the required data elements of Purpose(s) and Record Source Categories;

(e) To restate, for clarity and specificity, a routine use authorizing disclosure to the Department of Justice for advice or action;

(f) To restate, for clarity and specificity, a routine use authorizing disclosure in response to a court subpoena and for other litigation purposes;

(g) To restate, for clarity and specificity, a routine use authorizing disclosure to a Federal agency in response to its request in connection with the hiring or retaining of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit, and to include in the routine use disclosure to a state, local, tribal, or foreign agency, or other public authority;

(h) To restate, for clarity and specificity, a routine use authorizing disclosure to law enforcement authorities of apparent violations of civil or criminal law;

(i) To add a routine use authorizing disclosure to a contractor to the extent necessary to perform the contract;

(j) To incorporate from JBEA–2 and JBEA–7 a routine use authorizing disclosure to investigative offices of other agencies for development of facts, to include in the routine use disclosure to other third parties during an investigation, and to restate the routine use for clarity and specificity;

(k) To restate, for clarity and specificity, a routine use authorizing disclosure to the Department of Labor and the Department of the Treasury for purposes of administering ERISA and to include in the use disclosure to officers and employees of the Department of Labor, the Department of the Treasury, and the Pension Benefit Guaranty Corporation who have a need for the information in the performance of their duties in connection with administering and enforcing ERISA, ERISA-related programs, or the Joint Board's regulations, or in connection with administering and maintaining standards of integrity, conduct, and discipline on the part of individuals authorized to practice, or who seek authorization to practice, before such agencies;

(l) To restate, for clarity and specificity, a routine use authorizing the verification of enrollment status and to include in the routine use authority to make available for public inspection or otherwise disclose to the general public (including via Web sites) the name, enrollment number, enrollment status, including effective dates, as well as mailing address, firm or company name, telephone number, fax number, e-mail address, and Web site address, pertaining to individuals who are, or were, enrolled actuaries;

(m) To add a routine use authorizing disclosure of information to a public, quasi-public, or private professional authority, agency, organization, or association, which individuals covered by this system of records may be licensed by, subject to the jurisdiction of, a member of, or affiliated with, including but not limited to state bars and certified public accountancy boards, to assist such authorities, agencies, organizations, or associations in meeting their responsibilities in connection with the administration and maintenance of standards of integrity, conduct, and discipline;

(n) To add a routine use authorizing disclosure to appropriate agencies, entities, and persons when the Joint Board suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised, the Joint Board has determined that there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs that rely upon the compromised information, and the disclosure is reasonably necessary to

assist in connection with the Joint Board's efforts to respond and prevent, minimize, or remedy harm;

(o) To delete, as redundant to section (b)(1) of the Privacy Act, which permits disclosures within an agency, a routine stated as "Use in conjunction with disciplinary actions pursuant to Title 29 U.S. Code, Section 1242";

(p) To delete an unnecessary routine use authorizing disclosure to congressional offices in response to inquiries from constituents, who authorize disclosure by consent; and

(q) To make necessary "housekeeping" alterations, such as updating addresses.

(3) JBEA–6, General Correspondence File

The following alterations to this system of records are proposed:

(a) To change the title of the system to "Correspondence and Miscellaneous Records";

(b) To make necessary additions to Categories of Individuals Covered by the System, Categories of Records in the System, Retrievability, and Record Source Categories;

(c) To add to the system notice the required data element of Purpose(s);

(d) To incorporate from JBEA–1, JBEA–2, JBEA–4, JBEA–7, and JBEA–8 a routine use authorizing disclosure to the Department of Justice for advice or action and to restate the routine use for clarity and specificity;

(e) To restate, for clarity and specificity, a routine use authorizing disclosure in response to a court subpoena and for other litigation purposes;

(f) To restate, for clarity and specificity, a routine use authorizing disclosure to a Federal agency in response to its request in connection with the hiring or retaining of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit, and to include in the routine use disclosure to a state, local, tribal, or foreign agency, or other public authority;

(g) To incorporate from JBEA–1, JBEA–2, JBEA–3, JBEA–4, JBEA–7, and JBEA–8 a routine use authorizing disclosure to law enforcement authorities of apparent violations of civil or criminal law and to restate the routine use for clarity and specificity;

(h) To add a routine use authorizing disclosure to a contractor to the extent necessary to perform the contract;

(i) To incorporate a routine use from JBEA–1, JBEA–3, JBEA–4, and JBEA–8 authorizing disclosure to the Department of Labor and the Department of the Treasury for purposes of administering ERISA, to include in the routine use disclosure to officers and employees of the Department of Labor, the Department of the Treasury, and the Pension Benefit Guaranty Corporation who have a need for the information in the performance of their duties in connection with administering and enforcing ERISA, ERISA-related programs, or the Joint Board's regulations, or in connection with administering and maintaining standards of integrity, conduct, and discipline on the part of individuals authorized to practice, or who seek authorization to practice, before such agencies, and to restate the routine use for clarity and specificity;

(j) To add a routine use authorizing disclosure to appropriate agencies, entities, and persons when the Joint Board suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised, the Joint Board has determined that there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs that rely upon the compromised information, and the disclosure is reasonably necessary to assist in connection with the Joint Board's efforts to respond and prevent, minimize, or remedy harm;

(k) To delete a routine use stated as "Provide answers to inquiries or other information regarding the operation of the Joint Board," because records that are individually identifiable may be disclosed under other proposed routine uses of this system, and because records pertaining to Joint Board operations that are not individually identifiable are not protected by the Privacy Act;

(l) To delete an unnecessary routine use authorizing disclosure to congressional offices in response to inquiries from constituents, who authorize disclosure by consent; and

(m) To make necessary "housekeeping" alterations, such as updating addresses.

The following systems of records will be deleted upon implementation of the altered systems:

JBEA–1, Application Files;

JBEA–3, Denied Applications;

JBEA–5, Enrollment Roster;

JBEA–7, General Information;

JBEA–8, Suspension and Termination Files;

JBEA–9, Suspension and Termination Roster.

The report of the altered systems of records, as required by 5 U.S.C. 552a(r) of the Privacy Act, has been submitted to the Committee on Oversight and Government Reform of the House of Representatives, the Committee on Homeland Security and Governmental Affairs of the Senate, and the Office of Management and Budget (OMB), pursuant to Appendix I to OMB Circular A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals."

The three proposed altered systems of records, described above, are published in their entirety below.

Dated: November 4, 2010.

Carolyn E. Zimmerman,

Chair, Joint Board for the Enrollment of Actuaries.

JBEA–2

SYSTEM NAME:

Enrolled Actuary Disciplinary Records—JBEA–2.

SYSTEM LOCATION:

Office of the Executive Director, Joint Board for the Enrollment of Actuaries (Joint Board), located within the Office of Professional Responsibility, Internal Revenue Service, Washington, DC; and Memphis, Tennessee.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current and former subjects and potential subjects of disciplinary actions and proceedings relating to enrolled actuaries, including those who received disciplinary sanctions.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information sent to, or collected by, the Executive Director concerning potential violations of the Joint Board's regulations; records pertaining to the Executive Director's investigation and evaluation of such information; records of disciplinary proceedings brought by the Executive Director before administrative law judges, including records of appeals from decisions in such proceedings; petitions for reinstatement as an enrolled actuary; and the Executive Director's and the Joint Board's decisions, letters, and other responses to individuals covered by this system.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Employee Retirement Income Security Act of 1974 (ERISA), Section 3042 (29 U.S.C. 1242).

PURPOSE(S):

To enforce and administer the regulations (20 CFR parts 900–903) of the Joint Board governing practice as an enrolled actuary under ERISA; to make available to the general public information about disciplinary sanctions; and to assist public, quasi-public, or private professional

authorities, agencies, organizations, and associations, and other law enforcement and regulatory authorities in the performance of their duties in connection with the administration and maintenance of standards of integrity, conduct, and discipline.

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

Disclosure of returns and return information may be made only as provided by 26 U.S.C. 6103. All other records may be used as described below if the Joint Board deems the purpose of the disclosure to be compatible with the purpose for which the Joint Board collected the records and no privilege is asserted:

(1) Disclose information to the Department of Justice when seeking legal advice or for use in any proceeding, or in preparation for any proceeding, when: (a) The Joint Board, the Department of Labor, the Department of the Treasury, or the Pension Benefit Guaranty Corporation, or any component thereof; (b) any employee of such agencies in his or her official capacity; (c) any employee of such agencies in his or her individual capacity if the employing agency or the Department of Justice has agreed to provide representation for the employee; or (d) the United States is a party to, has an interest in, or is likely to be affected by, the proceeding; and the Joint Board determines that the information is relevant and necessary to the proceeding or advice sought.

(2) Disclose information during a proceeding before a court, administrative tribunal, or other adjudicative body when: (a) The Joint Board, the Department of Labor, the Department of the Treasury, or the Pension Benefit Guaranty Corporation, or any component thereof; (b) any employee of such agencies in his or her official capacity; (c) any employee of such agencies in his or her individual capacity if the employing agency or the Department of Justice has agreed to provide representation for the employee; or (d) the United States is a party to, has an interest in, or is likely to be affected by, the proceeding; and the Joint Board or the Department of Justice determines that the information is relevant and necessary to the proceeding. Information may be disclosed to the adjudicative body to resolve issues of relevancy, necessity, or privilege pertaining to the information.

(3) Disclose information to a Federal, state, local, tribal, or foreign agency, or other public authority, which has requested information relevant or necessary to hiring or retaining an employee or to issuing, or continuing, a contract, security clearance, license, grant, or other benefit.

(4) Disclose information to a Federal, state, local, tribal, or foreign agency or other public authority responsible for implementing or enforcing, or for investigating or prosecuting, the violation of a statute, rule, regulation, order, or license when a record on its face, or in conjunction with other records, indicates a violation or potential violation of law or regulation and the information disclosed is relevant to any regulatory, enforcement, investigative, or prosecutorial responsibility of the receiving authority.

(5) Disclose information to a contractor to the extent necessary to perform the contract.

(6) Disclose information to third parties during the course of an investigation to the extent deemed necessary by the Joint Board to obtain information pertinent to the investigation.

(7) Disclose information to officers and employees of the Department of Labor, the Department of the Treasury, and the Pension Benefit Guaranty Corporation who have a need for the information in the performance of their duties in connection with administering and enforcing ERISA, ERISA-related programs, or the Joint Board's regulations, or in connection with administering and maintaining standards of integrity, conduct, and discipline on the part of individuals authorized to practice, or who seek authorization to practice, before such agencies.

(8) Make available for public inspection or otherwise disclose to the general public (including via Web sites) the Joint Board's final agency decisions on appeal in disciplinary proceedings and administrative law judges' decisions that have become final agency decisions upon the expiration of the appeal period.

(9) Make available for public inspection or otherwise disclose (including via Web sites) to the general public, after the subject individual has exhausted administrative appeal rights, the name, mailing address, type of disciplinary sanction, effective dates, and information about the conduct that gave rise to the sanction pertaining to individuals who have received disciplinary sanctions.

(10) Disclose information to a public, quasi-public, or private professional authority, agency, organization, or association, which individuals covered by this system of records may be licensed by, subject to the jurisdiction of, a member of, or affiliated with, including but not limited to state bars and certified public accountancy boards, to assist such authorities, agencies, organizations, or associations in meeting their responsibilities in connection with the administration and maintenance of standards of integrity, conduct, and discipline.

(11) Disclose upon written request to a member of the public who has submitted to the Joint Board written information concerning potential violations of the regulations: (a) That the Executive Director is currently investigating or evaluating the information; or (b) that the Executive Director has determined that no action will be taken, because disciplinary jurisdiction is lacking, because a disciplinary proceeding would be time-barred, or because the information does not constitute actionable violations of the regulations; or (c) that the Executive Director has determined that the reported conduct does not warrant suspension or termination; and (d) if applicable, the name of the public, quasi-public, or private professional authority, agency, organization, or association, other law enforcement or regulatory authority, or bureau or office within the Department of Labor, Department of the Treasury, or Pension Benefit Guaranty Corporation to which the Joint Board or Executive Director has referred the information.

(12) Disclose to the Office of Personnel Management the identity and status of disciplinary cases in order for the Office of Personnel Management to process requests for assignment of administrative law judges employed by other Federal agencies to conduct disciplinary proceedings.

(13) Disclose information to appropriate agencies, entities, and persons when (a) the Joint Board suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Joint Board has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Joint Board or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Joint Board's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

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

STORAGE:

Paper and electronic media.

RETRIEVABILITY:

By individual's name. Non-unique names will be distinguished by addresses.

SAFEGUARDS:

Access controls are not less than those provided in Internal Revenue Manual (IRM) 10.8.1, Information Technology (IT) Security—Policy and Guidance, and IRM 10.2.1, Physical Security Program.

RETENTION AND DISPOSAL:

No records will be destroyed until the National Archives and Records Administration approves a records control schedule. The Joint Board proposes the following schedule: Retire records in disciplinary files to a Federal Records Center 20 years after files are closed; destroy 25 years after closing. Destroy records in files that did not generate an open disciplinary case five years after the date of the last record added to the file.

SYSTEM MANAGER(S) AND ADDRESS:

Executive Director, Joint Board for the Enrollment of Actuaries, c/o Internal Revenue Service/Office of Professional Responsibility, SE:OPR, 1111 Constitution Avenue, NW., Washington, DC 20224.

NOTIFICATION PROCEDURE:

This system of records is exempt from the notification provisions of the Privacy Act.

RECORD ACCESS PROCEDURES:

This system of records is exempt from the record access provisions of the Privacy Act.

CONTESTING RECORD PROCEDURES:

This system of records is exempt from the record contesting provisions of the Privacy Act.

RECORD SOURCE CATEGORIES:

Individuals covered by this system of records; witnesses; Federal or state courts, agencies, bodies, and other licensing authorities; professional organizations and associations; Treasury Department records; and public records.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Pursuant to section (k)(2) of the Privacy Act, 5 U.S.C. 552a(k)(2), the records contained within this system are exempt from the following sections of the Act: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

JBEA–4

SYSTEM NAME:

Enrolled Actuary Enrollment Records—JBEA–4.

SYSTEM LOCATION:

Office of the Executive Director, Joint Board for the Enrollment of Actuaries (Joint Board), located in the Office of Professional Responsibility, Internal Revenue Service, Washington, DC; and Memphis, Tennessee.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals currently or formerly enrolled as enrolled actuaries; applicants for such enrollment, including those who have appealed denial of applications for enrollment; and individuals who may not apply for enrollment even though they have requested a waiver of the requirements to take certain actuarial examinations or have taken actuarial examinations.

CATEGORIES OF RECORDS IN THE SYSTEM:

Applications for enrollment to perform actuarial services required by ERISA; requests for waiver of the requirements to take certain actuarial examinations; reports that individuals have engaged in misconduct in connection with taking actuarial examinations; records pertaining to the Joint Board's investigation and evaluation of individuals' eligibility for such enrollment; appeals from denials of applications for enrollment; records relating to enrollment examinations, including answer sheets and examination scores; applications for renewal of enrollment, including information on continuing education and requests for waiver of the continuing education requirements; requests for reinstatement of enrollment following termination for failure to renew enrollment; administrative records pertaining to enrollment status, including effective dates; and the Executive Director's and the Joint Board's decisions, letters, and other responses to individuals covered by this system.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Employee Retirement Income Security Act of 1974 (ERISA), Section 3042 (29 U.S.C. 1242).

PURPOSE(S):

To enforce and administer the regulations (20 CFR parts 900–903) of the Joint Board governing practice as an enrolled actuary under ERISA; to make available to the general public sufficient information to locate individuals enrolled to provide actuarial services required by ERISA and to verify individuals' enrollment status; and to assist public, quasi-public, or private professional authorities, agencies, organizations, and associations, and other law enforcement and regulatory authorities in the performance of their duties in connection with the administration and maintenance of standards of integrity, conduct, and discipline.

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

Disclosure of returns and return information may be made only as provided by 26 U.S.C. 6103. All other records may be used as described below if the Joint Board deems the purpose of the disclosure to be compatible with the purpose for which the Joint Board collected the records and no privilege is asserted:

(1) Disclose information to the Department of Justice when seeking legal advice or for use in any proceeding, or in preparation for any proceeding, when: (a) The Joint Board, the Department of Labor, the Department of the Treasury, or the Pension Benefit Guaranty Corporation, or any component thereof; (b) any employee of such agencies in his or her official capacity; (c) any employee of such agencies in his or her individual capacity if the employing agency or the Department of Justice has agreed to provide representation for the employee; or (d) the United States is a party to, has an interest in, or is likely to be affected by, the proceeding; and the Joint Board determines that the information is relevant and necessary to the proceeding or advice sought.

(2) Disclose information during a proceeding before a court, administrative tribunal, or other adjudicative body when: (a) The Joint Board, the Department of Labor, the Department of the Treasury, or the Pension Benefit Guaranty Corporation, or any component thereof; (b) any employee of such agencies in his or her official capacity; (c) any employee of such agencies in his or her individual capacity if the employing agency or the Department of Justice has agreed to provide representation for the employee; or (d) the United States is a party to, has an interest in, or is likely to be affected by, the proceeding; and the Joint Board or the Department of Justice determines that the information is relevant and necessary to the proceeding. Information may be disclosed to the adjudicative body to resolve issues of relevancy, necessity, or privilege pertaining to the information.

(3) Disclose information to a Federal, state, local, tribal, or foreign agency, or other public authority, which has requested information relevant or necessary to hiring or retaining an employee or to issuing, or continuing, a contract, security clearance, license, grant, or other benefit.

(4) Disclose information to a Federal, state, local, tribal, or foreign agency or other public authority responsible for implementing or enforcing, or for investigating or prosecuting, the violation of a statute, rule, regulation, order, or license when a record on its face, or in conjunction with other records, indicates a violation or potential violation of law or regulation and the information disclosed is relevant to any regulatory, enforcement, investigative, or prosecutorial responsibility of the receiving authority.

(5) Disclose information to a contractor to the extent necessary to perform the contract.

(6) Disclose information to third parties during the course of an investigation to the extent deemed necessary by the Joint Board to obtain information pertinent to the investigation.

(7) Disclose information to officers and employees of the Department of Labor, the Department of the Treasury, and the Pension Benefit Guaranty Corporation who have a need for the information in the performance of their duties in connection with administering and enforcing ERISA, ERISA-related programs, or the Joint Board's regulations, or in connection with administering and maintaining standards of integrity, conduct, and discipline on the part of individuals authorized to practice, or who seek authorization to practice, before such agencies.

(8) Make available for public inspection or otherwise disclose to the general public (including via Web sites) the name, enrollment number, enrollment status, including effective dates, as well as mailing address, firm or company name, telephone number, fax number, e-mail address, and Web site address, pertaining to individuals who are, or were, enrolled actuaries.

(9) Disclose information to a public, quasi-public, or private professional authority, agency, organization, or association, which individuals covered by this system of records may be licensed by, subject to the jurisdiction of, a member of, or affiliated with, including but not limited to state bars and certified public accountancy boards, to assist such authorities, agencies, organizations, or associations in meeting their responsibilities in connection with the administration and maintenance of standards of integrity, conduct, and discipline.

(10) Disclose information to appropriate agencies, entities, and persons when (a) the Joint Board suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Joint Board has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Joint Board or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Joint Board's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

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

STORAGE:

Paper and electronic media.

RETRIEVABILITY:

By individual's name. Non-unique names will be distinguished by addresses.

SAFEGUARDS:

Access controls are not less than those provided in Internal Revenue Manual (IRM) 10.8.1, Information Technology (IT) Security—Policy and Guidance, and IRM 10.2.1, Physical Security Program.

RETENTION AND DISPOSAL:

No records will be destroyed until the National Archives and Records Administration approves a records control schedule. The Joint Board proposes the following schedule: Destroy records in enrolled actuary files 20 years after termination of enrollment. Destroy records in files of individuals who were never enrolled 10 years after the date of the last record added to the file.

SYSTEM MANAGER(S) AND ADDRESS:

Executive Director, Joint Board for the Enrollment of Actuaries, c/o Internal Revenue Service/Office of Professional Responsibility, SE:OPR, 1111 Constitution Avenue, NW., Washington, DC 20224.

NOTIFICATION PROCEDURE:

This system of records is exempt from the notification provisions of the Privacy Act.

RECORD ACCESS PROCEDURES:

This system of records is exempt from the record access provisions of the Privacy Act.

CONTESTING RECORD PROCEDURES:

This system of records is exempt from the record contesting provisions of the Privacy Act.

RECORD SOURCE CATEGORIES:

Individuals covered by this system of records; witnesses; Federal or state courts, agencies, bodies, and other licensing authorities; professional organizations and associations; Treasury Department records; and public records.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

Pursuant to section (k)(2) of the Privacy Act, 5 U.S.C. 552a(k)(2), the records contained within this system are exempt from the following sections of the Act: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(3) JBEA–6

SYSTEM NAME:

Correspondence and Miscellaneous Records—JBEA–6.

SYSTEM LOCATION:

Office of the Executive Director, Joint Board for the Enrollment of Actuaries (Joint Board), located within the Office of Professional Responsibility, Internal Revenue Service, Washington, DC; and Memphis, Tennessee.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who correspond with the Joint Board, (including quality and improvement surveys), and individuals who are the subject of correspondence; individuals who request information, including requests pursuant to the Freedom of Information Act or the Privacy Act; and individuals who serve as point of contact for organizations (including organizations that apply for recognition as a sponsor of continuing education for enrolled actuaries).

CATEGORIES OF RECORDS IN THE SYSTEM:

Correspondence (including, but not limited to, letters, faxes, telegrams, and emails) sent and received; mailing lists of, and responses to, quality and improvement surveys of individuals; requests for information; requests for recognition as a sponsor of continuing education for enrolled actuaries; and the Executive Director's and the Joint Board's decisions, letters, and other responses to individuals covered by this system.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Employee Retirement Income Security Act of 1974 (ERISA), Section 3042 (29 U.S.C. 1242).

PURPOSE(S):

To enforce and administer the regulations (20 CFR parts 900–903) of the Joint Board governing practice as an enrolled actuary under ERISA; to permit the Joint Board to manage correspondence, to track responses from quality and improvement surveys, to manage workloads, and to collect and maintain other administrative records that are necessary for the Joint Board to perform its functions under the regulations.

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

Disclosure of returns and return information may be made only as provided by 26 U.S.C. 6103. All other records may be used as described below if the Joint Board deems the purpose of the disclosure to be compatible with the purpose for which the Joint Board collected the records and no privilege is asserted:

(1) Disclose information to the Department of Justice when seeking legal advice or for use in any proceeding, or in preparation for any proceeding, when: (a) The Joint Board, the Department of Labor, the Department of the Treasury, or the Pension Benefit Guaranty Corporation, or any component thereof; (b) any employee of such agencies in his or her official capacity; (c) any employee of such agencies in his or her individual capacity if the employing agency or the Department of Justice has agreed to provide representation for the employee; or (d) the United States is a party to, has an interest in, or is likely to be affected by, the proceeding; and the Joint Board determines that the information is relevant and necessary to the proceeding or advice sought.

(2) Disclose information during a proceeding before a court, administrative tribunal, or other adjudicative body when: (a) The Joint Board, the Department of Labor, the Department of the Treasury, or the Pension Benefit Guaranty Corporation, or any component thereof; (b) any employee of such agencies in his or her official capacity; (c) any employee of such agencies in his or her individual capacity if the employing agency or the Department of Justice has agreed to provide representation for the employee; or (d) the United States is a party to, has an interest in, or is likely to be affected by, the proceeding; and the Joint Board or the Department of Justice determines that the information is relevant and necessary to the proceeding. Information may be disclosed to the adjudicative body to resolve issues of relevancy, necessity, or privilege pertaining to the information.

(3) Disclose information to a Federal, state, local, tribal, or foreign agency, or other public authority, which has requested information relevant or necessary to hiring or retaining an employee or to issuing, or continuing, a contract, security clearance, license, grant, or other benefit.

(4) Disclose information to a Federal, state, local, tribal, or foreign agency or other public authority responsible for implementing or enforcing, or for investigating or prosecuting, the violation of a statute, rule, regulation, order, or license when a record on its face, or in conjunction with other records, indicates a violation or potential violation of law or regulation and the information disclosed is relevant to any regulatory, enforcement, investigative, or prosecutorial responsibility of the receiving authority.

(5) Disclose information to a contractor to the extent necessary to perform the contract.

(6) Disclose information to officers and employees of the Department of Labor, the Department of the Treasury, and the Pension Benefit Guaranty Corporation who have a need for the information in the performance of their duties in connection with administering and enforcing ERISA, ERISA-related programs, or the Joint Board's regulations, or in connection with administering and maintaining standards of integrity, conduct, and discipline on the part of individuals authorized to practice, or who seek authorization to practice, before such agencies.

(7) Disclose information to appropriate agencies, entities, and persons when (a) the Joint Board suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Joint Board has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs (whether maintained by the Joint Board or another agency or entity) that rely upon the compromised information; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Joint Board's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

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

STORAGE:

Paper and electronic media.

RETRIEVABILITY:

By individual's name. Non-unique names will be distinguished by addresses.

SAFEGUARDS:

Access controls are not less than those provided in Internal Revenue Manual (IRM) 10.8.1, Information Technology (IT) Security—Policy and Guidance, and IRM 10.2.1, Physical Security Program.

RETENTION AND DISPOSAL:

No records will be destroyed until the National Archives and Records Administration approves a records control schedule. The Joint Board proposes the following schedule: Destroy records concerning recognition as a sponsor of continuing education for enrolled actuaries 6 years after the expiration of the last sponsor enrollment cycle in which the sponsor received recognition. Destroy other correspondence 3 years after the date of the Executive Director's or the Joint Board's response, or if no response was required, 3 years after the date received.

SYSTEM MANAGER(S) AND ADDRESS:

Executive Director, Joint Board for the Enrollment of Actuaries, c/o Internal Revenue Service/Office of Professional Responsibility, SE:OPR, 1111 Constitution Avenue, NW., Washington, DC 20224.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains a record pertaining to themselves may inquire in accordance with instructions appearing at 20 CFR part 903. Inquiries should be addressed to the system manager listed above.

RECORD ACCESS PROCEDURES:

See "Notification Procedure" above.

CONTESTING RECORD PROCEDURES:

See "Notification Procedure" above.

RECORD SOURCE CATEGORIES:

Correspondents, including individuals and organizations; Treasury Department records.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2010–32160 Filed 12–21–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993 Vehicle Infrastructure Integration Consortium

Notice is hereby given that, on November 24, 2010, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), the Vehicle Infrastructure Integration Consortium ("VIIC") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Nissan North America, Inc., Franklin Hills, TN, has succeeded Nissan North America Technical Center, Inc., Farmington Hills, MI, as a member, and the name of the member previously listed as Mercedes-Benz Research & Technology North America, Inc. is corrected to read Mercedes-Benz Research & Development North America, Inc., Palo Alto, CA.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and VIIC intends to file additional written notification disclosing all changes in membership.

On May 1, 2006, VIIC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 2, 2006 (71 FR 32128).

The last notification was filed with the Department on March 11, 2008. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on April 7, 2008 (71 FR 18811).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2010–32053 Filed 12–21–10; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993 National Warheads and Energetics Consortium

Notice is hereby given that, on November 30, 2010, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), National Warheads and Energetics Consortium ("NWEC") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Franklin Engineering Group, Inc., Franklin, TN; RDM Engineering, LLC, East Brunswick, NJ; Rocky Mountain Scientific Laboratory, Centennial, CO; Rocky Research, Boulder City, NV; The Research Foundation of State University of New York, Binghamton, NY; and Wilkes University, Wilkes-Barre, PA, have been added as parties to this venture.

Also, AMTEC Corporation, Janesville, WI; Atlantic Technical Components, Inc., Middletown, NY; CAE Solutions Corp., Fremont, CA; and Clear Align, Eagleville, PA, have withdrawn as parties to this venture. No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NWEC intends to file additional written notifications disclosing all changes in membership.

On May 2, 2000, NWSC filed its original notification pursuant to Section 6(a) oi the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 30, 2010 (65 PR 40963).

The last notification was filed with the Department on August 16, 2010. A norice was published in the **Federal Register** pursuant to Section 6(b) of the Act on September 8, 2010 (74 FR 54652).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2010–32052 Filed 12–21–10; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–316N]

RIN 1117–AB18

Procedures for the Surrender of Unwanted Controlled Substances by Ultimate Users; Notice of Meeting

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Notice of meeting.

SUMMARY: The Drug Enforcement Administration (DEA) is conducting a public meeting to discuss procedures for the surrender of unwanted controlled substances by ultimate users and long term care facilities in the development of regulations to implement the Secure and Responsible Drug Disposal Act of 2010. Specifically, DEA invites all interested persons, including ultimate users, pharmacies, law enforcement, reverse distributors, and other third parties to express their views at the meeting or by written comment concerning the most safe and effective method of disposal of controlled substances consistent with the Controlled Substances Act and the Secure and Responsible Drug Disposal Act of 2010.

DATES: This meeting will be held Wednesday, January 19, 2011, and Thursday, January 20, 2011, 9 a.m. until 5:30 p.m. Check-in will begin at 8 a.m. This meeting will be held at the Mayflower Renaissance Washington, DC Hotel, 1127 Connecticut Avenue, NW., Washington, DC 20036; (202) 347–3000.

MEETING ATTENDANCE: Persons wishing to attend this meeting, space permitting, must provide attendee information to the Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, via e-mail: *dea.diversion.policy@usdoj.gov.* DEA will only accept requests to attend this public meeting by e-mail. Please include "Disposal meeting attendee information" in the subject line of the e-mail. Persons wishing to attend this meeting must provide the information requested under "Meeting Participation" to the Liaison and Policy Section via e-mail no later than January 12, 2011. There is no fee to register for the meeting and registrations will be accepted on a first-come, first-served basis. Early registration is encouraged because seating is limited.

MEETING PRESENTATIONS: DEA is accepting requests to make limited oral presentations during the public meeting, as discussed further in this document. Persons wishing to give an oral presentation at this meeting, space and time permitting, must provide attendee information and indicate the desire to present at this public meeting to the Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, via e-mail to *dea.diversion.policy@usdoj.gov.* DEA will only accept requests to present at this public meeting by e-mail. Please include "Disposal meeting: Request to present" in the subject line of the e-mail.

Persons wishing to give an oral presentation at this meeting must provide the information requested under "Meeting Participation" to the Liaison and Policy Section no later than January 7, 2011. Persons and groups having similar interests may wish to consider consolidating their information for an oral presentation through a single representative. After reviewing the requests to present, DEA will respond to all persons that request an oral presentation to notify them of the status of their request. If selected to give an oral presentation, DEA will notify the presenting person or party of the amount of time available to present and the approximate time the participant's presentation is scheduled to begin.

SUBMISSION OF WRITTEN COMMENTS: DEA is accepting written comments as discussed further in this document. Commenters should reference "Docket No. DEA–316" on all electronic and written correspondence. Written comments must be postmarked and electronic comments must be submitted on or before January 12, 2011. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after midnight Eastern Time on the last day of the comment period.

Comments may be sent electronically through *http://www.regulations.gov* using the electronic comment form provided on that site. Please note that DEA is requesting that electronic comments be submitted before midnight Eastern time on the day the comment period closes because *http://www.regulations.gov* terminates the public's ability to submit comments at midnight Eastern time on the day the comment period closes. Commenters in time zones other than Eastern time may want to consider this so that their electronic comments are received.

Written comments sent via regular or express mail should be sent to the Drug Enforcement Administration, *Attention:* DEA Federal Register Representative/ODL, 8701 Morrissette Drive, Springfield, VA 22152. All comments sent via regular or express mail will be considered timely if postmarked on the day the comment period closes.

FOR FURTHER INFORMATION CONTACT: Mark W. Caverly, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152, *telephone:* (202) 307–7297.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments: All submitted comments will be made available to be viewed on the Web site: *http://www.regulations.gov* prior to the public meeting. A link to this electronic docket will be available at the DEA Diversion Control Program Web site, *http://www.deadiversion.usdoj.gov.*

Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov* and in the Drug Enforcement Administration's public docket. Such information includes personal identifying information (such as your name, address, *etc.*) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, *etc.*) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase "*Personal Identifying Information*" in the first paragraph of your comment. You must also place all the personal identifying information you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase "*Confidential Business Informationm*" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personal identifying information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, will be posted online and placed in the Drug Enforcement Administration's public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency's public docket file in person by appointment, *please see* the **FOR FURTHER INFORMATION CONTACT** paragraph.

Background

The nonmedical use of prescription drugs is a growing problem in the United States, particularly among teenagers. According to the Department of Justice's 2009 National Prescription Drug Threat Assessment, unintentional overdose deaths involving prescription opioids increased 114 percent from 2001 to 2005, and the number of treatment admissions for prescription opioids increased 74 percent from 2002 to 2006. Teens abuse prescription drugs more than any illicit drug except marijuana—more than cocaine, heroin, and methamphetamine combined.[1] In 2009, 2.2 million (nearly one third (28.6%) of first time drug abusers) persons age 12 or older abused prescription drugs.[2]

DEA recognizes that abuse of prescription controlled substances is a significant issue in our nation's communities. When originally enacted in 1970, the Controlled Substances Act (CSA) and its implementing regulations did not contemplate a situation in which an ultimate user would deliver previously dispensed controlled substances to another person or entity. The CSA defines an ultimate user of a controlled substance as "a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household or for an animal owned by him or a member of his household" (21 U.S.C. 802(27)). Under the CSA, "the term 'distribute' means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical." (21 U.S.C. 802(11)). "The terms 'deliver' or 'delivery' mean the actual, constructive, or attempted transfer of a controlled substance or a listed chemical, whether or not there exists an agency relationship." (21 U.S.C. 802(8)).

On October 12, 2010, the Secure and Responsible Drug Disposal Act of 2010 (Pub. L. 111–273) was enacted. This act amended the Controlled Substances Act to allow ultimate users to dispose of unwanted controlled substances by delivering them to entities authorized by the Attorney General to accept them. This act also allows the Attorney General to authorize long term care facilities to dispose of their residents' controlled substances in certain instances. DEA is currently drafting regulations that would allow for the disposal of unwanted controlled substances by those not registered with DEA.

DEA has been charged by Congress with preventing diversion of controlled substances during the disposal process, and with considering the public health and safety as well as the ease and cost of program implementation and participation by various communities in drafting regulations to implement the

[1] Office of National Drug Control Policy 2008 "Prescription for Danger" January 24, 2008

[2] 2009 National Survey on Drug Use and Health (NSDUH), September 2010.

law. DEA also recognizes concerns raised by State and local governments, the healthcare industry, the law enforcement community, public and private environmental organizations, and individual citizens. In response to these concerns, DEA is holding a public meeting to gather information from interested persons regarding potential solutions within the framework of the Controlled Substances Act.

As discussed above, DEA is seeking input in the form of oral presentations and written comments. Regardless of the format, specific concerns which persons are encouraged to address are as follows:

- The process of the disposal of unwanted controlled substances could create new and unwanted avenues for diversion. What is the safest manner, in your opinion, to dispose of unwanted controlled substances while preventing diversion?
- Please explain why you believe the solution you propose would protect the public health and safety and would curtail diversion.
- Do you foresee any specific obstacles to the disposal of controlled substances in your community or geographical area? If so, what are they?
- How is the disposal of controlled substances affected by State and local laws and regulations?

Meeting Participation

This meeting is open to the public. Persons and organizations representing state and local governments; law enforcement agencies; publicly owned treatment works; DEA-registered pharmacies; DEA-registered manufacturers, distributors, and reverse distributors; ultimate users of controlled substances (*i.e.,* patients and members of their households); long term care facilities; hospices and in-home care groups; and other concerned organizations may be particularly interested in this meeting.

Persons wishing to attend, or provide oral presentations at this meeting, time and space permitting, must provide the following information to the Liaison and Policy Section using the contact information listed above no later than January 7, 2011 (request to present) and January 12, 2011 (request to attend):
Name:

Title:

Company/Organization:

Address:

Telephone:

E-mail address:

Date(s) you wish to attend:

Persons should clearly indicate in the subject line of their e-mail whether they are requesting to attend the meeting or requesting to present at the meeting, following the "*Meeting Attendance*" and "*Meeting Presentations*" sections of this notice.

Please note that this public meeting will not be webcast. A copy of the transcript from this public meeting will be made available at the DEA Diversion Control Program Web site, *http://www.deadiversion.usdoj.gov.*

Persons needing accommodations (*e.g.,* sign language interpreter) are requested to notify DEA with their accommodation request no later than January 7, 2011.

As this meeting is open to the public, confidential business information or other proprietary information should NOT be shared.

Persons wishing to provide written comments may do so no later than January 12, 2011. All comments will be made available at *http://www.regulations.gov* in the electronic docket for this notice of meeting. A link to the electronic docket may be found at *http://www.deadiversion.usdoj.gov. Please see* the "*Submission of Written Comments*" section for further information regarding providing written comments.

Dated: December 16, 2010.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control.

[FR Doc. 2010–32104 Filed 12–21–10; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Safety Defects; Examination, Correction, and Records

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) hereby announces the submission of the Mine Safety and Health Administration (MSHA)sponsored information collection request (ICR) titled, "Safety Defects; Examination, Correction, and Records," to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Submit comments on or before January 21, 2011.

ADDRESSES: A copy of this ICR, with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain* or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an e-mail to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor, Mine Safety and Health Administration (MSHA), Office of Management and Budget, Room 10235, Washington, DC 20503, *Telephone:* 202–395–4816/*Fax:* 202–395–6881 (these are not toll-free numbers), *e-mail: OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by *e-mail* at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: Federal Mine Safety and Health Act of 1977 (Mine Act) section 103(h), 30 U.S.C. 813(h), authorizes the MSHA to collect information necessary to carry out its duty in protecting the safety and health of miners.

Regulations 30 CFR 56.13015 and 57.13015 require compressed-air receivers and other unfired pressure vessels to be inspected by inspectors holding a valid National Board Commission and in accordance with the applicable chapters of the National Board Inspection Code, a Manual for Boiler and Pressure Vessels Inspectors, 1979. Safety defects found on compressed-air receivers and other unfired pressure vessels have caused injuries and fatalities in the mining industry. Records of inspections must be kept in accordance with the requirements of the National Board Inspection Code and the records must be made available to the Secretary or an authorized representative.

Regulations 30 CFR 56.13030 and 57.13030 require that fired pressure vessels (boilers) must be equipped with water level gauges, pressure gauges, automatic pressure-relief valves, blowdown piping and other safety devices approved by the American Society of Mechanical Engineers (ASME) to protect against hazards from

overpressure, flameouts, fuel interruptions and low water level. These sections also require that records of inspection and repairs be retained by the mine operator in accordance with the requirements of the ASME Boiler and Pressure Vessel Code, 1977, and the National Board Inspection Code (progressive records—no limit on retention time) and shall be made available to the Secretary or an authorized representative.

Regulations 30 CFR 56.14100 and 57.14100 require operators to inspect equipment, machinery, and tools that are to be used during a shift for safety defects before the equipment is placed in operation. Defects affecting safety are required to be corrected in a timely manner. In instances where the defect makes continued operation of the equipment hazardous to persons, the equipment must be removed from service, tagged to identify that it is out of use, and repaired before use is resumed. Safety defects on self-propelled mobile equipment account for many injuries and fatalities in the mining industry. Inspection of this equipment prior to use is required to assure safe operation. The equipment operator is required to make a visual and operational check of the various primary operating systems that affect safety, such as brakes, lights, horn, seatbelts, tires, steering, back-up alarm, windshield, cab safety glass, rear and side view mirrors, and other safety and health related items. Any defects found are required to be either corrected immediately or reported to and recorded by the mine operator prior to the timely correction. A record is not required if unsafe conditions are not present upon examination prior to use if the defect is corrected immediately. The precise format in which the record is kept is left to the discretion of the mine operator. Reports of uncorrected defects are required to be recorded by the mine operator and kept at the mine office from the date the defects are recorded, until the defects are corrected.

A competent person designated by the operator must examine each working place at least once each shift for conditions that may adversely affect safety or health. A record of such examinations must be kept by the operator for a period of one year and must be made available for review by the Secretary or an authorized representative.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is currently approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under OMB Control Number 1219–0089. The current OMB approval is scheduled to expire on December 31, 2010; however, it should be noted that information collections submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on September 16, 2010, (75 FR 56558).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference OMB Control Number 1219–0089. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: Mine Safety and Health Administration (MSHA).

Title of Collection: Safety Defects; Examination, Correction and Records.

OMB Control Number: 1219–0089.

Affected Public: Business or other for-profit.

Total Estimated Number of Respondents: 12,557.

Total Estimated Number of Responses: 11,502,241.

Total Estimated Annual Burden Hours: 1,223,104.

Total Estimated Annual Costs Burden: $47,719,911.

Dated: December 16, 2010.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2010–32038 Filed 12–21–10; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Application for Approval of a Representative's Fee in Black Lung Claim Proceedings Conducted by the U.S. Department of Labor

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) hereby announces the submission of the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) titled, "Application for Approval of a Representative's Fee in Black Lung Claim Proceedings Conducted by the U.S. Department of Labor," to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35).

DATES: Submit comments on or before January 21, 2011.

ADDRESSES: A copy of this ICR, with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain* or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an e-mail to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, *Attn:* OMB Desk Officer for the Department of Labor, Office of Workers' Compensation Programs (OWCP), Office of Management and Budget, Room 10235, Washington, DC 20503, *Telephone:* 202–395–4816/*Fax:* 202–395–6881 (these are not toll-free numbers), e-mail: *OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by e-mail at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION:

Individuals filing with the OWCP and Division of Coal Mine Workers' Compensation (DCMWC) for benefits under the Black Lung Benefits Act may elect to be represented or assisted by an attorney or other representative. For those cases that are approved, 30 U.S.C. 901 of the Black Lung Benefits Act and 20 CFR 725.365–6 of the Black Lung Regulations established standards for the information and documentation that must be submitted to the program for review so that the representative may be paid for services rendered to the claimant. Upon receipt of that evidence, the adjudicating official is required by regulation to evaluate the application and, based on the supporting information in the claim file, approve a fee for services rendered. To assist the representatives participating in the Black Lung Benefits Program a form, CM–972, was devised to provide a standardized format for submitting information required by regulation.

Form CM–972 is sent to and completed by the authorized representative of a black lung claimant whose claim has been approved for benefits. The completed form is then returned to and evaluated by the district director, administrative law judge, or appropriate appellate tribunal before whom the claimed services were performed, and a fee amount is determined.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is currently approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under OMB Control Number 1240–0011. The current OMB approval is scheduled to expire on December 31, 2010; however, it should be noted that information collections submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, *see* the related notice published in the **Federal Register** on August 20, 2010 (75 FR 51487).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to ensure the appropriate consideration, comments should reference OMB Control Number 1240–0011. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: Office of Workers' Compensation Programs (OWCP).

Title of Collection: Application for Approval of a Representative's Fee in Black Lung Claim Proceedings Conducted by the U.S. Department of Labor.

OMB Control Number: 1240–0011.

Affected Public: Private sector, Business or other for-profits.

Total Estimated Number of Respondents: 285.

Total Estimated Number of Responses: 285.

Total Estimated Annual Burden Hours: 200.

Total Estimated Annual Costs Burden: $0.

Dated: December 16, 2010.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2010–32088 Filed 12–21–10; 8:45 am]

BILLING CODE 4510–CK–P

DEPARTMENT OF LABOR

Bureau of Labor Statistics

Proposed Collection, Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c) (2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The Bureau of Labor Statistics (BLS) is soliciting comments concerning the proposed revision of the "National Longitudinal Survey of Youth 1997." A copy of the proposed information collection request (ICR) can be obtained by contacting the individual listed in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the Addresses section below on or before *February 22, 2011.*

ADDRESSES: Send comments to Carol Rowan, BLS Clearance Officer, Division of Management Systems, Bureau of Labor Statistics, Room 4080, 2 Massachusetts Avenue, NE., Washington, DC 20212. Written comments also may be transmitted by fax to 202–691–5111 (this is not a toll free number).

FOR FURTHER INFORMATION CONTACT: Carol Rowan, BLS Clearance Officer, 202–691–7628 (this is not a toll free number). (*See* **ADDRESSES** section.)

SUPPLEMENTARY INFORMATION:

I. Background

The National Longitudinal Survey of Youth 1997 (NLSY97) is a nationally representative sample of persons who were born in the years 1980 to 1984. These respondents were ages 12–17 when the first round of annual interviews began in 1997; the fifteenth round of annual interviews will be conducted from September 2011 to May 2012. The Bureau of Labor Statistics (BLS) contracts with the National Opinion Research Center (NORC) at the University of Chicago to conduct the NLSY97. The primary objective of the survey is to study the transition from schooling to the establishment of careers and families. The longitudinal focus of this survey requires information to be collected from the same individuals over many years in order to trace their education, training, work experience, fertility, income, and program participation.

One of the goals of the Department of Labor (DOL) is to produce and disseminate timely, accurate, and

relevant information about the U.S. labor force. The BLS contributes to this goal by gathering information about the labor force and labor market and disseminating it to policymakers and the public so that participants in those markets can make more informed, and thus more efficient, choices. Research based on the NLSY97 contributes to the formation of national policy in the areas of education, training, work experience, fertility, income, and program participation. In addition to the reports that the BLS produces based on data from the NLSY97, members of the academic community publish articles and reports based on NLSY97 data for the DOL and other funding agencies. To date, approximately 160 articles examining NLSY97 data have been published in scholarly journals. The survey design provides data gathered from the same respondents over time to form the only dataset that contains this type of information for this important population group. Without the collection of these data, an accurate longitudinal dataset could not be provided to researchers and policymakers, thus adversely affecting the DOL's ability to perform its policy- and report-making activities.

II. Current Action

The BLS seeks approval to conduct round 15 of annual interviews of the NLSY97. Respondents to the NLSY97 will undergo an interview of approximately 65 minutes during which they will answer questions about schooling and labor market experiences, family relationships, and community background.

During the fielding period for the main round 15 interviews, about 2 percent of respondents will be asked to participate in a brief validation interview a few weeks after the initial interview. The purpose of the validation interview is to verify that the initial interview took place as the interviewer reported and to assess the data quality of selected questionnaire items.

The BLS plans to record randomly selected segments of the main interviews during round 15. Recording interviews helps the BLS and NORC to ensure that the interviews actually took place and that interviewers are reading the questions exactly as worded and entering the responses properly. Recording also helps to identify parts of the interview that might be causing problems or misunderstanding for interviewers or respondents. Each respondent will be informed that the interview may be recorded for quality control, testing, and training purposes. If the respondent objects to the recording of the interview, the interviewer will confirm to the respondent that the interview will not be recorded and then proceed with the interview.

During round 15, the BLS proposes to administer a noninterview respondent questionnaire to sample members who have missed at least five consecutive rounds and who do not complete the round 15 interview on first approach. Responses to this questionnaire will enable the BLS and NORC to learn more about long-term nonrespondents and therefore understand attrition patterns and any nonresponse bias. Other changes in round 15 include collecting permission forms from respondents to obtain their college transcripts. Permission forms were sought in round 14 from respondents who had received a high school diploma or GED credential or completed coursework in a postsecondary degree program. During round 15, BLS and NORC plan to seek permission forms from individuals who have not yet provided one, primarily those who did not complete the round 14 interview or who completed it by phone rather than in person.

The round 15 questionnaire includes questions on work schedules for respondents and their spouses or partners. The round 15 questionnaire also includes questions about the lowest wage at which a respondent would accept a job offer (known to labor economists as the reservation wage) and about the hours of desired work for such an offer. Questions will be asked about respondents' handedness, or left/right dominance, which is of interest to psychologists and neurologists, who have documented handedness as predictive of later neurological conditions. In addition, handedness has been studied as a predictor of workplace injuries.

As in prior rounds of the NLSY97, round 15 will include a pretest conducted several months before the main fielding to test survey procedures and questions and resolve problems before the main fielding begins. The Round 15 pretest will include a trial collection of birth certificates on a small number of survey respondents. Birth certificates are the optimal source of information about birth weight, a measure of considerable research interest given its relationship with child development, lifetime obesity, and other outcomes. This trial collection of birth certificates will provide insight into respondent reactions and concerns regarding the release of administrative records and the logistical issues surrounding the handling, acquiring, and coding of such documents. The round 15 pretest also will include a trial Internet collection of selected information used to locate respondents for interviews. The purpose of the trial is to determine whether Internet collection yields information of higher quality when compared to the current method of collecting the information as part of the interview. The Internet trial also will be used to assess respondent acceptance of Internet collection generally and whether such collection can reduce respondent burden without reducing the quality of the survey information.

III. Desired Focus of Comments

The Bureau of Labor Statistics is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

Type of Review: Revision of a currently approved collection.

Agency: Bureau of Labor Statistics.

Title: National Longitudinal Survey of Youth 1997.

OMB Number: 1220–0157.

Affected Public: Individuals or households.

Form	Total respondents	Frequency	Total responses	Average time per response	Estimated total burden
NLSY97 Pretest: July–August 2011 ..	150	Annually	150	65 minutes	163 hours.

Form	Total respondents	Frequency	Total responses	Average time per response	Estimated total burden
Collection of birth certificates in the NLSY97 Pretest: July–August 2011.	135	Once	135	1.5 minutes	3.4 hours.
Main NLSY97: September 2011–May 2012.	7,400	Annually	7,400	65 minutes	8,017 hours.
Round 15 Validation Interview	147	Annually	147	4 minutes	10 hours.
Noninterview Respondent Questionnaire.	130	Annually	130	10 minutes	22 hours.
College Transcript Release Form	2,500	Once	2,500	1.5 minutes	62.5 hours.
TOTALS	7,680		10,462		8,278 hours.

The difference between the total number of respondents and the total number of responses reflects the fact that about 2,500 are expected to complete the main interview and the college transcript permission form. In addition, about 147 respondents will be interviewed twice, once in the main survey and a second time in the 4-minute validation interview. Finally, the 135 pretest respondents expected to provide birth certificates or permission forms are included among the 150 respondents expected to complete the Round 15 pretest.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they also will become a matter of public record.

Signed at Washington, DC, this 16th day of December 2010.

Kimberley D. Hill,

Chief, Division of Management Systems, Bureau of Labor Statistics.

[FR Doc. 2010–32155 Filed 12–21–10; 8:45 am]

BILLING CODE 4510–24–P

OFFICE OF MANAGEMENT AND BUDGET

Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery

AGENCY: Office of Management and Budget (OMB).

ACTION: Notice and request for comments.

SUMMARY: As part of a Federal Government-wide effort to streamline the process to seek feedback from the public on service delivery, OMB is coordinating the development of the following proposed Generic Information Collection Request (Generic ICR): "Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery" for approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et. seq.*). This notice announces that agencies intend to submit this collection to OMB for approval and solicits comments on specific aspects for the proposed information collection,

A copy of the draft supporting statement is available at *http://www.regulations.gov,* (*see* Docket ID OMB–2010–0021). Following review and disposition of public comments on this joint 60-day notice, each Agency will submit its own Generic ICR to OMB for review and will issue its own 30-day notice to solicit additional public comments.

DATES: Consideration will be given to all comments received by February 22, 2011.

ADDRESSES: Submit comments by one of the following methods:

- *Web site: www.regulations.gov.* Direct comments to Docket ID OMB–2010–0021.
- *E-mail: ServiceDeliveryComments@omb.eop.gov.*
- *Fax:* (202) 395–7245.

Comments submitted in response to this notice may be made available to the public through relevant Web sites. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an e-mail comment, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comments that may be made available to the public notwithstanding the inclusion of the routine notice.

FOR FURTHER INFORMATION CONTACT: *ServiceDeliveryComments@omb.eop.gov.*

SUPPLEMENTARY INFORMATION:

Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery.

Abstract: The proposed information collection activity provides a means to garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. The following agencies are planning to submit this collection to OMB for approval: Department of Agriculture, Department of Commerce, Department of Defense, Department of Education, Department of Energy, Department of Health and Human Services, Department of Homeland Security Department of Housing and Urban Development, Department of the Interior, Department of Justice, Department of Labor Department of State, Department of Transportation, Department of the Treasury Department of Veterans Affairs, Environmental Protection Agency, National Aeronautics and Space Administration, Social Security Administration, Administrative Conference of the United States, Consumer Product Safety Commission, Corporation for National and Community Service, Equal Employment Opportunity Commission, Export-Import Bank of the United States, Federal Communications Commission, Federal Deposit Insurance Corporation, Federal Energy Regulatory Commission, Federal Trade Commission, Institute of Museum and Library Services, Merit Systems Protection Board, National Credit Union Administration, National Endowment for the Arts, National Endowment for the Humanities, Office of the Comptroller of the Currency, Overseas Private Investment Corporation, Peace Corps, Pension Benefit Guaranty Corporation, Railroad Retirement Board, Securities and Exchange Commission, Surface Transportation Board, Tennessee Valley Authority, U.S. Election Assistance Commission, U.S. International Trade Commission, and U.S. Access Board.

By qualitative feedback we mean information that provides useful

insights on perceptions and opinions, but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

The solicitation of feedback will target areas such as: timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable.

The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

- The collections are voluntary;
- The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government;
- The collections are non-controversial and do not raise issues of concern to other Federal agencies;
- Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future;
- Personally identifiable information (PII) is collected only to the extent necessary and is not retained;
- Information gathered is intended to be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency (if released, the agency must indicate the qualitative nature of the information);
- Information gathered will not be used for the purpose of substantially informing influential policy decisions; and
- Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: the target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Current Actions: New collection of information.

Type of Review: New Collection.

Affected Public: Individuals and Households, Businesses and Organizations, State, Local or Tribal Government.

Estimated Number of Respondents: Below is a preliminary estimate of the aggregate burden hours for this generic clearance. This estimate based on a review of past behavior of the participating agencies and by several individual agencies' estimates for this ICR. In recognition that individual agencies will differ in how often they use this generic clearance, this burden estimate assumes that ten agencies would be the heaviest users and account for approximately ten times as great a burden as the other agencies combined. Agencies will provide more refined individual estimates of burden in their subsequent notices.

Average Expected Annual Number of activities: 25,000.

Average number of Respondents per Activity: 200.

Annual responses: 5,000,000.

Frequency of Response: Once per request.

Average minutes per response: 30.

Burden hours: 2,500,000.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; to develop, acquire, install and utilize technology and systems for the purpose of collecting, validating and verifying information, processing and maintaining information, and disclosing and providing information; to train personnel and to be able to respond to a collection of information, to search data sources, to complete and review the collection of information; and to transmit or otherwise disclose the information.

All written comments will be available for public inspection Regulations.gov.

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

Shelley Metzenbaum,

Associate Director for Performance and Personnel Management.

[FR Doc. 2010–32084 Filed 12–21–10; 8:45 am]

BILLING CODE P

MILLENNIUM CHALLENGE CORPORATION

[MCC FR 10–16]

Change of Date for December 15, 2010 Millennium Challenge Corporation Board of Directors Meeting; Sunshine Act Meeting

AGENCY: Millennium Challenge Corporation.

TIME AND DATE: 10 a.m. to 12 p.m., Wednesday, January 5, 2011.

FOR FURTHER INFORMATION CONTACT: Information on the meeting may be obtained from Melvin Williams, Jr., Vice President, General Counsel and Corporate Secretary via e-mail at *Corporatesecretary@mcc.gov* or by telephone at (202) 521–3600.

Background

On November 23, 2010, the Millennium Challenge Corporation published a notice in the **Federal Register** pursuant to the Government in the Sunshine Act (5 U.S.C. 552b) stating that the MCC Board of Directors would hold a meeting December 15, 2010. (Volume 75, Number 225, page 71465) This meeting is now being moved to January 5, 2011. All other details regarding the place, status, and matters to be considered remain the same.

Amendment

The time and date of the meeting are amended to read: 10 a.m. to 12 p.m., Wednesday, January 5, 2011

Dated: December 20, 2010.

Melvin F. Williams, Jr.,

VP/General Counsel and Corporate Secretary, Millennium Challenge Corporation.

[FR Doc. 2010–32352 Filed 12–20–10; 4:15 pm]

BILLING CODE 9211–03–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–286; NRC–2010–0562]

Entergy Nuclear Operations, Inc.; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (NRC, the Commission) has granted the request of Entergy Nuclear Operations, Inc. (the licensee) to withdraw its December 15, 2009, application for proposed amendment to Facility Operating License No. DPR–64 for the Indian Point Nuclear Generating Unit No. 3, located in Westchester County, New York.

The proposed amendment would have revised the Technical Specifications pertaining to the auxiliary feedwater system.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on December 21, 2009 (74 FR 67932). However, by letter dated November 17, 2010, the licensee withdrew the proposed change.

For further details with respect to this action, see the application for amendment dated December 15, 2009, and the licensee's letter dated November 17, 2010, which withdrew the application for license amendment. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (First Floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737 or by email to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 13th day of December 2010.

For the Nuclear Regulatory Commission.

John P. Boska,

Senior Project Manager, Plant Licensing Branch I–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–32138 Filed 12–21–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2010–0344]

NUREG–1953, Confirmatory Thermal-Hydraulic Analysis To Support Specific Success Criteria in the Standardized Plant Analysis Risk Models—Surry and Peach Bottom Draft Report for Comment

AGENCY: Nuclear Regulatory Commission.

ACTION: Announcement of reopening of public comment period

SUMMARY: The Nuclear Regulatory Commission is re-opening the public comment period for the document entitled: NUREG–1953, "Confirmatory Thermal-Hydraulic Analysis to Support Specific Success Criteria in the Standardized Plant Analysis Risk Models—Surry and Peach Bottom, Draft Report for Comment." This report was originally issued for public comment via **Federal Register** Notice [75 FR 69140–69141], dated November 10, 2010 (NRC–2010–0344).

DATES: Please submit comments by February 28, 2011. Comments received after this date will be considered if it is practical to do so, but the NRC staff is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any one of the following methods. Please include Docket ID NRC–2010–0344 in the subject line of your comments. Comments submitted in writing or in electronic form will be posted on the NRC Web site and on the Federal rulemaking Web site Regulations.gov. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed.

The NRC requests that any party soliciting or aggregating comments received from other persons for submission to the NRC inform those persons that the NRC will not edit their comments to remove any identifying or contact information, and therefore, they should not include any information in their comments that they do not want publicly disclosed.

Federal Rulemaking Web site: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2010–0344. Address questions about NRC dockets to Carol Gallagher 301–492–3668; *e-mail: Carol.Gallagher@nrc.gov.*

Mail comments to: Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Division of Administrative Services, Office of Administration, *Mail Stop:* TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, or by fax to RADB at 301–492–3446.

You can access publicly available documents related to this notice using the following methods:

NRC's Public Document Room (PDR): The public may examine and have copied, for a fee, publicly available documents at the NRC's PDR, Public File Area O1 F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland.

NRC's Agencywide Documents Access and Management System (ADAMS): Publicly available documents created or received at the NRC are available

electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this page, the public can gain entry into ADAMS, which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC's PDR reference staff at 1–800–397–4209, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.* NUREG–1953 is available electronically under ADAMS Accession Number ML102940233.

Federal Rulemaking Web site: Public comments and supporting materials related to this notice can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2010–0344.

FOR FURTHER INFORMATION CONTACT: Donald Helton, Division of Risk Analysis, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. *Telephone:* 301–251–7594, *e-mail: Donald.Helton@nrc.gov.*

SUPPLEMENTARY INFORMATION: NUREG–1953, "Confirmatory Thermal-Hydraulic Analysis to Support Specific Success Criteria in the Standardized Plant Analysis Risk Models—Surry and Peach Bottom, Draft Report for Comment," investigates specific thermal-hydraulic aspects of the Surry and Peach Bottom Standardized Plant Analysis Risk models, with the goal of further strengthening the technical basis for decisionmaking that relies on the SPAR models. This analysis employs the MELCOR computer code to analyze a number of scenarios with different assumptions.

Dated at Rockville, Maryland, this 15th day of December, 2010.

For the Nuclear Regulatory Commission.

Kevin A. Coyne,

Chief, Probabilistic Risk Assessment Branch, Division of Risk Analysis, Office of Nuclear Regulatory Research.

[FR Doc. 2010–32140 Filed 12–21–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–261; NRC–2010–0062]

Carolina Power & Light Company; H.B. Robinson Steam Electric Plant, Unit No. 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption pursuant to Title 10 of the Code of Federal Regulations (10 CFR) Section 73.5, "Specific exemptions," from the implementation date for certain new requirements of 10 CFR Part 73, "Physical protection of plants and materials," for Facility Operating License No. DPR–23, issued to Carolina Power & Light Company (the licensee), for operation of the H. B. Robinson Steam Electric Plant, Unit 2 (HBRSEP), located in Darlington County, South Carolina. In accordance with 10 CFR 51.21, "Criteria for and identification of licensing and regulatory actions requiring environmental assessments," the NRC staff prepared an environmental assessment documenting its finding. The NRC staff concluded that the proposed action will have no significant environmental impact.

Environmental Assessment

Identification of the Proposed Action

The proposed action would exempt the licensee from the required implementation date of March 31, 2010, for one specific requirement of 10 CFR Part 73. Specifically, HBRSEP would be granted a second exemption, further extending the date for full compliance with one remaining item of the requirements contained in 10 CFR 73.55, from December 30, 2010, (the date specified in a prior exemption granted by NRC on March 3, 2010), until September 16, 2011. The proposed action, an extension of the schedule for completion of certain actions required by the revised 10 CFR Part 73, does not result in any additional physical changes to the reactor, fuel, plant structures, support structures, water, or land at the HBRSEP site.

The proposed action is in accordance with the licensee's application dated September 30, 2010.

The Need for the Proposed Action

The proposed exemption is needed to provide the licensee with additional time, beyond the date granted by the NRC letter dated March 3, 2010, to implement one remaining item of the two requirements in the previous exemption that involves important physical modifications to the HBRSEP security system. The licensee has performed an extensive evaluation of the revised 10 CFR Part 73 and has achieved compliance with a vast majority of the revised rule by the March 31, 2010, compliance date. However, the licensee has determined that implementation of one specific provisions of the rule will require more time to implement because they involve upgrades to the security system that require significant physical modifications (*e.g.,* the relocation of certain security assets to a new security building that will be constructed, and the addition of certain power supplies). There are several issues which have delayed the work to this point and impacted the projected schedule: (1) The complexity of the design and construction of the projects which lead to unforeseen scope growth; (2) a better understanding of the time necessary for transition and testing for the new systems; and (3) due to a fire in an electrical switchgear room, the spring refueling outage was extended beyond that originally anticipated when schedules were first developed. These issues were revealed as the design evolved from the conceptual state to a detailed design. Additional time, beyond that previously approved, is needed due the extensive redesign and review effort that was unforeseen at the conceptual design stage.

Environmental Impacts of the Proposed Action

The NRC staff has completed its environmental assessment of the proposed exemption and has concluded that the proposed action to extend the implementation deadline would not significantly affect plant safety and would not have a significant adverse effect on the probability or consequences of an accident.

The proposed action would not result in an increased radiological hazard beyond those previously analyzed in the environmental assessment and finding of no significant impact made by the Commission in promulgating its revisions to 10 CFR Part 73 as discussed in a **Federal Register** notice dated March 27, 2009 (74 FR 13967). There will be no change to radioactive effluents that affect radiation exposures to plant workers and members of the public. Therefore, no changes or different types of radiological impacts are expected as a result of the proposed exemption.

The proposed action does not result in changes to land use or water use, or result in changes to the quality or quantity of non-radiological effluents. No changes to the National Pollution Discharge Elimination System permit are needed. No effects on the aquatic or terrestrial habitat in the vicinity of the plant, or to threatened, endangered, or protected species under the Endangered Species Act, or impacts to essential fish habitat covered by the Magnuson-Stevens Act are expected. There are no impacts to the air or ambient air quality.

There are no impacts to historical and cultural resources. There would be no impact to socioeconomic resources. Therefore, no changes to or different types of non-radiological environmental

impacts are expected as a result of the proposed exemption.

Accordingly, the NRC staff concludes that there are no significant environmental impacts associated with the proposed action.

With its request to extend the implementation deadline, the licensee currently maintains a security system acceptable to the NRC and that will continue to provide acceptable physical protection of HBRSEP in lieu of the new requirements in 10 CFR Part 73. Therefore, the extension of the implementation date for one element of the new requirements of 10 CFR Part 73 to September 16, 2011, would not have any significant environmental impacts.

The NRC staff's safety evaluation will be provided as part of a letter to the licensee approving the exemption to the regulation, if granted.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the NRC staff considered denial of the proposed action (*i.e.,* the "no action" alternative). Denial of the exemption request would result in no change in current environmental impacts. If the proposed action was denied, the licensee would have to comply with the existing implementation deadline of December 30, 2010, for one remaining item of the two requirements, as granted on March 3, 2010. The environmental impacts of the proposed exemption and the "no action" alternative are similar.

Alternative Use of Resources

The action does not involve the use of any different resources than those considered in the Final Environmental Statement for the HBRSEP, dated April 1975, as supplemented through the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants: H.B. Robinson Steam Electric Plant, Unit 2—Final Report (NUREG—1437, Supplement 13)."

Agencies and Persons Consulted

In accordance with its stated policy, on December 15, 2010, the NRC staff consulted with the South Carolina State official, Susan Jenkins of the South Carolina Bureau of Land and Waste Management, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated September 30, 2010. Portions of the September 30, 2010, submittal contain proprietary and security-related information, and accordingly, a redacted version of this letter is available for public review in the Agencywide Documents Access and Management System (ADAMS), Accession No. ML102770306. This document may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the ADAMS Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.*

Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or send an e-mail to *pdr.resource@nrc.gov.*

Dated at Rockville, Maryland, this 16th day of December 2010.

For the Nuclear Regulatory Commission.

Farideh E. Saba,

Senior Project Manager, Plant Licensing Branch II–2, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–32142 Filed 12–21–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–280 and 50–281; NRC–2010–0283]

Virginia Electric and Power Company; Surry Power Station Unit Nos. 1 and 2; Exemption

1.0 Background

Virginia Electric and Power Company (the licensee) is the holder of Facility Operating License Nos. DPR–32 and DPR–37 which authorizes operation of the Surry Power Station (SURRY) Unit Nos. 1 and 2. The license provides, among other things, that the facility is subject to all rules, regulations, and Orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect.

The facility consists of a pressurized-water reactor located in Surry County, Virginia.

2.0 Request/Action

Pursuant to Title 10 of the Code of Federal Regulations (10 CFR), Section 50.12, "Specific exemptions," the Virginia Electric and Power Company (VEPCO), by letter dated February 10, 2010,[1] requested an exemption from certain requirements of 10 CFR 50.46, "Acceptance criteria for emergency core cooling systems [ECCS] for light-water nuclear power reactors," and Appendix K to 10 CFR Part 50, "ECCS Evaluation Models" (Appendix K). The regulations in 10 CFR 50.46 contain acceptance criteria for the ECCS for reactors fueled with zircaloy or ZIRLO™ cladding. In addition, Appendix K to 10 CFR Part 50 requires that the Baker-Just equation be used to predict the rates of energy release, hydrogen concentration, and cladding oxidation from the metal/water reaction. The Baker-Just equation assumed the use of a zirconium alloy different than Optimized ZIRLO™. The exemption request relates solely to the specific types of cladding material specified in these regulations. As written, the regulations presume the use of zircaloy or ZIRLO™ fuel rod cladding. Thus, an exemption from the requirements of 10 CFR 50.46 and Appendix K is needed to support the use of different fuel rod cladding material. Therefore, the licensee requested an exemption that would allow the use of Optimized ZIRLO™ fuel rod cladding at SURRY. The NRC staff will prepare a separate safety evaluation, fully addressing VEPCO's application for a related license amendment.

3.0 Discussion

Pursuant to 10 CFR 50.12, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR Part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, and are consistent with the common defense and security; and (2) when special circumstances are present. Under 10 CFR 50.12(a)(2), special circumstances include, among other things, when application of the specific regulation in the particular circumstance would not serve, or is not necessary to achieve, the underlying purpose of the rule.

[1] VEPCO letter to NRC, Agencywide Documents Access and Management System (ADAMS) Accession No. ML100470738.

Authorized by Law

This exemption would allow the use of Optimized ZIRLO™ fuel rod cladding material at SURRY. As stated above, 10 CFR 50.12 allows the NRC to grant exemptions from the requirements of 10 CFR Part 50. The NRC staff has determined that granting of the licensee's proposed exemption will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

No Undue Risk to Public Health and Safety

The underlying purpose of 10 CFR 50.46 is to establish acceptance criteria for adequate ECCS performance. By letter dated June 10, 2005, the NRC staff issued a safety evaluation (SE) [2] approving Addendum 1 to Westinghouse Topical Report WCAP–12610–P–A and CENPD–404–P–A, "Optimized ZIRLO™ (these topical reports are non-publicly available because they contain proprietary information)," wherein the NRC staff approved the use of Optimized ZIRLO™ as a fuel cladding material. The NRC staff approved the use of Optimized ZIRLO™ as a fuel cladding material based on: (1) Similarities with standard ZIRLO™, (2) demonstrated material performance, and (3) a commitment to provide irradiated data and validate fuel performance models ahead of burnups achieved in batch application. The NRC staff's safety evaluation for Optimized ZIRLO™ includes 10 conditions and limitations for its use. As previously documented in the NRC staff's review of topical reports submitted by Westinghouse Electric Company, LLC (Westinghouse), and subject to compliance with the specific conditions of approval established therein, the NRC staff finds that the applicability of these ECCS acceptance criteria to Optimized ZIRLO™ has been demonstrated by Westinghouse. Ring compression tests performed by Westinghouse on Optimized ZIRLO™ (NRC-reviewed, approved, and documented in Appendix B of WCAP–12610–P–A and CENPD–404–P–A, Addendum 1–A, "Optimized ZIRLO™") demonstrate an acceptable retention of post-quench ductility up to 10 CFR 50.46 limits of 2200 degrees Fahrenheit and 17 percent equivalent clad reacted. Furthermore, the NRC staff has concluded that oxidation measurements provided by the licensee illustrate that oxide thickness (and associated hydrogen pickup) for Optimized ZIRLO™ at any given burnup would be less than both zircaloy-4 and ZIRLO™. Hence, the NRC staff concludes that Optimized ZIRLO™ would be expected to maintain better post-quench ductility than ZIRLO™. This finding is further supported by an ongoing loss-of-coolant accident (LOCA) research program at Argonne National Laboratory, which has identified a strong correlation between cladding hydrogen content (due to in-service corrosion) and post-quench ductility.

The underlying purpose of 10 CFR Part 50, Appendix K, Section I.A.5, "Metal-Water Reaction Rate," is to ensure that cladding oxidation and hydrogen generation are appropriately limited during a LOCA and conservatively accounted for in the ECCS evaluation model. Appendix K states that the rates of energy release, hydrogen concentration, and cladding oxidation from the metal-water reaction shall be calculated using the Baker-Just equation. Since the Baker-Just equation presumes the use of zircaloy clad fuel, strict application of the rule would not permit use of the equation for Optimized ZIRLO™ cladding for determining acceptable fuel performance. However, the NRC staff has found that metal-water reaction tests performed by Westinghouse on Optimized ZIRLO™ demonstrate conservative reaction rates relative to the Baker-Just equation and are bounding for those approved for ZIRLO™ under anticipated operational occurrences and postulated accidents.

Based on the above, no new accident precursors are created by using Optimized ZIRLO™; thus, the probability of postulated accidents is not increased. Also, based on the above, the consequences of postulated accidents are not increased. Therefore, there is no undue risk to public health and safety due to using Optimized ZIRLO™.

Consistent With Common Defense and Security

The proposed exemption would allow the use of Optimized ZIRLO™ fuel rod cladding material at SURRY. This change to the plant configuration has no relation to security issues. Therefore, the common defense and security is not impacted by this exemption.

Special Circumstances

Special circumstances, in accordance with 10 CFR 50.12(a)(2)(ii), are present whenever application of the regulation in the particular circumstances is not necessary to achieve the underlying purpose of the rule. The underlying purpose of 10 CFR 50.46 and Appendix K to 10 CFR Part 50 is to establish acceptance criteria for ECCS performance. The wording of the regulations in 10 CFR 50.46 and Appendix K is not directly applicable to Optimized ZIRLO™, even though the evaluations above show that the intent of the regulation is met. Therefore, since the underlying purposes of 10 CFR 50.46 and Appendix K are achieved through the use of Optimized ZIRLO™ fuel rod cladding material, the special circumstances required by 10 CFR 50.12(a)(2)(ii) for the granting of an exemption from certain requirements of 10 CFR 50.46 and Appendix K exist.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12, the exemption is authorized by law, will not present an undue risk to the public health and safety, and is consistent with the common defense and security. Also, special circumstances are present. Therefore, the Commission hereby grants VEPCO an exemption from certain requirements of 10 CFR 50.46 and Appendix K to 10 CFR Part 50, to allow the use of Optimized ZIRLO™ fuel rod cladding material, for SURRY, Unit Nos. 1 and 2.

Pursuant to 10 CFR 51.32, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment as published in the **Federal Register** on October 5, 2010 (75 FR 61528).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 15th day of December 2010.

For the Nuclear Regulatory Commission.

Joseph G. Giitter,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–32144 Filed 12–21–10; 8:45 am]

BILLING CODE 7590–01–P

[2] ADAMS Accession No. ML051670408.

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–400; NRC–2010–0020]

Carolina Power & Light Company, Shearon Harris Nuclear Power Plant, Unit No. 1; Exemption

1.0 Background

Carolina Power & Light Company (CP&L, the licensee) is the holder of Renewed Facility Operating License No. NPF–63, which authorizes operation of the Shearon Harris Nuclear Power Plant (HNP), Unit 1. The license provides, among other things, that the facility is

subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect. The facility consists of one pressurized-water reactor located in New Hill, North Carolina.

2.0 Request/Action

Title 10 of the *Code of Federal Regulations* (10 CFR) Part 73, "Physical protection of plants and materials," Section 73.55, "Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage," published as a final rule in the **Federal Register** on March 27, 2009, effective May 26, 2009, with a full implementation date of March 31, 2010, requires licensees to protect, with high assurance, against radiological sabotage by designing and implementing comprehensive site security plans. The amendments to 10 CFR 73.55 published on March 27, 2009 (74 FR 13926), establish and update generically applicable security requirements similar to those previously imposed by Commission orders issued after the terrorist attacks of September 11, 2001, and implemented by licensees. In addition, the amendments to 10 CFR 73.55 include additional requirements to further enhance site security based upon insights gained from implementation of the post-September 11, 2001, security orders.

By letter dated February 24, 2010 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML093620908), the NRC granted an exemption to the licensee for three specific items subject to the new rule in 10 CFR 73.55, allowing the implementation of these items to be extended until December 15, 2010. The licensee has implemented all other physical security requirements established by this rulemaking prior to March 31, 2010, the required implementation date.

By letter dated September 20, 2010, the licensee requested an exemption in accordance with 10 CFR 73.5, "Specific exemptions." Specifically, the licensee requested an extension of the implementation date for one remaining item from December 15, 2010, to November 30, 2011. Portions of the licensee's September 20, 2010, letter contain security-related information and, accordingly, a redacted version of this letter is available for public review in the ADAMS No. ML102650191. The licensee requested this exemption to allow an additional extension from the current implementation date granted in the prior exemption to implement one remaining item of the requirements that involves important physical modifications to the HNP, Unit 1 security system. The licensee identified several issues that have delayed the work to this point and impacted the projected schedule, such as the existence of safety-related conduit and dedicated safe shut down equipment of HNP, Unit 1 within the area where important security modifications are planned. These issues were revealed as the design evolved from the conceptual state to a detailed design state and led to a significant increase in the project's complexity and scope of tasks to be performed. The licensee stated that additional time, beyond that previously approved, is needed due the extensive redesign and review effort that was unforeseen at the conceptual design stage. Granting an exemption would allow the licensee time to complete the necessary security modifications to meet the regulatory requirements.

3.0 Discussion of Part 73 Schedule Exemption From the March 31, 2010, Full Implementation Date

Pursuant 10 CFR 73.55(a)(1), "By March 31, 2010, each nuclear power reactor licensee, licensed under 10 CFR Part 50, shall implement the requirements of this section through its Commission-approved Physical Security Plan, Training and Qualification Plan, Safeguards Contingency Plan, and Cyber Security Plan referred to collectively hereafter as 'security plans.'" In accordance with 10 CFR 73.5, the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR Part 73 when the exemptions are authorized by law, and will not endanger life or property or the common defense and security, and are otherwise in the public interest.

NRC approval of this exemption would allow an additional extension from the implementation date granted under a previous exemption from December 15, 2010, to November 30, 2011, for one remaining item of the three requirements of the final rule. As stated above, 10 CFR 73.5 allows the NRC to grant exemptions from the requirements of 10 CFR 73. The NRC staff has determined that granting of the licensee's proposed exemption would not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemption is authorized by law.

In the draft final rule provided to the Commission, the NRC staff proposed that the requirements of the new regulation be met within 180 days. The Commission directed a change from 180 days to approximately 1 year for licensees to fully implement the new requirements. This change was incorporated into the final rule.

As noted in the final rule, the Commission anticipated that licensees would have to conduct site-specific analyses to determine what changes were necessary to implement the rule's requirements, and that changes could be accomplished through a variety of licensing mechanisms, including exemptions. Since issuance of the final rule, the Commission has rejected a request to generically extend the rule's compliance date for all operating nuclear power plants, but noted that the Commission's regulations provide mechanisms for individual licensees, with good cause, to apply for relief from the compliance date (Reference: June 4, 2009, letter from R.W. Borchardt, NRC, to M.S. Fertel, Nuclear Energy Institute (ADAMS Accession No. ML091410309)). The licensee's request for an exemption is, therefore, consistent with the approach set forth by the Commission and discussed in the June 4, 2009, letter.

Shearon Harris Schedule Exemption Request

The licensee provided detailed information in its letter dated September 20, 2010, describing the reason and justification for an exemption to extend the implementation date for the one remaining requirement. Additionally, the licensee has provided information regarding the revised scope for projects at HNP, Unit 1 and the impacts on the licensee's ability to meet the current implementation date of December 15, 2010. The existence of safety-related conduit and dedicated safe shut down (SSD) equipment of HNP, Unit 1 within the area where important security modifications are planned have delayed the work and impacted the projected schedule. A direct outside access route to the physical construction area has not been available due to design basis tornado and missile considerations for the safety-related conduits and SSD equipment. The licensee is now pursuing a design solution that will allow both temporary and ultimately permanent direct outside access to the area to ensure that the new plans will meet all regulatory requirements. The extensive redesign and review efforts that were unforeseen at the conceptual design stage need additional time beyond that previously approved. Portions of the September 20, 2010, letter contain security-related information regarding the site security plan, details of specific portions of the regulation from which the licensee

seeks exemption, justification for the additional extension request, a description of the required changes to the physical security systems, and a revised timeline with critical path activities that would enable the licensee to achieve full compliance by November 30, 2011. The timeline provides dates indicating when (1) design activities will be completed and approved, (2) the exterior missile protection plate will be modified for entry, and (3) the new and relocated equipment will be installed and tested.

The site-specific information provided within the HNP exemption request is relative to the requirements from which the licensee requested exemption and demonstrates the need for modification to meet the one specific remaining requirement of 10 CFR 73.55. The proposed implementation schedule depicts the critical activity milestones of the security system upgrades; is consistent with the licensee's solution for meeting the requirements; is consistent with the scope of the modifications and the issues and challenges identified; and is consistent with the licensee's requested compliance date.

Notwithstanding the proposed schedule exemption for this one remaining requirement, the licensee will continue to be in compliance with all other applicable physical security requirement as described in 10 CFR 73.55 and reflected in its current NRC-approved physical security program. By November 30, 2011, the HNP physical security system will be in full compliance with all of the regulatory requirements of 10 CFR 73.55, as published on March 27, 2009.

4.0 Conclusion for Part 73 Schedule Exemption Request

The NRC staff has reviewed the licensee's submittals and concludes that the licensee has provided adequate justification for its request for an extension of the previously authorized implementation date from December 15, 2010, with regard to one remaining requirement of 10 CFR 73.55, to November 30, 2011. This conclusion is based on the NRC staff's determination that the licensee has made a good faith effort to meet the requirements in a timely manner, has sufficiently described the reason for the unanticipated delays, and has provided an updated detailed schedule with adequate justification to the additional time requested for the extension.

The long-term benefits that will be realized when the security systems upgrade is complete justify extending the full compliance date with regard to the specific requirements of 10 CFR 73.55 for this particular licensee. The security measures that HNP needs additional time to implement are new requirements imposed by amendments to 10 CFR 73.55, as published on March 27, 2009, and are in addition to those required by the security orders issued in response to the events of September 11, 2001. Accordingly, an exemption from the March 31, 2010, implementation date is authorized by law and will not endanger life or property or the common defense and security, and the Commission hereby grants the requested exemption.

As per the licensee's request and the NRC's regulatory authority to grant an exemption to the March 31, 2010, implementation date for the one item specified in Attachment 1 of the CP&L letter dated September 20, 2010, the licensee is required to implement this one remaining item and be in full compliance with 10 CFR 73.55 by November 30, 2011. In achieving compliance, the licensee is reminded that it is responsible for determining the appropriate licensing mechanism (*i.e.,* 10 CFR 50.54(p) or 10 CFR 50.90) for incorporation of all necessary changes to its security plans.

In accordance with 10 CFR 51.32, "Finding of no significant impact," the Commission has previously determined that the granting of this exemption will not have a significant effect on the quality of the human environment (75 FR 77919 dated December 14, 2010).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 14th day of December 2010.

For the Nuclear Regulatory Commission.

Joseph G. Giitter,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–32145 Filed 12–21–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–346; NRC–2010–0378]

FirstEnergy Nuclear Operating Company, Davis-Besse Nuclear Power Station; Exemption

1.0 Background

FirstEnergy Nuclear Operating Company (FENOC, the licensee) is the holder of Facility Operating License No. NFP–3, which authorizes operation of the Davis-Besse Nuclear Power Station, Unit 1 (DBNPS). The license provides, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC, the Commission) now or hereafter in effect.

The facility consists of one pressurized-water reactor located in Ottawa County, Ohio.

2.0 Request/Action

Title 10 of the *Code of Federal Regulations* (10 CFR), Part 50, Appendix G requires that fracture toughness requirements for ferritic materials of pressure-retaining components of the reactor coolant pressure boundary of light-water nuclear power reactors provide adequate margins of safety during any condition of normal operation, including anticipated operational occurrences and system hydrostatic tests, to which the pressure boundary may be subjected over its service lifetime; and Section 50.61 provides fracture toughness requirements for protection against pressurized thermal shock (PTS) events. By letter dated April 15, 2009, (Agencywide Documents Access and Management System (ADAMS) Accession No. ML091130228), as supplemented by letters dated December 18, 2009, (ADAMS Accession No. ML093570103) and October 8, 2010 (ADAMS Accession No. ML102861221), FENOC proposed exemptions from the requirements of 10 CFR Part 50, Appendix G and 10 CFR 50.61, to revise certain DBNPS reactor pressure vessel (RPV) initial (unirradiated) properties using Framatome Advanced Nuclear Power Topical Report (TR) BAW–2308, Revisions 1A and 2A, "Initial RT_{NDT} of Linde 80 Weld Materials."

The licensee requested an exemption from Appendix G to 10 CFR Part 50 to replace the required use of the existing Charpy V-notch (C_v) and drop weight-based methodology and allow the use of an alternate methodology to incorporate the use of fracture toughness test data for evaluating the integrity of the DBNPS RPV circumferential beltline welds based on the use of the 1997 and 2002 editions of American Society for Testing and Materials (ASTM) Standard Test Method E 1921, "Standard Test Method for Determination of Reference Temperature T_0, for Ferritic Steels in the Transition Range," and American Society for Mechanical Engineering (ASME), *Boiler and Pressure Vessel Code* (Code), Code Case N–629, "Use of Fracture Toughness Test Data to establish Reference Temperature for Pressure Retaining materials of Section III, Division 1, Class 1." The exemption is required since Appendix G to 10 CFR Part 50, through reference to Appendix G to Section XI of the ASME Code

pursuant to 10 CFR 50.55(a), requires the use of a methodology based on C_v and drop weight data.

The licensee also requested an exemption from 10 CFR 50.61 to use an alternate methodology to allow the use of fracture toughness test data for evaluating the integrity of the DBNPS RPV circumferential beltline welds based on the use of the 1997 and 2002 editions of ASTM E 1921 and ASME Code Case N–629. The exemption is required since the methodology for evaluating RPV material fracture toughness in 10 CFR 50.61 requires the use of the C_v and drop weight data for establishing the PTS reference temperature (RT_{PTS}).

3.0 Discussion of Exemption

Pursuant to 10 CFR 50.12(a), the Commission may, upon application by any interested person or upon its own initiative, grant exemptions from the requirements of 10 CFR Part 50 when (1) the exemptions are authorized by law, will not present an undue risk to public health or safety, are consistent with the common defense and security; and (2) when special circumstances are present. These circumstances include the special circumstances that allow the licensee an exemption from the use of the C_v and drop weight-based methodology required by 10 CFR Part 50, Appendix G and 10 CFR 50.61. These exemptions only modify the methodology to be used by the licensee for demonstrating compliance with the requirements of 10 CFR Part 50, Appendix G and 10 CFR 50.61, and does not exempt the licensee from meeting any other requirement of 10 CFR Part 50, Appendix G and 10 CFR 50.61.

Authorized by Law

These exemptions would allow the licensee to use an alternate methodology to make use of fracture toughness test data for evaluating the integrity of the DBNPS RPV beltline welds, and would not result in any changes to the operation of the plant. Section 50.60(b) of 10 CFR Part 50 allows the use of alternatives to 10 CFR Part 50, Appendix G, or portions thereof, when an exemption is granted by the Commission under 10 CFR 50.12. In addition, Section 50.60(b) of 10 CFR Part 50 permits different NRC-approved methods for use in determining the initial material properties. As stated above, 10 CFR 50.12(a) allows the NRC to grant exemptions from the requirements of 10 CFR Part 50, Appendix G and 10 CFR 50.61. The NRC staff has determined that granting of the licensee's proposed exemptions will not result in a violation of the Atomic Energy Act of 1954, as amended, or the Commission's regulations. Therefore, the exemptions are authorized by law.

No Undue Risk to Public Health and Safety

The underlying purpose of Appendix G to 10 CFR Part 50 is to set forth fracture toughness requirements for ferritic materials of pressure-retaining components of the reactor coolant pressure boundary of light-water nuclear power reactors to provide adequate margins of safety during any condition of normal operation, including anticipated operational occurrences and system hydrostatic tests, to which the pressure boundary may be subjected over its service lifetime. The methodology underlying the requirements of Appendix G to 10 CFR Part 50 is based on the use of C_v and drop weight data. The licensee proposes to replace the use of the existing C_v and drop weight-based methodology by a fracture toughness-based methodology to demonstrate compliance with Appendix G to 10 CFR Part 50. The NRC staff has concluded that the exemptions are justified based on the licensee utilizing the fracture toughness methodology specified in BAW–2308, Revisions 1A and 2A, within the conditions and limitations delineated in the NRC staff's safety evaluations (SEs), dated August 4, 2005 (ADAMS Accession No. ML052070408) and March 24, 2008 (ADAMS Accession No. ML080770349). The use of the methodology specified in the NRC staff's SEs will ensure that pressure-temperature limits developed for the DBNPS RPV will continue to be based on an adequately conservative estimate of RPV material properties and ensure that the pressure-retaining components of the reactor coolant pressure boundary retain adequate margins of safety during any condition of normal operation, including anticipated operational occurrences. This exemption only modifies the methodology to be used by the licensee for demonstrating compliance with the requirements of Appendix G to 10 CFR Part 50, and does not exempt the licensee from meeting any other requirement of Appendix G to 10 CFR Part 50.

The underlying purpose of 10 CFR 50.61 is to establish requirements for evaluating the fracture toughness of RPV materials to ensure that a licensee's RPV will be protected from failure during a PTS event. The licensee seeks an exemption from 10 CFR 50.61 to use a methodology for the "determination of adjusted/indexing reference temperatures." The licensee proposes to use ASME Code Case N–629 and the methodology outlined in its submittal, which are based on the use of fracture toughness data, as an alternative to the C_v and drop weight-based methodology required by 10 CFR 50.61 for establishing the initial, unirradiated properties when calculating RT_{PTS} values. The NRC staff has concluded that the exemption is justified based on the licensee utilizing the methodology specified in the NRC staff's SE regarding TR BAW–2308, Revisions 1–A and 2–A, dated August 4, 2005, and March 24, 2008, respectively. This TR established an alternative method for determining initial (unirradiated) material reference temperatures for RPV welds manufactured using Linde 80 weld flux (i.e., "Linde 80 welds") and established weld wire heat-specific and Linde 80 weld generic values of this reference temperature. These weld wire heat-specific and Linde 80 weld generic values may be used in lieu of the nil-ductility reference temperature (RT_{NDT}) parameter, the determination of which is specified by paragraph NB–2331 of Section III of the ASME Code. Regulations associated with the determination of RPV material properties involving protection of the RPV from brittle failure or ductile rupture include Appendix G to 10 CFR Part 50 and 10 CFR 50.61, the PTS rule. These regulations require that the initial (unirradiated) material reference temperature, RT_{NDT}, be determined in accordance with the provisions of the ASME Code, and provide the process for determination of RT_{PTS}, the reference temperature RT_{NDT}, evaluated for the end of license fluence.

In TR BAW–2308, Revision 1, the Babcock and Wilcox Owners Group proposed to perform fracture toughness testing based on the application of the Master Curve evaluation procedure, which permits data obtained from sample sets tested at different temperatures to be combined, as the basis for redefining the initial (unirradiated) material properties of Linde 80 welds. NRC staff evaluated this methodology for determining Linde 80 weld initial (unirradiated) material properties and uncertainty in those properties, as well as the overall method for combining unirradiated material property measurements based on NRC-accepted values of initial (unirradiated) reference temperature (IRT_{To}), with property shifts from models in Regulatory Guide (RG) 1.99, Revision 2, "Radiation Embrittlement of Reactor Vessel Materials," which are based on C_v testing and a defined margin term to account for uncertainties in the NRC

staff SE. Table 3 in the staff's August 4, 2005, SE of BAW–2308, Revision 1, contains the NRC staff-accepted IRT_{TO} and corresponding initial uncertainty term, σ_I, for specific Linde 80 weld wire heat numbers. In accordance with the conditions and limitations outlined in the NRC staff's August 4, 2005 SE of TR BAW–2308, Revision 1, for utilizing the values in Table 3, the licensee's proposed methodology (1) utilized the appropriate NRC staff-accepted IRT_{To} and σ_I values for Linde 80 weld wire heat numbers; (2) applied the appropriate chemistry factors for temperatures greater than 167 °F (the weld wire heat-specific chemical composition, via the methodology of RG 1.99, Revision 2, indicated that higher chemistry factors are applicable); (3) applied a value of 28 °F for $\sigma\Delta$ in the margin term; and (4) submitted values for ΔRT_{NDT} and the margin term for each Linde 80 weld in the RPV through the end of the current operating license. Additionally, the NRC's SE for TR BAW–2308, Revision 2, concludes that the revised IRT_{T0} and σ_I values for Linde 80 weld materials are acceptable for referencing in plant-specific licensing applications as delineated in TR BAW–2308, Revision 2, and to the extent specified under Section 4.0, Limitations and Conditions, of the SE, which states: "Future plant-specific applications for RPVs containing weld heat 72105, and weld heat 299L44, of Linde 80 welds must use the revised IRT_{T0} and σ_I, values in TR BAW–2308, Revision 2." The staff notes that neither of these weld heats is used at DBNPS. Therefore, all conditions and limitations outlined in the NRC staff SEs for TR BAW–2308, Revisions 1–A and 2–A, have been met for DBNPS.

The use of the methodology in TR BAW–2308, Revision 1, will ensure the PTS evaluation developed for the DBNPS RPV will continue to be based on an adequately conservative estimate of RPV material properties and ensure the RPV will be protected from failure during a PTS event. Also, when additional fracture toughness data relevant to the evaluation of the DBNPS RPV welds is acquired as part of the surveillance program, this data must be incorporated into the evaluation of the DBNPS RPV fracture toughness requirements.

Based on the above, no new accident precursors are created by allowing an exemption to use an alternate methodology to comply with the requirements of 10 CFR 50.61 in determining adjusted/indexing reference temperatures, thus, the probability of postulated accidents is not increased. Also, based on the above, the consequences of postulated accidents are not increased. Therefore, there is no undue risk to public health and safety. On February 3, 2010, a new rule, 10 CFR 50.61a, "Alternate Fracture Toughness Requirements for Protection Against PTS Events," became effective. The NRC staff reviewed this new rule against the licensee's exemption request and determined that there is no effect on the exemption request. The new rule does not modify the requirements from which the licensee has sought an exemption, and the alternative provided by the new rule does not address the scope of issues associated with both 10 CFR 50.61 and 10 CFR Part 50, Appendix G that the requested exemption does.

Consistent With Common Defense and Security

The proposed exemption would allow the licensee to use an alternate methodology to allow the use of fracture toughness test data for evaluating the integrity of the DBNPS RPV beltline welds. This change has no relation to security issues. Therefore, the common defense and security is not impacted by these exemptions.

Special Circumstances

Special circumstances, in accordance with 10 CFR 50.12(a)(2)(ii), are present whenever application of the regulation in the particular circumstances is not necessary to achieve the underlying purpose of the rule. The underlying purpose of 10 CFR Part 50, Appendix G and 10 CFR 50.61 is to protect the integrity of the reactor coolant pressure boundary by ensuring that each reactor vessel material has adequate fracture toughness. Therefore, since the underlying purpose of 10 CFR Part 50, Appendix G and 10 CFR 50.61 is achieved by an alternative methodology for evaluating RPV material fracture toughness, the special circumstances required by 10 CFR 50(a)(2)(ii) for the granting of an exemption from portions of the requirements of 10 CFR Part 50, Appendix G and 10 CFR 50.61 exist.

4.0 Conclusion

The staff has reviewed the licensee's submittals and concludes that the licensee has provided adequate justification for its request for an exemption from certain requirements of Appendix G to 10 CFR Part 50 and 10 CFR 50.61, to allow an alternative methodology that is based on using fracture toughness test data to determine initial, unirradiated properties for evaluating the integrity of the DBNPS RPV beltline welds.

Accordingly, the Commission has determined that pursuant to 10 CFR 50.12, "Specific exemptions," an exemption from certain requirements of Appendix G to 10 CFR Part 50 and 10 CFR 50.61 is authorized by law and will not endanger life or property or the common defense and security, and is otherwise in the public interest.

Pursuant to 10 CFR 51.32, "Finding of no significant impact," the Commission has previously determined that the granting of this exemption will not have a significant effect on the quality of the human environment (75 FR 76498).

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 14th day of December 2010.

For the Nuclear Regulatory Commission.

Joseph G. Giitter,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–32141 Filed 12–21–10; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63551; File No. SR–CME–2010–01]

Self-Regulatory Organizations; Chicago Mercantile Exchange Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Amendments to Chicago Mercantile Exchange's Rules Governing Contract Specifications for Physically Delivered Single Security Futures

December 15, 2010.

Pursuant to Section 19(b)(7) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on December 7, 2010, Chicago Mercantile Exchange Inc. ("CME") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. CME also has filed this proposed rule change concurrently with the Commodity Futures Trading Commission ("CFTC"). CME filed a written certification with the CFTC under Section 5c(c) of the Commodity Exchange Act on November 24, 2010.

[1] 15 U.S.C. 78s(b)(7).

I. Self-Regulatory Organization's Description of the Proposed Rule Change

CME proposes to amend its Rules governing the trade of physically delivered single security futures. Specifically, the Exchange intends to delist futures on three (3) Exchange Traded Funds (ETFs), specifically the Nasdaq-100 Tracking Stock℠ ("QQQQ"), Standard & Poor's Depositary Receipts® ("SPDR") and iShares Russell 2000 ("IWM").

The text of the proposed rule changed [sic] is as follows (brackets indicate words to be deleted; italics indicate words to be added):

CHAPTER 710: PHYSICALLY DELIVERED SINGLE SECURITY FUTURES 71004. APPROVED SECURITIES

The following securities have been approved by the Board of Directors as the subject of Physically Delivered Single Security Futures Contracts:

Approved security	Unit of trading	Minimum fluctuation	Position limit in expiring contract in last 5 trading days
[Nasdaq-100 Tracking Stock℠ ("QQQQ")]	[200 Shares]	[$0.01 or $2.00 per contract]	[11,250]
[Standard & Poor's Depositary Receipts® ("SPDR")]	[100 Shares]	[$0.01 or $1.00 per contract]	[22,500]
[iShares Russell 2000 ("IWM")]	[200 Shares]	[$0.01 or $2.00 per contract]	[11,250]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

CME intends to delist futures on three (3) Exchange Traded Funds (ETFs), specifically the Nasdaq-100 Tracking Stock℠ ("QQQQ"), Standard & Poor's Depositary Receipts® ("SPDR") and iShares Russell 2000 ("IWM"), because trading activity has been *de minimis* in these products as illustrated below.

AVERAGE DAILY VOLUME

	Jan–Oct 2010	2009
Nasdaq-100 Tracking Stock℠ ("QQQQ")	1	1
Standard & Poor's Depositary Receipts® ("SPDR")	4	7
iShares Russell 2000 ("IWM")	0	0

2. Statutory Basis

CME believes that the proposed delistings are consistent with Section 6 of the Act.[2] CME believes the rule changes are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general to protect investors and the public interest, because the proposed rule change merely delists products that have had a de minimus amount of historical trading activity on CME.

B. Self-Regulatory Organization's Statement on Burden on Competition

CME does not believe that the proposed action will have an impact on competition because the proposed rule change merely delists products that have had a de minimus amount of historical trading activity on CME.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Comments on the proposed rule change have not been solicited.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective on December 7, 2010. However, CME intends to implement this delisting in such a way as to avoid impacting any current positions in these markets. Accordingly, CME will not delist any contract months while there are open positions. Rather, CME will simply refrain from listing any new contracts. To the extent that open interest declines to zero in any contract month listed subsequent to December 7, 2010, CME shall retire that contract month. Note that, as of Friday, November 12, 2010, there were a total of 14 open positions in the SPDR contract with 5 open contracts in December 2010 and 9 open contracts in January 2011. There was a total of 9 open positions in the QQQQ contract, all held in the December 2010 contract. Finally, there were zero (0) open positions held in the IWN [sic] contract.

Within 60 days of the date of effectiveness of the proposed rule change, the Commission, after consultation with the CFTC, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of Section 19(b)(1) of the Act.[3]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[2] 15 U.S.C. 78f(b).

[3] 15 U.S.C. 78s(b)(1).

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–CME–2010–01 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–CME–2010–01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange.[4] All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CME–2010–01 and should be submitted on or before January 12, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[5]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–32086 Filed 12–21–10; 8:45 am]

BILLING CODE 8011–01–P

[4] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov*.

[5] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63558; File No. SR–NYSEAmex–2010–100]

Self-Regulatory Organizations; NYSE Amex LLC; Order Approving a Proposed Rule Change Relating to Complex Orders

December 16, 2010.

I. Introduction

On October 20, 2010, NYSE Amex LLC ("NYSE Amex" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to: (i) Add to Rule 900.3NY(h) a definition of "Stock/Complex Order;" (ii) revise Rule 963NY(d) to update the provisions governing open outcry trading of Complex Orders and Stock/option Orders and apply these provisions to Stock/Complex Orders; (iii) delete Rule 963.1NY; (iv) add Rule 980NY(e) to establish an electronic Complex Order Auction ("COA"); and (v) revise other provisions of Rule 980NY to include Stock/Complex Orders. The proposed rule change was published for comment in the **Federal Register** on November 2, 2010.[3] The Commission received no comments regarding the proposal. This order approves the proposed rule change.

II. Description of the Proposal

A. Definition of Stock/Complex Order

The proposal amends Rule 900.3NY(h) to add a definition of "Stock/Complex Order." Rule 900.3NY(h)(2) defines a "Stock/Complex Order" as the purchase or sale of a Complex Order, as defined in Rule 900.3NY(e), coupled with an order to buy or sell a stated number of units of an underlying stock or a security convertible into the underlying stock ("convertible security") representing either (A) the same number of units of the underlying stock or convertible security as are represented by the options leg of the Complex Order with the least number of options contracts, or (B) the number of units of the underlying stock necessary to create a delta neutral position, but in no case in a ratio greater than eight options contracts per unit of trading of the underlying stock or convertible security established for that series by the Clearing Corporation, as represented by the options leg of the Complex Order with the least number of options contracts.

B. Revisions To Open Outcry Rules

The proposal revises paragraph (d) of Rule 963NY, "Priority and Order Allocation Procedures—Open Outcry," to update the provisions governing the trading of Complex Orders Stock/option Orders in open outcry. Rule 963NY(d), as amended, will also apply to Stock/Complex Orders trading in open outcry. According to the Exchange, the changes to Rule 963NY(d) streamline and update the text of Rule 963NY(d), but do not alter the Exchange's existing procedures for trading Complex Orders or Stock/option Orders, or the priority of quotations and orders. The Exchange notes that the Rule 963NY(d), as amended, is based on Chicago Board Options Exchange, Incorporated ("CBOE") Rule 6.45(e).[4]

Under Rule 963(d), as amended, Complex Orders, as defined in Rule 900.3NY(e), and Stock/Complex Orders, as defined in Rule 900.3(h)(2), may be executed at a net debit or credit with another ATP Holder without giving priority to equivalent bids (offers) in the individual series legs that are represented in the Trading Crowd or Customer limit orders in the Consolidated Book, provided that at least one options leg of the order betters the corresponding Customer bid (offer) in the Consolidated Book by at least one minimum trading increment, as defined in Rule 960NY (*i.e.,* $0.10, $0.50, or $0.01, as applicable), or a $0.01 increment, as determined by the Exchange on a class-by-class basis. Stock/option Orders, as defined in Rule 900.3(h)(1), have priority over equivalent bids (offers) of the trading crowd, but not over equivalent Customer bids (offers) in the Consolidated Book.

In addition, Rule 963NY(d) provides that bids and offers for Complex Orders, Stock/option Orders, and Stock/

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 63187 (October 27, 2010), 75 FR 67424 ("Notice").

[4] CBOE Rule 6.45(e) states that "A complex order as defined in Rule 6.42.01 may be executed at a net debit or credit price with another Trading Permit Holder without giving priority to equivalent bids (offers) in the individual series legs that are represented in the trading crowd or in the public customer limit order book provided at least one leg of the order betters the corresponding bid (offer) in the public customer limit order book by at least one minimum trading increment as defined in Rule 6.42 (*i.e.,* $0.10, $0.05 or $0.01, as applicable) or a $0.01 increment, which increment shall be determined by the Exchange on a class-by-class basis. Stock-option orders and security future-option orders, as defined in Rule 1.1(ii)(a) and Rule 1.1(zz)(a), respectively, have priority over bids (offers) of the trading crowd but not over bids (offers) in the public customer limit order book."

Complex Orders may be expressed in $0.01 increments regardless of the minimum increment otherwise applicable to the individual legs of the order.

The Exchange also proposes to delete Rule 963.1NY, "Complex Order Transactions—Open Outcry." According to the Exchange, Rule 963NY(d) describes priority for all Complex Orders and Stock/option Orders. The Exchange states that Rule 963.1NY describes procedures for executing Complex Orders in open outcry, but does not describe any execution priority, obligation, or privilege that is not already described in other rules. In addition, Rule 963.1NY describes procedures only for Complex Orders with two options legs, rather than for all Complex Orders. The Exchange notes, further, that Rule 963.1NY(f) describes a narrow circumstance, relating to a Locked Book Market, that was more appropriate when an Order Book Official maintained the Public Customer Book. According to the Exchange, Rule 963NY(d), as amended, addresses this and similar circumstances more clearly. Accordingly, the Exchange proposes to delete Rule 963.1NY.

C. Electronic COA

As described more fully in the Notice,[5] the Exchange proposes to adopt Rule 980NY(e), which establishes an electronic request for responses COA for Complex Orders, Stock/option Orders, and Stock/Complex Orders ("Electronic Complex Orders"). The Exchange states that the COA is similar to the electronic complex order auction provided for in CBOE Rule 6.53(d), with a priority change based on Nasdaq OMX Phlx, Inc. Rule 1080, Commentary .08(e)(vi)(A)(2). Electronic Complex Orders processed through the Exchange's COA may be executed without consideration to prices of the same complex orders that might be available on other exchanges.[6]

The Exchange may determine, on a class-by-class basis, the Electronic Complex Orders that are eligible for a COA ("COA-eligible orders"), based on the order's marketability, size, number of series, and order origin type (*i.e.,* Customer, broker-dealer that is not a Market-Maker or options exchange specialist, and/or Market-Maker or options exchange specialist).[7] Upon receipt of a COA-eligible order, and direction from the entering ATP Holder that an auction be initiated, the Exchange will send an RFR message to ATP Holders that subscribe to RFR messages.[8] The RFR message will identify the component series, the size of the order and any contingencies, but not the side of the market.[9]

Each Market-Maker with an appointment in the relevant option class, and each ATP Holder acting as agent for orders resting at the top of the Consolidated Book in the relevant option series, may submit responses to the RFR message ("RFR Responses") during the Response Time Interval.[10] RFR Responses, which may be submitted in $0.01 increments, will be ranked and displayed in the Consolidated Book.[11] The Exchange will determine the length of the Response Time Interval, which will not exceed one second.[12] The obligations of Rule 935NY, "Order Exposure Requirements," are separate from the duration of the Response Time Interval.[13]

RFR Responses may be modified, but may not be withdrawn, at any time prior to the end of the Response Time Interval.[14] At the end of the Response Time Interval, RFR Responses are firm with respect to the COA-eligible order, and RFR Responses that exceed the size of the COA-eligible order are also firm with respect to other incoming COA-eligible orders and RFR Responses that are received during the Response Time Interval.[15] Any RFR Responses that are not accepted in full or in a permissible ratio will expire at the end of the Response Time Interval.[16]

At the conclusion of the Response Time Interval, a COA-eligible order will be executed in whole or in part against the best priced contra side interest.[17] At the same net price, a COA-eligible order will execute first against individual orders and quotes in the leg markets resting in the Consolidated Book prior to the initiation of the COA, provided that the COA-eligible order can be executed in full, or in a permissible ratio, by orders and quotes in the Consolidated Book; second, against Customer Electronic Complex Orders resting in the Consolidated Book before, or that are received during, the Response Time Interval, and Customer RFR Responses, allocated on a size pro rata basis as defined in Rule 964NY(b)(3); and third, against non-Customer Electronic Complex Orders resting in the Consolidated Book or placed in the Consolidated Book during the Response Time Interval, and non-Customer RFR Responses, allocated on a size pro rata basis as defined in Rule 964NY(b)(3).[18] Individual orders and quotes in the leg markets that cause the derived Complex Best Bid/Offer to be improved during the COA and match the best RFR Responses and/or Electronic Complex Orders received during the Response Time Interval will be filled after Electronic Complex Orders and RFR Responses at the same net price.[19] Any unexecuted portion of a COA-eligible order will be placed in the Consolidated Book or, if marketable, will initiate another COA.[20]

The COA rules also address the handling of unrelated Electronic Complex Orders received during a COA,[21] and the effect of a change in the best bid or offer in the leg markets.[22]

A pattern or practice of submitting unrelated orders that cause a COA to conclude early, or the dissemination to third parties of information related to COA-eligible orders, will be deemed

[5] *See* note 3, *supra.*

[6] *See* Rule 980NY(e)(1).

[7] *See* Rule 980NY(e)(1)(A).

[8] *See* Rule 980NY(e)(2).

[9] *Id.*

[10] *See* Rule 980NY(e)(4).

[11] *Id.*

[12] *See* Rule 980NY(e)(3).

[13] *Id.* Rule 935NY provides that: "With respect to orders routed to the NYSE Amex System, Users may not execute as principal orders they represent as agent unless (i) agency orders are first exposed on the Exchange for at least one (1) second or (ii) the User has been bidding or offering on the Exchange for at least one (1) second prior to receiving an agency order that is executable against such bid or offer."

[14] *See* Rule 980NY(e)(7).

[15] *Id.*

[16] *Id.*

[17] *See* Rule 980NY(e)(5) and (6).

[18] *See* Rule 980NY(e)(6)(A)–(C).

[19] *See* Rule 980NY(e)(6)(D).

[20] *See* Rule 980NY(e)(5).

[21] Incoming Electronic Complex Orders received during the Response Time Interval that are on the opposite side of the market from, and marketable against, the COA-eligible order will be ranked and executed in price/time priority with RFR Responses by account type, as provided in Rule 980NY(e)(6), and any remaining balance of the initiating COA-eligible order or the incoming Electronic Complex Order will be placed in the Consolidated Book. Incoming COA-eligible orders received during the Response Time Interval that are one the same side of the market and at a price that is equal to the price of the original COA-eligible order will join the COA, and a message with the updated size will be published. The incoming order(s) and the initiating COA-eligible order will be ranked and executed in price/time priority, and any remaining balance of the initiating order or the incoming order(s) will be placed in the Consolidated Book. Similarly, an incoming COA-eligible order on the same side of the market as the original COA-eligible order with a price that is worse than the price of the original COA-eligible order will join the COA, and will be ranked and executed with the initiating COA-eligible order in price/time priority. An incoming COA-eligible order on the same side of the market as the original COA-eligible order with a price that is better than the price of the original COA-eligible order will cause the auction to end, and the initiating COA-eligible order will be executed in accordance with Rule 980NY(e)(6). The COA-eligible order that caused the auction to end will then be executed, and any unexecuted portion will either be placed in the Consolidated Book or, if marketable, will initiate another COA. *See* Rule 980NY(e)(8).

[22] *See* Rule 980NY(e)(9).

conduct inconsistent with just and equitable principles of trade.[23]

D. Additional Changes

The proposal modifies Rule 980NY, Commentary .02 to provide that at least one leg of an Electronic Complex Order must trade at a price that is a least $0.01 better than the corresponding Customer bid or offer in the Consolidated Book if the Exchange has designated the options class as eligible for COAs. The proposal also amends Rule 980NY, Commentary .03(a) to require the execution of the stock component of a Stock/Complex Order to be consistent with the rules of the stock execution venue. In addition, the proposal revises Rule 980NY, Commentary .03(c) to establish the execution sequence for Stock/Complex Orders submitted to the Exchange's Complex Matching Engine ("CME"). The proposal also amends Rule 980NY, Commentary .03(d), to provide that the requirement to trade with existing Customer interest at the Exchange's best bid (offer) before executing the options legs of a Stock/Complex Order will apply only if there are Customer orders at the best bid (offer) for each of the options legs of the Stock/Complex Order.

III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[24] In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,[25] which requires, in part, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission finds that the proposal is designed to facilitate the trading of Complex Orders, Stock/option Orders, and Stock/Complex Orders on the Exchange.

Rule 900.3NY(h)(2) defines a new order type, the Stock/Complex Order, that could provide market participants with flexibility by permitting orders composed of an underlying stock or convertible security and multiple options legs. As discussed above, a Stock/Complex Order must be comprised of a Complex Order, as defined in Rule 900.3NY(e), and a stock leg.[26] Under the proposal, the options legs of a Stock/Complex Order must (a) satisfy the conditions in the definition of Complex Order; [27] and (b) at least one options leg of a Complex Order or a Stock/Complex Order must trade at a price that is better than the corresponding Customer bid or offer for the same series.[28] Accordingly, the priority provisions applicable to Stock/Complex Orders are consistent with the priority provisions applicable to Complex Orders.

Rule 963NY(d), as amended, sets forth the procedures and priority requirements for Complex Orders, Stock/option Orders, and Stock/Complex Orders trading in open outcry. As described more fully above, Rule 963NY(d) states that Complex Orders and Stock/Complex Orders may be executed at a net debt or credit with another ATP Holder without giving priority to equivalent bids (offers) in the individual series legs that are represented in the Trading Crowd or Customer limit orders in the Consolidated Book, provided that at least one options leg of the order betters the corresponding Customer bid (offer) by at least one minimum trading increment or by a $0.01 increment, as applicable. Stock/option Orders have priority over equivalent bids (offers) in the Trading Crowd, but not over equivalent Customer bids (offers) in the Consolidated Book. The Commission notes that Rule 963NY(d), as amended, is substantially similar to CBOE Rule 6.45(e). According to the Exchange, the proposal streamlines and updates Rule 963NY(d), but does not substantively alter the procedures or priorities for trading Complex Order and Stock/option Orders in open outcry.

The proposal also applies the priorities and procedures in Rule 963NY(d) to Stock/Complex Orders. The Commission believes that it is reasonable to apply these procedures and priorities to Stock/Complex Orders to provide consistent treatment of Complex Orders, which are comprised of multiple options legs, and Stock/Complex Orders, which are comprised of multiple options legs and the underlying stock or convertible security. The Commission believes, further, that the changes to Rule 963NY(d), together with the deletion of Rule 963.1NY, which has become outdated, should help to assure that the Exchange's rules clearly describe the procedures and priorities for executing Complex Orders, Stock/Complex Orders, and Stock/option Orders in open outcry.

The Commission believes that the electronic COA provided in new Rule 980NY(e) could facilitate the trading of Complex Orders, Stock/Complex Orders, and Stock/option Orders and provide price improvement opportunities for these orders. As described more fully above, Market Makers with an appointment in the relevant options class and ATP Holders acting as agent for orders resting at the top of the Consolidated Book will be able to submit RFR Responses. At the conclusion of a COA, the auctioned order may execute against individual orders or quotes, Customer Electronic Complex Orders or RFR Responses, or non-Customer Electronic Complex Orders or RFR Responses, as provided in Rule 980NY(e)(6). The Commission notes that the Exchange's COA is substantially similar to the electronic complex order auction provided under CBOE Rule 6.53C(d).

The proposal revises Rule 980NY, Commentary .02, to provide that, for options classes designated as eligible for COAs, at least one leg of an Electronic Complex Order must trade at a price that is better than the corresponding Customer bids or offers in the same series in the Consolidated Book by at least $0.01. The Commission believes that the $0.01 price improvement requirement is appropriate in this circumstance in light of the price competition for Electronic Complex Orders driven by the Consolidated Book and the availability of the COA.

In addition, the Commission notes that the changes to Rule 980NY, Commentary .03, relating to the electronic trading of Stock/Complex Orders, are consistent with the treatment in CBOE Rule 6.53C, Commentary .06, of orders composed of stock and multiple options legs. The requirement in Rule 980NY, Commentary .03(a) that the stock leg of a Stock/Complex Order be executed consistent with the rules of the stock execution venue is consistent with the requirement in CBOE Rule 6.53C, Commentary .06(a), that the stock leg of an order be executed consistent with the order execution rules of the CBOE Stock

[23] *See* Rule 980NY(e), Commentary .04.

[24] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[25] 15 U.S.C. 78f(b)(5).

[26] *See* Rule 900.3NY(h)(2).

[27] *See* Rule 900.3NY(e). Specifically, Rule 900.3NY(e) states that a Complex Order is an order involving the simultaneous purchase and/or sale of two or more different option series in the same underlying security, for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for the purpose of executing a particular investment strategy.

[28] *See* Rules 963NY(d) and 980NY, Commentary .02.

Exchange. The execution sequence for Stock/Complex Orders in Rule 980NY, Commentary .03(b) for orders submitted to the Exchange's CME is consistent with the execution sequence set forth in CBOE Rule 6.53C, Commentary .06(c), and the requirement in Rule 980NY, Commentary .03(d) to trade with Customer orders only if there are Customer orders at the Exchange's best quote for each of the options legs of a Stock/Complex Order is consistent with CBOE Rule 6.53C, Commentary .06(f).

Rule 980NY, Commentary .04 provides that a pattern or practice of submitting unrelated orders that cause a COA to conclude early will be deemed conduct inconsistent with just and equitable principles of trade, as will the dissemination to third parties of information related to COA-eligible orders. These provisions, which are comparable to CBOE Rule 6.53C, Commentary .05, will require the Exchange to surveil for, and should help to deter, potential abuses of the COA process. Finally, the Commission notes that the order exposure obligations in Rule 935NY apply to orders submitted to a COA, and that these order exposure obligations are separate from the duration of the Response Time Interval.[29]

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[30] that the proposed rule change (File No. SR–NYSEAmex–2010–100) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–32089 Filed 12–21–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63561; File No. SR–FINRA–2010–066]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Update a Cross-Reference in FINRA Rule 2232 (Customer Confirmations)

December 16, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 13, 2010, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as "constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule" under Section 19(b)(3)(A)(i) of the Act[3] and Rule 19b–4(f)(1) thereunder,[4] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to update a certain cross-reference in FINRA Rule 2232 (Customer Confirmations) to reflect changes adopted in the consolidated FINRA rulebook.

The text of the proposed rule change is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA, on the Commission's Web site at *http://www.sec.gov,* and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

FINRA is in the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook").[5] As part of that process, the SEC recently approved the adoption of FINRA Rule 2232 (Customer Confirmations) in the Consolidated FINRA Rulebook.[6]

The proposed rule change updates a certain cross-reference in FINRA Rule 2232 to reflect recent changes adopted in the Consolidated FINRA Rulebook, specifically, the transfer of the definition of "direct participation program" from former FINRA Rule 6642 to current FINRA Rule 6420.[7]

FINRA has filed the proposed rule change for immediate effectiveness. The implementation date of FINRA Rule 2232 will be June 17, 2011.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[8] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes the proposed rule change will provide greater clarity to members and the public regarding FINRA's rules.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

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[29] *See* Rule 980NY(e)(3) and note 13, *supra.*

[30] 15 U.S.C. 78s(b)(2).

[31] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(i).

[4] 17 CFR 240.19b–4(f)(1).

[5] The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[6] *See* Securities Exchange Act Release No. 63150 (October 21, 2010), 75 FR 66173 (October 27, 2010) (Order Approving Proposed Rule Change; File No. SR–FINRA–2009–058).

[7] *See* Securities Exchange Act Release No. 61819 (March 31, 2010), 75 FR 17806 (April 7, 2010) (Order Approving Proposed Rule Change; File No. SR–FINRA–2009–061).

[8] 15 U.S.C. 78*o*–3(b)(6).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and paragraph (f)(1) of Rule 19b–4 thereunder.[10] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–FINRA–2010–066 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–FINRA–2010–066. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–FINRA–2010–066 and should be submitted on or before January 12, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–32090 Filed 12–21–10; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(1).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63555; File No. SR–NYSEAmex–2010–118]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Commentary .11(a) to NYSE Amex Options Rule 915 To Permit Trading Options on Leveraged Exchange-Traded Notes and Broaden the Definition of Futures Linked Securities

December 15, 2010.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the "Act") [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 9, 2010, NYSE Amex LLC (the "Exchange" or "NYSE Amex") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Commentary .11(a) to NYSE Amex Options Rule 915 to: (1) Permit trading options on leveraged (multiple or inverse) exchange-traded notes, and (2) broaden the definition of "Futures-Linked [sic]. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Commentary .11(a) to NYSE Amex Options Rule 915 to: (1) Permit trading options on leveraged (multiple or inverse) exchange-traded notes ("ETNs"), and (2) broaden the definition of "Futures-Linked Securities." [4] ETNs are also known as "Index-Linked Securities," which are designed for investors who desire to participate in a specific market segment by providing exposure to one or more identifiable underlying securities, commodities, currencies, derivative instruments, or market indexes of the foregoing. Index-Linked Securities are the nonconvertible debt of an issuer that have a term of at least one (1) year but not greater than thirty (30) years. Despite the fact that Index-Linked Securities are linked to an underlying index, each trade as a single exchange-listed security. Accordingly, rules pertaining to the listing and trading of standard equity options apply to Index-Linked Securities.

Leveraged ETN Options

The Exchange proposes to amend Commentary .11(a) to NYSE Amex Options Rule 915 to permit the listing of options on leveraged (multiple or inverse) ETNs. Multiple leveraged ETNs seek to provide investment results that correspond to a specified multiple of the percentage performance on a given day of a particular Reference Asset. Inverse leveraged ETNs seek to provide investment results that correspond to

[4] The amendments proposed herein are similar to changes approved for the Chicago Board Options Exchange ("CBOE"). *See* Securities Exchange Act Release No. 63202 (October 28, 2010), 75 FR 67794 (November 3, 2010) (SR–CBOE–2010–080).

the inverse (opposite) of the percentage performance on a given day of a particular Reference Asset by a specified multiple. Multiple leveraged ETNs and inverse leveraged ETNs differ from traditional ETNs in that they do not merely correspond to the performance of a given Reference Asset, but rather attempt to match a multiple or inverse of a Reference Asset's performance.

The Barclays Long B Leveraged S&P 500 TR ETN ("BXUB"), the Barclays Long C Leveraged S&P 500 TR ETN ("BXUC"), and the UBS AG 2x Monthly Leveraged Long Exchange-Traded Access Securities (E–TRACS) linked to the Alerian MLP Infrastructure Index due July 9, 2040 ("MLPL") currently trade on the NYSE Arca equity platform and are examples of multiple leveraged ETNs. In addition, the Barclays ETN + Inverse S&P 500 VIX Short-Term Futures ETN ("XXV") currently trades on the NYSE Arca equity platform and is an example of an inverse leveraged ETN. The NYSE Arca equity platform also lists several other inverse leveraged ETNs for trading.[5]

Currently, Commentary .11 to NYSE Amex Options Rule 915 provides that securities deemed appropriate for options trading shall include shares or other securities ("Index-Linked Securities," "Commodity-Linked Securities," "Currency-Linked Securities," "Fixed Income-Linked Securities," "Futures-Linked Securities," and "Combination-Linked Securities," collectively known as "Section 107 Securities"), as defined in Sections 107D, 107E, 107F, 107G, 107H and 107I of the NYSE Amex *Company Guide*, that are principally traded on a national securities exchange and an "NMS stock" (as defined in Rule 600 of Regulation NMS under the Securities Exchange Act of 1934), and represent ownership of a security that provides for the payment at maturity, as described below:

- Index-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of an underlying index or indexes of equity securities ("Equity Reference Asset");
- Commodity-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of one or more physical commodities or commodity futures, options on commodities or other commodity derivatives or Commodity-Based Trust Shares or a basket or index of any of the foregoing ("Commodity Reference Asset");
- Currency-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of one or more currencies, or options on currencies or currency futures or other currency derivatives or Currency Trust Shares (as defined in NYSE Amex Rule 1200B–AEMI(b)), or a basket or index of any of the foregoing ("Currency Reference Asset");
- Fixed Income-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of one or more notes, bonds, debentures or evidence of indebtedness that include, but are not limited to, U.S. Department of Treasury securities ("Treasury Securities"), government-sponsored entity securities ("GSE Securities"), municipal securities, trust preferred securities, supranational debt and debt of a foreign country or a subdivision thereof or a basket or index of any of the foregoing ("Fixed Income Reference Asset");
- Futures-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of an index of: (a) Futures on Treasury Securities, GSE Securities, supranational debt and debt of a foreign country or a subdivision thereof, or options or other derivatives on any of the foregoing; (b) interest rate futures or options or derivatives on the foregoing in this subparagraph (b); or (c) CBOE Volatility Index ("VIX") futures ("Futures Reference Asset"); and
- Combination-Linked Securities are securities that provide for the payment at maturity of a cash amount based on the performance of any combination of two or more Equity Reference Assets, Commodity Reference Assets, Currency Reference Assets, Fixed Income Reference Assets, or Futures Reference Assets ("Combination Reference Asset").

For purposes of Commentary .11 to NYSE Amex Options Rule 915, Equity Reference Assets, Commodity Reference Assets, Currency Reference Assets, Fixed Income Reference Assets, Futures Reference Assets, and Combination Reference Assets collectively are referred to as "Reference Assets."

In addition, Section 107 Securities must meet the criteria and guidelines for underlying securities set forth in Commentary .01 to NYSE Amex Options Rule 915 or the Section 107 Securities must be redeemable at the option of the holder at least on a weekly basis through the issuer at a price related to the applicable underlying Reference Asset. In addition, the issuing company is obligated to issue or repurchase the securities in aggregation units for cash, or cash equivalents, satisfactory to the issuer of the Section 107 Securities that underlie the option as described in the Section 107 Securities prospectus.

The Exchange proposes to amend Commentary .11(a) to NYSE Amex Options Rule 915 to expand the type of Section 107 Securities that may underlie options to include leveraged (multiple or inverse) ETNs. To effect this change, the Exchange proposes to amend Commentary .11(a) to NYSE Amex Options Rule 915 by adding the phrase "or the leveraged (multiple or inverse) performance" to each of the subparagraphs ((1) through (6)) in that section, which sets forth the different eligible Reference Assets.[6]

The Exchange's current continuing listing standards for ETN options will continue to apply. Specifically, under Commentary .12 to NYSE Amex Options Rule 916, ETN options shall not be deemed to meet the Exchange's requirements for continued approval, and the Exchange shall not open for trading any additional series or [sic] option contracts of the class covering such Section 107 Securities whenever the underlying securities are delisted and trading in the Section 107 Securities is suspended on a national securities exchange, or the Section 107 Securities are no longer an "NMS stock" (as defined in Rule 600 of Regulation NMS under the Securities Exchange Act of 1934). In addition, the Exchange shall consider the suspension of opening transactions in any series of options of the class covering Section 107 Securities in any of the following circumstances: (1) The underlying Section 107 Security fails to comply with the terms of Commentary .11 to NYSE Amex Options Rule 915; (2) in accordance with the terms of Commentary .01 to NYSE Amex Options Rule 916, in the case of options covering Section 107 Securities when such options were approved pursuant to Commentary .11 to NYSE Amex Options Rule 915, except that, in the case of options covering Section 107 Securities approved pursuant to Commentary .11(c)(2) that are redeemable at the option of the holder at least on a weekly basis, then option contracts of the class covering such Securities may only continue to be open for trading as long as the Securities are listed on a national securities exchange and are "NMS stock" as defined in Rule

[5] These ETNs include the Barclays Short B Leveraged Inverse S&P 500 TR ETN ("BXDB"), the Barclays Short C Leveraged Inverse S&P 500 TR ETN ("BXDC") and the Barclays Short D Leveraged Inverse S&P 500 TR ETN ("BXDD").

[6] The Exchange also proposes technical corrections to the Rule to conform certain definitions. In particular, we are changing the defined term "NMS Stock" to "NMS stock" to conform to how it is defined in Rule 600 of Regulation NMS under the Securities and Exchange Act of 1934.

600 of Regulation NMS; (3) in the case of any Section 107 Security trading pursuant to Commentary .11 to NYSE Amex Options Rule 915, the value of the Reference Asset is no longer calculated or available or (4) such other event shall occur or condition exist that in the opinion of the Exchange make further dealing in such options on the Exchange inadvisable. Expanding the eligible types of ETNs for options trading under Commentary .11 to NYSE Amex Options Rule 915 will not have any effect on the rules pertaining to position and exercise limits [7] or margin.[8]

This proposal is necessary to enable the Exchange to list and trade options on shares of BXUB, BXUC, XXV, BXDB, BXDC, BXDD and MLPL. The Exchange believes the ability to trade options on leveraged (multiple or inverse) ETNs will provide investors with greater risk management tools. The proposed amendment to the Exchange's listing criteria for options on ETNs is necessary to ensure that the Exchange will be able to list options on the above listed leveraged (multiple and inverse) ETNs as well as other leveraged (multiple and inverse) ETNs that may be introduced in the future.

The Exchange represents that its existing surveillance procedures applicable to trading in options are adequate to properly monitor the trading in leveraged (multiple and inverse) ETN options.

It is expected that The Options Clearing Corporation will seek to revise the Options Disclosure Document to accommodate the listing and trading of leveraged (multiple and inverse) ETN options.

Broaden the Definition of "Futures-Linked Securities"

The second change proposed by this filing is to amend the definition of "Futures-Linked Securities" set forth in Commentary .11(a)(5) to NYSE Amex Options Rule 915. Currently, the definition of "Futures-Linked Securities" is limited to securities that provide for the payment at maturity of a cash amount based on the performance of an index of: (a) Futures on Treasury Securities, GSE Securities, supranational debt and debt of a foreign country or a subdivision thereof, or options or other derivatives on any of the foregoing; (b) interest rate futures or options or derivatives on the foregoing; or (c) CBOE VIX futures.

NYSE Amex Options Rule 915 sets forth generic listing criteria for securities that may serve as underlyings for listed options trading. The Exchange believes that the current definition of "Futures-Linked Securities" is unnecessarily restrictive and requires the Exchange to submit a filing to amend the definition each time a new ETN is issued that tracks the performance of an index of futures/options on futures that is not enumerated in the existing rule. To address this issue, the Exchange is proposing to revise the definition of "Futures-Linked Securities" to provide that they are securities that provide for the payment at maturity of a cash amount based on the performance or the leveraged (multiple or inverse) performance of an index or indexes of futures contracts or options or derivatives on futures contracts ("Futures Reference Asset"). The Exchange notes that all ETNs eligible for options trading must be principally traded on a national securities exchange and an "NMS stock." As a result, the Exchange believes that broadening the definition of "Futures-Linked Securities" by no longer specifically listing the types of futures and options on futures contracts that may be tracked by an ETN is appropriate.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Section 6(b)(5) of the Act,[10] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes the proposed rules applicable to trading pursuant to generic listing and trading criteria serve to foster investor protection.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [11] and Rule 19b–4(f)(6) thereunder.[12]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requested that the Commission waive the 30-day operative delay so that the Exchange can list and trade options on leveraged (multiple or inverse) ETNs and implement the amended definition of "Futures-Linked Securities" immediately. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[13] The Commission notes the proposal is substantively identical a proposal that was recently approved by the Commission, and does not raise any new regulatory issues.[14] For these reasons, the Commission designates the proposed rule change as operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may

[7] *See* NYSE Amex Options Rule 904, Position Limits, and Rule 905, Exercise Limits.

[8] *See* NYSE Amex Options Rule 462, Minimum Margin.

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A).

[12] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has fulfilled this requirement.

[13] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] *See supra* note 4.

temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form *(http://www.sec.gov/rules/sro.shtml);* or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEAmex–2010–118 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSEAmex–2010–118. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange.[15] All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEAmex–2010–118 and should be submitted on or before January 12, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–32087 Filed 12–21–10; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63559; File No. SR–CBOE–2010–109]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing of a Proposed Rule Change Regarding Rule 4.20—Anti-Money Laundering Compliance Program

December 16, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 2, 2010, the Chicago Board Options Exchange, Incorporated ("Exchange" or "CBOE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to amend CBOE Rule 4.20 to require all Trading Permit Holders or TPH organizations to conduct independent testing during the first calendar year of becoming a Trading Permit Holder or TPH organization. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/legal*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Rule 4.20—*Anti-Money Laundering Compliance Program* to require all Trading Permit Holders or TPH organizations to conduct independent testing during the first calendar year of becoming a Trading Permit Holder or TPH organization. CBOE Rule 4.20 generally requires annual (on a calendar-year basis) independent testing for compliance. However, if the Trading Permit Holder or TPH organization does not execute transactions for customers or otherwise hold customer accounts, or act as an introducing broker with respect to customer accounts (*e.g.,* engages solely in proprietary trading or conducts business only with other broker-dealers), such "independent testing" is required every two years (on a calendar-year basis). The Exchange believes that it is prudent to amend this rule to require that all Trading Permit Holders or TPH organizations conduct testing during the first calendar year of the Trading Permit Holder or TPH organization's existence to ensure anti-money laundering compliance is in place and established at the outset of the Trading Permit Holder's or TPH organization's existence, even if they would thereafter conduct such testing every two years.

CBOE Interpretations and Policies .01 continues to provide that all Trading Permit Holders should undertake more frequent testing than required by Rule 4.20 if circumstances warrant (*e.g.,* should the business mix of the Trading Permit Holder or TPH organization materially change, in the event of a merger or acquisition, in light of a systemic weaknesss uncovered via testing of the anti-money laundering program, or in response to any other "red flags").[3]

[15] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov.*

[16] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 57044 (December 27, 2007), 73 FR 2 (January 3, 2008) (SR–CBOE–2007–130).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)[4] of the Act and the rules and regulations thereunder, in general, and furthers the objectives of Section 6(b)(5),[5] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received written comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2010–109 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–CBOE–2010–109. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2010–109 and should be submitted on or before January 12, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–32067 Filed 12–21–10; 8:45 am]

BILLING CODE 8011–01–P

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Community Express Pilot Program

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Notice of short-term extension and termination of the Community Express Pilot Program.

SUMMARY: This notice announces the termination of the Community Express Pilot Program following a four month extension to April 30, 2011. As of May 1, 2011, no new Community Express loan applications will be approved. SBA is in the process of replacing this pilot with two new lending initiatives aimed at increasing 7(a) lending in underserved communities which initiatives are expected to be available by April 30, 2011.

DATES: The Community Express Pilot Program is extended through April 30, 2011, at which time the pilot program will terminate.

FOR FURTHER INFORMATION CONTACT: Grady B. Hedgespeth, Office of Financial Assistance, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416; Telephone (202) 205–6490; *grady.hedgespeth@sba.gov*.

SUPPLEMENTARY INFORMATION: The Community Express Pilot Program was established in 1999 and was based on the Agency's SBA Express Program. Lenders approved for participation in Community Express are authorized to use the expedited loan processing procedures in place for SBA Express for lending to distressed or underserved markets. In addition, participating lenders must arrange and, when necessary, pay for appropriate management and technical assistance for their Community Express borrowers. To encourage lenders to make these loans, SBA provides its full 75–85 percent guaranty, rather than the 50 percent guaranty the Agency provides under SBA Express. The maximum loan amount under this pilot program is $250,000.

On June 30, 2008, SBA published a notice in the **Federal Register** to extend the Community Express Pilot Program through September 30, 2008, and to notify the public of SBA's plan to significantly restructure the pilot program effective October 1, 2008. The notice also indicated that the restructured pilot program would be extended through December 31, 2009 (73 FR 36950). On January 5, 2010, SBA announced that to allow time to better evaluate the results of the program changes implemented in October 2008,

the pilot program was extended again through December 31, 2010 (75 FR 473).

SBA has completed its evaluation of Community Express and has determined that the pilot program is not achieving the expected results at a reasonable cost to the taxpayers. When measured against broad program goals, Community Express has had mixed outcomes. The Community Express product has resulted in loans to new businesses, minority businesses and other underserved sectors; however, it has consistently ranked as SBA's highest loss product, even when controlling for loan size, and it has never had widespread acceptance by SBA lenders or good geographical dispersion.

Throughout its history, Community Express has had significantly higher default rates (almost 40% of loans defaulted in certain cohorts) compared with other similarly sized 7(a) loans, which also resulted in higher net losses because most Community Express loans are unsecured. In addition, the difficulty of coordinating and ensuring efficient access to quality management and technical assistance to borrowers resulted in large lenders abandoning the product a few years after its creation. Many commercial lenders may not have been willing or able to efficiently meet SBA's technical assistance delivery and reporting requirements because the provision and reporting of management and technical assistance is not normally part of their lending model. Eventually, less than 5% of SBA's active lenders were using the product and most of the activity was concentrated in a handful of lenders (three lenders comprised approximately 85% of the Community Express loan volume in recent years, one of which has been taken over by the FDIC and is no longer in operation).

SBA's Office of Inspector General (OIG) conducted a thorough review of the Community Express Pilot Program over the span of 14 months resulting in an audit report issued on August 25, 2010. The OIG identified significant issues with the pilot program, including the following: (1) Community Express has not been as effective as other 7(a) loan programs in increasing loans to underserved markets; (2) Community Express has a high cost, which is expected to significantly increase the overall 7(a) program subsidy rate; and (3) the credit scoring practices of the two most active Community Express Lenders have increased program risk. Based on the issues identified above, the central recommendation of the OIG report was that SBA *not* extend the Community Express Pilot Loan Program in its current form.

For the reasons discussed above, SBA is proposing to replace Community Express with two new 7(a) lending initiatives designed to reach underserved markets more efficiently and effectively and at a lower cost to the taxpayer. Extending Community Express four months will permit SBA time to roll out the new pilot program.

Authority: 15 U.S.C. 636(a)(25); 13 CFR 120.3.

Dated: December 16, 2010.

Karen G. Mills,

Administrator.

[FR Doc. 2010–32095 Filed 12–21–10; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Council on Underserved Communities, Establishment of and Request for Nominations

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Notice of creation of Council on Underserved Communities and request for nominations.

SUMMARY: Pursuant to the Federal Advisory Committee Act and its implementing regulations, SBA is issuing this notice to announce the creation of its Council on Underserved Communities. This advisory committee is being established to help the agency identify and address needs of small businesses in underserved urban and rural communities. With this notice SBA is also requesting nominations for members of this Council.

DATES: Submit nominations on or before 5 p.m. EST January 31, 2011.

FOR FURTHER INFORMATION CONTACT: Questions about the Council on Underserved Communities may be directed to Dan Jones, telephone (202) 205–7583, fax (202) 481–6536, e-mail *dan.jones@sba.gov* or mail, U.S. Small Business Administration, 409 3rd Street, SW. 7th Floor, Washington DC 20416.

SUPPLEMENTARY INFORMATION: Pursuant to its authority in section 8(b)(13) of the Small Business Act, (15 U.S.C. 637(b)), SBA is establishing the Council on Underserved Communities. This discretionary committee is being established in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. App.).

The Council will provide advice, ideas and opinions on SBA programs and services and issues of interest to small businesses in underserved communities. Its members provide an essential connection between SBA and small businesses in inner city and rural communities. The Council's scope of activities includes reviewing SBA current programs and policies, while working towards creating new and insightful place-based initiatives to spur economic growth, job creation, competiveness, and sustainability.

Council members will bring a number of important points of views to the Council: an understanding of the barriers to success for small business owners in underserved communities; experience working in and operating businesses in urban and rural underserved communities; challenges regarding access to capital; knowledge and experience in training and counseling entrepreneurs in underserved communities; and associations representing owners of small business in underserved communities.

The Council will have a total of twenty (20) members, 19 members-at-large and one Chair. Members may consist of current or former small business owners, community leaders, officials from small business trade associations, and academic institutions. Members shall represent the interests of underserved communities across the country, both rural and urban.

Request for Nominations

SBA is requesting nominations for the Council on Underserved Communities and encourages all qualified candidates to apply. Candidates may self nominate or be nominated by another source. SBA will be accepting nominations for membership through January 31, 2011. Please e-mail contact information and a resume or bio to *underservedcouncil@sba.gov.*

Qualifications

SBA is asking for nominations to fill the 19 at-large Council members. Members must represent at least one of the following constituencies: current or former small business owners; community leaders; small business trade associations; or academic institutions. SBA seeks candidates representing both urban and rural underserved communities.

Status

All members serve at the pleasure of the SBA Administrator and will be considered representatives. Members will not be paid for participation however, the Agency will pay travel and per diem expenses while members are attending required meetings. Council members are expected to attend all required meetings. Some meetings may be held via conference call. Initially,

nine (9) members will be appointed for a term of 2 years and eleven (11) members will be appointed for a term of 3 years. Thereafter, members will be appointed for two (2) year terms and may not serve more than three (3) terms unless SBA terminates membership sooner.

Nomination Process

Nominees should send a letter of self-nomination or a letter of nomination from a peer, professional organization or society or member of Congress. This letter must indicate which category the nominee will represent and highlight accomplishments and experience working with small businesses in urban or rural underserved communities, including personal experience as a small business owner located in an underserved community. The letter should also include the following information: full name of nominee, occupation, physical address, telephone number, and e-mail address.

All nominees are subject to a conflict of interest determination by SBA and will not be considered eligible until such determination is made. Nominees may be asked to submit additional information. Nominations must be sent to Dan Jones at *underservedcouncil@sba.gov.*

Dated: December 16, 2010.

Dan Jones,

SBA Committee Management Officer.

[FR Doc. 2010–32097 Filed 12–21–10; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Agency Information Collection Activities: Proposed Request and Comment Request

The Social Security Administration (SSA) publishes a list of information collection packages requiring clearance by the Office of Management and Budget (OMB) in compliance with Public Law (Pub. L.) 104–13, the Paperwork Reduction Act of 1995, effective October 1, 1995. This notice includes revisions to OMB-approved information collections.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility, and clarity; and ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology. Mail, email, or fax your comments and recommendations on the information collection(s) to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses or fax numbers.

(OMB)

Office of Management and Budget, Attn: Desk Officer for SSA, Fax: 202–395–6974, E-mail address: *OIRA_Submission@omb.eop.gov.*

(SSA)

Social Security Administration, DCBFM, Attn: Reports Clearance Officer, 1333 Annex Building, 6401 Security Blvd., Baltimore, MD 21235, Fax: 410–965–6400, E-mail address: *OPLM.RCO@ssa.gov.*

I. The information collections below are pending at SSA. SSA will submit them to OMB within 60 days from the date of this notice. To be sure we consider your comments, we must receive them no later than February 22, 2011. Individuals can obtain copies of the collection instruments by calling the SSA Reports Clearance Officer at 410–965–8783 or by writing to the above email address.

1. RSI/DI Quality Review Case Analysis—Sampled Number Holder; Auxiliaries/Survivors; Parent; Stewardship Annual Earnings Test—0960–0189. SSA collects information on Forms SSA–2930, SSA–2931, and SSA–2932 to establish a national payment accuracy rate for all cases in payment status, and to serve as a source of information regarding problem areas in the Retirement and Survivors Insurance (RSI) and Disability Insurance (DI) programs. SSA also uses the information to measure the accuracy rate for newly adjudicated RSI/DI cases. SSA collects information on Form SSA–4659 to evaluate and determine the effectiveness of the annual earnings test, and uses the results in developing ongoing improvements in the process. SSA sends each beneficiary an appointment letter for the interview. About 25 percent of respondents will have face-to-face contact reviews and receive one of the following letters for an appointment: SSA–L8550–U3 (Appointment Letter—Sample Individual), SSA–L8551–U3 (Appointment Letter—Sample Family), or the SSA–L8552–U3 (Appointment Letter—Rep Payee). The other 75 percent of respondents will receive a notice for a telephone contact review: either the SSA–L8553–U3 (Beneficiary Telephone Contact), or the SSA–L8554–U3 (Rep Payee Telephone Contact) notice.

To help the beneficiary prepare for the interview, we include three forms with each notice:

(1) SSA–85 (Information Needed to Review Your Social Security Claim) that lists the information the beneficiary will need to gather for the interview;

(2) SSA–2935 (Authorization to the Social Security Administration to Obtain Personal Information) so SSA can obtain information to verify the beneficiary's correct payment amount, if necessary; and

(3) SSA–8552 (Interview Confirmation) to confirm or reschedule the interview if necessary.

The respondents are a statistically valid sample of all RSI/DI beneficiaries in current pay status or their representative payees.

Type of Request: Revision of an OMB-approved information collection.

Form number	Number of responses	Frequency of response	Average burden per response (minutes)	Total annual burden (hours)
SSA–2930	1,500	1	30	750
SSA–2931	750	1	30	375
SSA–2932	100	1	20	33
SSA–4659	325	1	10	54
SSA–L8550–U3	385	1	5	32
SSA–L8551–U3	95	1	5	8
SSA–L8552–U3	35	1	5	3
SSA–L8553–U3	4,490	1	5	374
SSA–L8554–U3	670	1	5	56
SSA–8552	2,350	1	5	196
SSA–85	3,850	1	5	321
SSA–2935	2,350	1	5	196

Form number	Number of responses	Frequency of response	Average burden per response (minutes)	Total annual burden (hours)
SSA–820/821	400	1	15	100
SSA–8510	800	1	5	67
iClaim Stewardship Questions	324	1	10	54
Totals	18,424	.....	.....	2,619

2. Request for Social Security Earnings Information—20 CFR 404.810 & 401.100—0960–0525. The Social Security Act permits wage earners, or their authorized representative, to request Social Security earnings information from SSA using Form SSA–7050. SSA uses the information to verify the requestor's right to access the information and to produce the earnings statement. The respondents are wage earners and their authorized representatives.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 60,400.

Frequency of Response: 1.

Average Burden per Response: 11 minutes.

Estimated Annual Burden: 11,073.

3. Employer Reports of Special Wage Payments—20 CFR 404.428–404.429—0960–0565. SSA collects information on the SSA–131 to prevent earnings-related overpayments and to avoid erroneous withholding of benefits. SSA field offices and program service centers also use Form SSA–131 for awards and post-entitlement events requiring special wage payment verification from employers. While we need this information to ensure the correct payment of benefits, we do not require employers to respond. The respondents are large and small businesses that make special wage payments to retirees.

Type of Request: Extension of an OMB-approved information collection.

Modality of completion	Number of respondents	Frequency of response	Average burden per response (minutes)	Total annual burden (hours)
Paper Version: SSA–131 (without #6)	105,000	1	20	35,000
Paper Version: SSA–131 #6 only	1,050	1	2	35
Electronic version: BSO Special Wage Payments	26	1	5	2
Totals	106,076			35,037

4. Methods for Conducting Personal Conferences When Waiver of Recovery of a Title II or Title XVI Overpayment Cannot Be Approved—20 CFR 404.506(e)(3), 404.506(f)(8), 416.557(c)(3), and 416.557(d)(8)—0960–0769. SSA conducts personal conferences when we cannot approve a waiver of recovery of a title II or title XVI overpayment. We are required to give overpaid Social Security beneficiaries and Supplemental Security Income (SSI) recipients the right to request a waiver of recovery and automatically schedule a personal conference if we cannot approve their request for waiver of overpayment. We conduct these conferences face-to-face, by telephone, or by video teleconference. Social Security beneficiaries and recipients or their representatives may provide documents to demonstrate they are without fault in causing the overpayment and do not have the ability to repay the debt. They may submit these documents by printed form (SSA–632 (OMB # 0960–0037), Request for Waiver of Overpayment Recovery; SSA–795 (OMB # 0960–0045), Statement of Claimant or Other Person, or personal statement submitted by mail, telephone, personal contact, or other suitable method, such as fax or email. This information collection satisfies the requirements for request for waiver of recovery of an overpayment and allows individuals to pursue further levels of administrative appeal via personal conference. Respondents are Social Security beneficiaries and SSI recipients or their representatives seeking reconsideration of an SSA waiver decision.

Type of Request: Extension of an OMB-approved information collection.

Title/section & collection description	Number of responses	Frequency of response	Average burden per response (minutes)	Total annual burden (hours)
Personal conference 404.506(e)(3) submittal of additional documents for consideration at personal conferences	150,000	1	30	75,000
Personal conference 404.506(f)(8) submittal of additional mitigating financial information and verifications for consideration at personal conferences	75,000	1	30	37,500
Personal conference 416.557(c)(3) submittal of additional documents for consideration at personal conferences	100,000	1	30	50,000
Personal conference 416.557(d)(8) submittal of additional mitigating financial information and verifications for consideration at personal conferences	50,000	1	30	25,000
Total	375,000			187,500

II. SSA has submitted the information collections listed below to OMB for clearance. Your comments on the information collections would be most useful if OMB and SSA receive them within 30 days from the date of this publication. To be sure we consider your comments, we must receive them no later than January 21, 2011. You can obtain a copy of the OMB clearance packages by calling the SSA Reports Clearance Officer at 410–965–8783 or by writing to the above email address.

1. State Mental Institution Policy Review Booklet—20 CFR 404.2035, 404.2065, 416.635, & 416.665—0960–0110. SSA uses the information collected on Form SSA–9584–BK to determine whether: 1) The policies and practices of a State mental institution acting as a representative payee for SSA beneficiaries conform to SSA's regulations in the use of benefits; and 2) the institution is performing other duties and responsibilities required of a representative payee. SSA also uses the information as the basis for conducting onsite reviews of the institution and preparing subsequent reports of findings. The respondents are State mental institutions serving as representative payees for Social Security beneficiaries and SSI recipients.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 88.

Frequency of Response: 1.

Average Burden per Response: 60 minutes.

Estimated Annual Burden: 88 hours.

2. Employee Identification Statement—20 CFR 404.702—0960–0473. When two or more individuals report earnings under the same Social Security number (SSN), SSA collects information on the SSA–4156 so we can credit earnings to the correct individual and the correct SSN. We send this form to the employer to identify the employees involved, to resolve the discrepancy, and to post earnings to the correct SSN. The respondents are employers reporting erroneous wage information for an employee.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 4,750.

Frequency of Response: 1.

Average Burden per Response: 10 minutes.

Estimated Annual Burden: 792 hours.

3. Modified Benefit Formula Questionnaire—Employer—20 CFR 401 & 402—0960–0477. SSA collects information on Form SSA–58 to verify the claimant's allegations on Form SSA–150 (OMB # 0906–0395, Modified Benefits Formula Questionnaire). SSA uses the SSA–58 to determine if the modified benefit formula is applicable and when to apply it to a person's benefit. SSA sends Form SSA–58 to an employer for pension-related information, if the claimant is unable to provide it. The respondents are employers of people who are eligible after 1985 for both Social Security benefits and a pension based on work not covered by SSA.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 30,000.

Frequency of Response: 1.

Average Burden per Response: 20 minutes.

Estimated Average Burden: 10,000 hours.

4. Work Activity Report (Self-Employed Person)—20 CFR 404.1520(b), 20 CFR 1571–.1576, 20 CFR 404.1584–.1593, and 20 CFR 416.971–.976—0960–0598. SSA uses the information on Form SSA–820–U4 to determine initial or continuing eligibility for SSI payments or Social Security disability benefits. Under titles II and XVI of the Social Security Act, applicants for disability benefits and SSI payments must prove they cannot perform any kind of substantial gainful activity (SGA) generally available in the national economy for which we expect them to qualify based on age, education, and work experience. SSA needs information about this work to determine whether the applicant was (or is) engaging in SGA. Working, after a claimant becomes entitled, can cause SSA to discontinue disability benefits or SSI payments. Using information from Form SSA–820–U4, SSA can determine if we should stop the respondent's payments. The respondents are applicants and claimants for SSI or Social Security disability benefits.

Type of Request: Revision of an OMB-approved information collection.

Number of Respondents: 100,000.

Frequency of Response: 1.

Average Burden per Response: 30 minutes.

Estimated Annual Burden: 50,000 hours.

Dated: *December 16, 2010.*

Faye Lipsky,

Reports Clearance Officer, Center for Reports Clearance, Social Security Administration.

[FR Doc. 2010–32107 Filed 12–21–10; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice: 7272]

60-Day Notice of Proposed Renewal of Information Collection: Form DS–0064, Statement Regarding a Lost or Stolen Passport, 1405–0014.

ACTION: Notice of request for public comments.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection renewal described below. The purpose of this notice is to allow 60 days for public comment in the **Federal Register** preceding submission to OMB. We are conducting this process in accordance with the Paperwork Reduction Act of 1995.

- *Title of Information Collection:* Statement Regarding a Lost or Stolen Passport.
- *OMB Control Number:* 1405–0014.
- *Type of Request:* Extension of a Currently Approved Collection.
- *Originating Office:* CA/PPT/PMO/PC.
- *Form Number:* DS–0064.
- *Respondents:* Individuals or Households.
- *Estimated Number of Respondents:* 122,500.
- *Estimated Number of Responses:* 122,500.
- *Average Hours Per Response:* 5 minutes.
- *Total Estimated Burden:* 10,208 hours.
- *Frequency:* On occasion.
- *Obligation to Respond:* Required to Obtain a Benefit.

DATES: The Department will accept comments from the public up to 60 days from December 22, 2010.

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

- *E-mail: PPT-Forms-Officer@state.gov*.
- *Mail (paper, disk, or CD–ROM submissions):* Passport Forms Management Officer, U.S. Department of State, Office of Program Management and Operational Support, 2100 Pennsylvania Avenue, NW., Room 3031, Washington, DC 20037.

You must include the DS form number (if applicable), information collection title, and OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed information collection and supporting documents, to

Passport Forms Management Officer, U.S. Department of State, Office of Program Management and Operational Support, 2100 Pennsylvania Avenue, NW., Room 3031, Washington, DC 20037, who may be reached on 202–663–2457 or at *PPT-Forms-Officer@state.gov.*

SUPPLEMENTARY INFORMATION:

We are soliciting public comments to permit the Department to:

• Evaluate whether the proposed information collection is necessary for the proper performance of our functions.

• Evaluate the accuracy of our estimate of the burden of the proposed collection, including the validity of the methodology and assumptions used.

• Enhance the quality, utility, and clarity of the information to be collected.

• Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of technology.

Abstract of Proposed Collection

The form is used prior to passport issuance and solicits information relating to the loss or theft of a valid U.S. passport. The information is used by the United States Department of State to ensure that no person shall bear more than one valid or potentially valid U.S. passport book and passport card at any one time, except as authorized by the Department, and is also used to combat passport fraud and misuse.

Methodology

This form is used in conjunction with the Form DS–11, Application for a U.S. Passport, or submitted separately to report loss or theft of a U.S. passport. Passport Services collects the information when a U.S. citizen or non-citizen national applies for a new U.S. passport and has been issued a previous, still valid U.S. passport that has been lost or stolen, or when a passport holder independently reports it lost or stolen. Passport applicants can either download the form from the Internet or pick one up at any Passport Agency or Acceptance Facility.

Dated: December 15, 2010.

Barry Conway,

Deputy Assistant Secretary for Passport Services, Acting Bureau of Consular Affairs, Department of State.

[FR Doc. 2010–32135 Filed 12–21–10; 8:45 am]

BILLING CODE 4710–06–P

DEPARTMENT OF STATE

[Public Notice Number 7171]

Overseas Schools Advisory Council Notice of Meeting

The Overseas Schools Advisory Council, Department of State, will hold its Executive Committee Meeting on Thursday, January 20, 2011, at 9:30 a.m. in Conference Room 1107, Department of State Building, 2201 C Street, NW., Washington, DC. The meeting is open to the public and will last until approximately 12 p.m.

The Overseas Schools Advisory Council works closely with the U.S. business community in improving those American-sponsored schools overseas that are assisted by the Department of State and attended by dependents of U.S. Government families and children of employees of U.S. corporations and foundations abroad.

This meeting will deal with issues related to the work and the support provided by the Overseas Schools Advisory Council to the American-sponsored overseas schools. The agenda includes a review of the projects selected for the 2009 and 2010 Educational Assistance Program and a presentation on current education issues in the United States and their impact on American-sponsored overseas schools.

Members of the public may attend the meeting and join in the discussion, subject to the instructions of the Chair. Admittance of public members will be limited to the seating available. Access to the State Department is controlled, and individual building passes are required for all attendees. Persons who plan to attend should so advise the office of Dr. Keith D. Miller, Department of State, Office of Overseas Schools, Room H328, SA–1, Washington, DC 20522–0132, telephone 202–261–8200, prior to January 10, 2011. Each visitor will be asked to provide his/her date of birth and either driver's license or passport number at the time of registration and attendance, and must carry a valid photo ID to the meeting.

Personal data is requested pursuant to Public Law 99–399 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), as amended; Public Law 107–56 (USA PATRIOT Act); and Executive Order 13356. The purpose of the collection is to validate the identity of individuals who enter Department facilities. The data will be entered into the Visitor Access Control System (VACS–D) database. Please see the Privacy Impact Assessment for VACS–D at *http://www.state.gov/documents/organization/100305.pdf* for additional information.

Any requests for reasonable accommodation should be made at the time of registration. All such requests will be considered, however, requests made after January 10th might not be possible to fill. All attendees must use the C Street entrance to the building.

Dated: December 16, 2010.

Keith D. Miller,

Executive Secretary, Overseas Schools Advisory Council.

[FR Doc. 2010–32136 Filed 12–21–10; 8:45 am]

BILLING CODE 4710–05–P

TENNESSEE VALLEY AUTHORITY

Meeting of the Regional Resource Stewardship Council

AGENCY: Tennessee Valley Authority (TVA).

ACTION: Notice of Meeting.

SUMMARY: The TVA Regional Resource Stewardship Council (RRSC) will hold a meeting on Wednesday, January 19 and Thursday, January 20, 2011, to consider various matters.

The RRSC was established to advise TVA on its natural resource stewardship activities. Notice of this meeting is given under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2.

The management of the Tennessee Valley reservoirs and the lands adjacent to them has long been an integral component of TVA's mission. As part of implementing the TVA Environmental Policy, TVA is developing a Natural Resource Plan (NRP) that will help prioritize techniques for the management of TVA's biological and cultural resource management activities, recreation management activities, water resource protection and improvement activities, and lands planning. In accordance with the National Environmental Policy Act, TVA is also developing an accompanying Environmental Impact Statement (EIS) in which TVA will evaluate the preferred strategy for the NRP, as well as other viable alternative strategies. TVA would like to utilize the RRSC as a key stakeholder group throughout the development of the NRP to advise TVA on the issues, tradeoffs, and focus of environmental stewardship activities. At the January 2011 meeting, TVA will be seeking advice from the RRSC on issues regarding the key programs in each resource area, the management options and scenario planning described in the NRP, and the valuation of natural resource programs.

The meeting agenda includes the following:

1. Introductions

2. Natural Resource Plan Overview; Options for the management of biological, cultural, water, and recreational resources, and lands planning; Valuation of natural resource programs

3. RRSC Discussion Topic: The scope of the programs included in the resource area components of the NRP (*e.g.,* Biological and Cultural Resource Management, Reservoir Lands Planning, Water Resources, and Recreation) and the valuation and weighting of benefits stemming from such programs

4. Public Comments

5. RRSC Discussion and Advice

The TVA RRSC will hear opinions and views of citizens by providing a public comment session. The public comment session will be held at 10:00 a.m., EST, on Thursday, January 20. Persons wishing to speak are requested to register at the door by 9:00 a.m. on Thursday, January 20 and will be called on during the public comment period. Handout materials should be limited to one printed page. Written comments are also invited and may be mailed to the Regional Resource Stewardship Council, Tennessee Valley Authority, 400 West Summit Hill Drive, WT 11B, Knoxville, Tennessee 37902.

DATES: The meeting will be held on Wednesday, January 19 from 8:30 a.m. to 4:30 p.m., and Thursday, January 20 from 8 a.m. to 12 noon, EST.

ADDRESSES: The meeting will be held at the Sheraton Read House, 827 Broad Street, Chattanooga, Tennessee 37402, and will be open to the public. Anyone needing special access or accommodations should let the contact below know at least one week in advance.

FOR FURTHER INFORMATION CONTACT: Beth Keel, 400 West Summit Hill Drive, WT 11B, Knoxville, Tennessee 37902, (865) 632–6113.

Dated December 14, 2010.

Anda A. Ray,

Senior Vice President, Office of Environment and Research, Tennessee Valley Authority, WT 11A–K.

[FR Doc. 2010–32075 Filed 12–21–10; 8:45 am]

BILLING CODE 8120–08–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Requests for Comments; Clearance of Renewed Approval of Information Collection(s): Aviation Maintenance Technical Schools

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on September 22, 2010, vol. 75, no. 183, pages 57827–57828. The information collected is needed to determine applicant eligibility and compliance for certification of Civil Aviation mechanics and operation of aviation mechanic schools.

DATES: Written comments should be submitted by January 21, 2011.

FOR FURTHER INFORMATION CONTACT: Carla Scott on (202) 267–9895, or by e-mail at: *Carla.Scott@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0040.

Title: Aviation Maintenance Technical Schools.

Form Numbers: FAA Form 8310–6.

Type of Review: Renewal of an information collection.

Background: The collection of information is necessary to ensure that Aviation Maintenance Technician Schools meet the minimum requirements for procedures and curriculum set forth by the FAA in FAR Part 147. Applicants submit FAA Form 8310–6, Aviation Maintenance Technician School certificate and Ratings Application, to the appropriate FAA district office for review. If the application (including supporting documentation) is satisfactory, an on-site inspection is conducted. When all FAR Part 147 requirements have been met, an aviation maintenance technician school certificate with appropriate ratings is issued.

Respondents: Approximately 174 representatives of aviation maintenance technician schools.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 3.17 hours.

Estimated Total Annual Burden: 66,134 hours.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,* or faxed to (202)395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC on December 15, 2010.

Carla Scott,

FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2010–32042 Filed 12–21–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Agency Information Collection Activities: Clearance of Renewed Approval of Information Collection: Air Carriers and Commercial Operators Certification

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The Federal Register Notice with a 60-day comment period soliciting comments on the following collection of information was published on September 22, 2010, vol. 75, no. 183,

page 57829. The respondents to this information collection are CFR Part 135 and Part 121 operators. The FAA uses the information to ensure compliance and adherence to the regulations.

DATES: Written comments should be submitted by January 21, 2011.

FOR FURTHER INFORMATION CONTACT: Carla Scott on (202) 267–9895, or by e-mail at: *Carla.Scott@faa.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 2120–0593.

Title: FAR part 119—Certification: Air Carriers and Commercial Operators.

Form Numbers: FAA Form 8400–6.

Type of Review: Renewal of an information collection.

Background: This request for clearance reflects requirements necessary under parts 135, 121, and 125 to comply with part 119. The FAA uses the information it collects and reviews to insure compliance and adherence to regulations and, if necessary, take enforcement action on violators of the regulations.

Respondents: Approximately 2,445 air carriers and commercial operators.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 2.45 hours.

Estimated Total Annual Burden: 8,869 hours.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the attention of the Desk Officer, Department of Transportation/FAA, and sent via electronic mail to *oira_submission@omb.eop.gov,*or faxed to (202)395–6974, or mailed to the Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street, NW., Washington, DC 20503.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

Issued in Washington, DC, on December 15, 2010.

Carla Scott,

FAA Information Collection Clearance Officer, IT Enterprises Business Services Division, AES–200.

[FR Doc. 2010–32045 Filed 12–21–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Proposed Modification of the Philadelphia, PA, Class B Airspace Area; Public Meetings

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of meetings; correction.

SUMMARY: This action corrects an error in the notice of meetings published in the **Federal Register** on Tuesday, November 30, 2010, concerning a proposal to revise Class B airspace at Philadelphia, PA. The name and phone number of the person to contact for further information has changed from that published in the notice.

SUPPLEMENTARY INFORMATION:

History

On Tuesday, November 30, 2010, a notice of meetings was published in the **Federal Register** concerning a proposal to revise Class B airspace at Philadelphia, PA (75 FR 74127). The name and phone number of the person to contact for further information has subsequently been changed. This action provides the correct information.

Correction

In notice of meetings FR Doc. 2010–30085, as published on November 30, 2010 (75 FR 74127) on page 74127, column two, make the following correction:

FOR FURTHER INFORMATION CONTACT: Dennis Sweeney, Philadelphia ATCT/TRACON, 15 Hog Island Road, Philadelphia, PA 19153; *telephone:* 215–492–4100, extension 287.

Issued in Washington, DC, on December 14, 2010.

Edith V. Parish,

Manager, Airspace, Regulations and ATC Procedures Group.

[FR Doc. 2010–32048 Filed 12–20–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2010–57]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of the FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATE: Comments on this petition must identify the petition docket number involved and must be received on or before January 11, 2011.

ADDRESSES: You may send comments identified by Docket Number FAA–2010–1050 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to

http://www.regulations.gov at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mark Forseth, ANM–113, (425) 227–2796, Federal Aviation Administration, 1601 Lind Avenue SW., Renton, WA 98057–3356, or Frances Shaver, (202) 267–4059, Office of Rulemaking (ARM–207), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 16, 2010.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2010–1050.

Petitioner: Voyageur Airways Ltd.

Section of 14 CFR Affected: § 25.981(a)(3), Amendment 25–125.

Description of Relief Sought: The petitioner requests an exemption from fuel-tank ignition-source prevention requirements that apply to installation of an auxiliary fuel system on De Havilland Model DHC–8–100, –200, and –300 airplanes.

[FR Doc. 2010–32043 Filed 12–21–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Summary Notice No. PE–2010–58]

Petition for Exemption; Summary of Petition Received

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of petition for exemption received.

SUMMARY: This notice contains a summary of a petition seeking relief from specified requirements of 14 CFR. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of the petition or its final disposition.

DATES: Comments on this petition must identify the petition docket number involved and must be received on or before January 11, 2011.

ADDRESSES: You may send comments identified by Docket Number FAA–2010–1196 using any of the following methods:

- *Government-wide rulemaking Web site:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to the Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Fax:* Fax comments to the Docket Management Facility at 202–493–2251.
- *Hand Delivery:* Bring comments to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov*, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to the Docket Management Facility in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Frances Shaver, ARM–207, (202) 267–4059, FAA, Office of Rulemaking, 800 Independence Ave SW., Washington, DC 20591. This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC, on December 16, 2010.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

Petition for Exemption

Docket No.: FAA–2010–1196.

Petitioner: Avianca Airlines.

Section of 14 CFR Affected: § 121.359(k).

Description of Relief Sought: Avianca Airlines is requesting relief from the requirement to have a cockpit voice recorder and a flight data recorder that records all datalink messages as required by the certification rule for its Airbus A330–243 airplanes.

[FR Doc. 2010–32055 Filed 12–21–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Notice and Request for Comments

AGENCY: Surface Transportation Board, DOT.

ACTION: 60-day notice of intent to seek extension of approval: Disclosure of Rail Interchange Commitments.

SUMMARY: As required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3519 (PRA), the Surface Transportation Board (STB or Board) gives notice of its intent to seek from the Office of Management and Budget (OMB) an extension of approval for the currently approved collection of rail contracts that contain interchange commitments. Such contracts are submitted in operation and acquisition exemption proceedings, in accordance with the Board's regulations governing the disclosure of rail interchange commitments. *See* 49 CFR 1121.3(d); 1150.33 (h); 1150.43(h); 1180.4(g)(4). This information collection is described in more detail below. Comments are requested concerning (1) the accuracy of the Board's burden estimates; (2) ways to enhance the quality, utility, and clarity of the information collected; (3) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate; and (4) whether this collection of information is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility. Submitted comments will be summarized and included in the Board's request for OMB approval.

Description of Collection

Title: Disclosure of Rail Interchange Commitments.

OMB Control Number: 2140–0016.

STB Form Number: None.

Type of Review: Extension without change.

Respondents: Noncarriers and carriers seeking an exemption to acquire (through purchase or lease) and/or operate a rail line, if the proposed transaction would create an interchange commitment.

Number of Respondents: 6.

Estimated Time per Response: Less than 15 minutes.

Frequency: On occasion.

Total Burden Hours (annually including all respondents): 1½; hours.

Total "*Non-hour Burden*" *Cost:* None identified.

Needs and Uses: Under 49 U.S.C. 10502, noncarriers and carriers may seek an exemption from the prior approval requirements of sections 10901, 10902, and 11323 to acquire (through purchase or lease) and operate a rail line. This collection of agreements with interchange commitments facilitates the case-specific review of interchange commitments and facilitates the Board's monitoring of their usage generally.

Retention Period: Information in this report will be maintained in the Board's confidential file for 10 years, after which it is transferred to the National Archives.

DATES: Comments on this information collection should be submitted by February 22, 2011.

ADDRESSES: Direct all comments to Marilyn Levitt, Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001, or to *levittm@stb.dot.gov.* When submitting comments, please refer to "Disclosure of Rail Interchange Commitments, OMB Control Number 2140–0016."

For Further Information or to Obtain a Copy of the STB Form, Contact: Joe Dettmar at (202) 245–0395 or at *dettmarj@stb.dot.gov*. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.]

SUPPLEMENTARY INFORMATION: Under the PRA, a Federal agency conducting or sponsoring a collection of information must display a currently valid OMB control number. A collection of information, which is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c), includes agency requirements that persons submit reports, keep records, or provide information to the agency, third parties, or the public. Under section 3506(c)(2)(A) of the PRA, Federal agencies are required to provide, prior to an agency's submitting a collection to OMB for approval, a 60-day notice and comment period through publication in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information.

Dated: December 16, 2010.

Andrea Pope-Matheson,

Clearance Clerk.

[FR Doc. 2010–31995 Filed 12–21–10; 8:45 am]

BILLING CODE 4915–01–P

Federal Register

Wednesday,
December 22, 2010

Part II

Commodity Futures Trading Commission

17 CFR Parts 1, 16, and 38

Core Principles and Other Requirements for Designated Contract Markets; Proposed Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 1, 16, and 38

RIN 3038–AD09

Core Principles and Other Requirements for Designated Contract Markets

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission ("Commission" or "CFTC") is proposing new rules and amended guidance and acceptable practices to implement the new statutory provisions enacted by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The proposed rules, guidance and acceptable practices, which apply to the designation and operation of contract markets, implement the Dodd-Frank Act's new statutory framework that, among other things, amends Section 5 of the Commodity Exchange Act ("CEA") concerning designation and operation of contract markets, and adds a new CEA Section 2(h)(8) to include the listing, trading and execution of swaps on designated contract markets. The Commission requests comment on all aspects of the proposed rules, guidance and acceptable practices.

DATES: Comments must be received on or before February 22, 2011.

ADDRESSES: You may submit comments, identified by RIN number 3038–AD09, by any of the following methods:

- *Agency Web site, via its Comments Online process: http://comments.cftc.gov.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations, 17 CFR 145.9.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from www.cftc.gov that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Nancy Markowitz, Assistant Deputy Director, 202–418–5453, *nmarkowitz@cftc.gov,* or Nadia Zakir, Attorney-Advisor, 202–418–5720, *nzakir@cftc.gov,* Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

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I. Background

A. Overview

On July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act [1] Title VII of the Dodd-Frank Act [2] amended the CEA [3] to establish a comprehensive, new regulatory framework for swaps and security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

Section 735 of the Dodd-Frank Act amended Section 5 of the CEA pertaining to the designation and operation of contract markets, by: (i) Eliminating the stand-alone designation criteria contained in former Section 5(b) of the CEA; (ii) revising the existing core principles, including incorporating therein most of the substantive elements of the former designation criteria; and (iii) adding five new core principles, thereby requiring applicants and designated contract markets ("DCMs") to comply with a total of 23 core principles as a condition of obtaining and maintaining designation as a contract market.

In addition, Section 723(a)(3) of the Dodd-Frank Act added Section 2(h)(8) of the CEA to require, among other things, that execution of swaps subject to the clearing requirement of Section 2(h)(1) of the CEA must occur either on a DCM or on a new type of regulated facility called a Swap Execution Facility ("SEF").[4] Also, Section 733 of the Dodd-Frank Act added Section 5h(a)(1), requiring that no person may operate a facility for the trading or processing of swaps unless the facility is registered as a SEF or as a DCM. Accordingly, the rules proposed in this release also implement provisions related to the processing, trading and execution of swaps on DCMs.

In enacting the Dodd-Frank Act, Congress directed that rules and regulations required by the provisions of Title VII take effect the later of 360 days after enactment of the bill or to the extent that a rulemaking is required by the Dodd-Frank Act, not less than 60 days after the publication of that final rule.[5] Consistent with Congress' directive, this release proposes amendments to parts 38, 16 and 1 of the Commission's regulations to implement Section 5 of the CEA, as well as the requirements of Sections 2(h)(8) and 5h(a)(1) of the CEA, as amended by the Dodd-Frank Act, as applicable to DCMs.

B. The Current Statutory Framework

Section 5 of the CEA governs the designation and operation of DCMs.[6] DCMs were first established under the Commodity Futures Modernization Act of 2000 ("CFMA") [7] as one of two forms of Commission-regulated markets for the trading of contracts for sale of a commodity for future delivery or commodity options.[8]

The CEA, as amended by the CFMA, requires a DCM applicant to demonstrate that it satisfies each of

[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) ("Dodd-Frank Act"). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/hr4173_enrolledbill.pdf.*

[2] Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

[3] 7 U.S.C. 1 *et seq.* (amended 2010).

[4] The Commission will be proposing rules governing the registration and operation of SEFs in a separate, forthcoming rulemaking. *See* CFTC Web site for additional information on the "SEF Registration Requirements and Core Principle Rulemaking, Interpretation & Guidance" rulemaking, at *http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_13_SEFRules/index.htm* (last visited Dec. 14, 2010).

[5] *See* Section 754 of the Dodd-Frank Act.

[6] 7 U.S.C. 7; *see also,* Section 5 of the CEA, as amended by the Dodd-Frank Act.

[7] Commodity Futures Modernization Act of 2000, Public Law 106–554, 114 Stat. 2763 (2000) ("CFMA").

[8] The CFMA established two tiers of regulated markets—designated contract markets and registered derivatives transaction execution facilities ("DTEFs"). In addition, the CFMA provided for two markets exempt from regulation, exempt boards of trade ("EBOTs") and exempt commercial markets ("ECMs"). A description of the categories, requirements and functions of each of these markets as first established under the CFMA is provided in the Commission's notice of proposed rulemaking and final rulemaking implementing the CFMA. *See* A New Regulatory Framework for Trading Facilities, Intermediaries and Clearing Organizations, Notice of Proposed Rulemaking, 66 FR 14,262, March 9, 2001; Final Rulemaking, 66 FR 42,256, Aug. 10, 2001. In addition, a new type of regulated market was created under the CFTC Reauthorization Act of 2008 ("Farm Bill"), Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1651 (June 18, 2008). Under the Farm Bill, the Commission was required to determine and make public its determination whether a particular agreement, contract or transaction executed or traded on an ECM serves a significant price discovery function ("SPDC"). Once a contract was identified as a SPDC, the ECM on which the contract was traded was required to demonstrate to the Commission that the ECM had a regulatory system in place that satisfied the requirements of the core principles under current Section 2(h)(7) of the current CEA and the applicable provisions of § 36.3 of the Commission's regulations. Section 723 of the Dodd-Frank Act repealed the ECM SPDC provisions.

eight designation criteria as a condition of obtaining designation as a contract market.[9] In addition, each applicant is required to demonstrate its ability to comply with 18 core principles at the time of application, and on an ongoing basis after designation.[10]

C. The Dodd-Frank Act Amendments Applicable to Designated Contract Markets

Section 735 of the Dodd-Frank Act amends Section 5 of the CEA by: (i) Eliminating the eight criteria for designation as a contract market; (ii) amending many of the core principles, including incorporating most of the substantive requirements of the current designation criteria, and requiring that all DCMs demonstrate compliance with each of the core principles as a condition of obtaining and maintaining designation as a contract market; and (iii) adding five new core principles, specifically Core Principle 13 (Disciplinary Procedures), Core Principle 20 (System Safeguards), Core Principle 21 (Financial Resources), Core Principle 22 (Diversity of Boards of Directors), and Core Principle 23 (Securities and Exchange Commission).[11]

As noted above, the Dodd-Frank Act also specifically requires under Section 2(h)(8) of the CEA, as amended,[12] that execution of swaps that are required to be cleared must occur on either a DCM or a SEF, except where no DCM or SEF makes the swap available for trading.[13] Accordingly, unless otherwise specified in this release, each of the 23 core principles and the proposed regulations, guidance and acceptable practices, apply to all "contracts" listed on a DCM, which will include swaps, futures and options contracts.

In sum, the new and revised regulations, guidance and acceptable practices proposed in this release will implement the regulatory obligations that each DCM must meet in order to comply with Section 5 of the CEA, as amended by the Dodd-Frank Act, initially upon designation and thereafter on an ongoing basis. The Commission requests comments on all aspects of the proposed rules, guidance and acceptable practices.

II. The Proposed Rules

A. Proposed Repeal of Appendix A to Part 38

Section 735 of the Dodd-Frank Act eliminates the criteria for designation as a contract market in current CEA Section 5(b), creates a new core principle from one of the criterion, and incorporates most of the substance of the remaining designation criteria into the core principles. Because the designation criteria are eliminated under the Dodd-Frank Act, the Commission proposes to eliminate the guidance on compliance with the designation criteria for DCMs contained in Appendix A to part 38. As noted below, this release further proposes to redesignate Appendix A as the application form for contract market designation.

B. Adoption of New Regulations and Revised Guidance and Acceptable Practices

In implementing the provisions of the CFMA, the Commission adopted a regulatory framework for part 38 of its regulations that consisted largely of general application guidance and acceptable practices consistent with the CFMA's principles-based regime.[14] The Dodd-Frank Act amends Section 5(d)(1)(B) of the CEA generally to provide that the Commission, in its discretion, may determine by rule or regulation the manner in which boards of trade comply with the core principles.[15] Accordingly, the Commission undertook a comprehensive evaluation of its existing regulations, guidance and acceptable practices associated with each of the core principles in order to update those provisions and to determine which core principles would benefit from new or revised regulations and new or revised guidance or acceptable practices. Based on that review, the Commission is proposing both new and revised regulations and revised guidance and acceptable practices for some core principles, as set forth in this release.

The proposed new regulations codify certain requirements and practices that are commonly accepted in the industry and have been found, based on the Commission's administrative experience in overseeing the futures markets since passage of the CFMA, to represent the best practice means of complying with the core principles.[16] Indeed, some of these requirements are the off-shoot of the Rule Enforcement Reviews ("RERs") periodically carried out by Commission staff.

The RERs are the cornerstone of the Commission's oversight program, serving as a key tool for monitoring a DCM's compliance with the core principles, and also as a primary means for identifying industry trends and DCM best practices for self-regulation. Essentially, RER findings and recommendations communicate to the industry what Commission staff believes are best practices for compliance and such recommendations typically are then adopted industry-wide as the standard form of compliance.

The RERs, which are conducted periodically at all DCMs, typically examine DCMs' compliance with specific core principles relating to audit trail, trade practice surveillance, market surveillance, disciplinary programs, and dispute resolution.[17] Commission staff's

[9] The eight designation criteria under current Section 5(b) of the CEA are titled the following: (1) In General; (2) Prevention of Market Manipulation; (3) Fair and Equitable Trading; (4) Trade Execution Facility; (5) Financial Integrity of Transactions; (6) Disciplinary Procedures; (7) Public Access; and (8) Ability to Obtain Information.

[10] 7 U.S.C. 7(d). The Commission also undertakes due diligence reviews of each contract market's compliance with the core principles during rule and product certification reviews and periodic examinations of DCMs' compliance with the core principles under Rule Enforcement Reviews ("RERs").

[11] New Core Principle 13 is verbatim of current Designation Criterion 6.

[12] *See* Section 723 of the Dodd-Frank Act.

[13] Section 5h(a)(1) of the CEA, as amended by Dodd-Frank Act, also prohibits any person from operating a facility for the trading and processing of swaps unless the facility is registered as a SEF or DCM.

[14] Guidance provides DCMs and DCM applicants with contextual information regarding the core principles, including important concerns which the Commission believes must be taken into account in complying with specific core principles. In contrast, the acceptable practices are more specific than guidance and provide examples of how DCMs may satisfy particular requirements of the core principles; they do not, however, establish mandatory means of compliance. Acceptable practices are intended to assist DCMs by establishing non-exclusive safe harbors. The safe harbors apply only to compliance with specific aspects of the core principle, and do not protect the contract market with respect to charges of violations of other sections of the CEA or other aspects of the core principle.

[15] Current Core Principle 1 states, among other things, that boards of trade "shall have reasonable discretion in establishing the manner in which they comply with the core principles." This "reasonable discretion" provision underpins the Commission's use of core principle guidance and acceptable practices. Section 735 of the Dodd-Frank Act amends this provision to include the proviso that "[u]nless otherwise determined by the Commission by rule or regulation * * *," boards of trade shall have reasonable discretion in establishing the manner in which they comply with the core principles. *See* Section 735(b) of the Dodd-Frank Act, amending Section 5(d)(1)(B) of the CEA.

[16] The Commission's oversight of DCMs' compliance with the core principles includes the evaluation of applications for contract market designation, periodic RERs of DCMs' compliance with various statutory requirements, and the review of rule and product certifications implicating all aspects of the core principles.

[17] Staff typically review a one-year target period and, depending on the core principles covered, thoroughly examine a DCM's audit trail reviews, trade practice and market surveillance investigations, investigation logs, hedge exemptions, surveillance systems, compliance manuals, summary fine schedules, disciplinary files, settlement agreements, and arbitration files. Staff also conducts on-the-record interviews with DCM compliance officials.

findings and any recommendations for improvement are included in a report that is presented to the Commission, and the Commission votes on whether to accept the report. The RER report is publicly released and published on the Commission's Web site and also sent to the DCM. Although a DCM may not fully agree with the Commission staff's findings, responses from DCMs, which are required within 30 days, almost always explain how the DCM intends to implement staff's recommendations, if any. Because RER reports are public, recommendations for one DCM invariably lead to all DCMs that suffer from the same identified shortfall taking timely corrective action. Such corrective action usually includes modifying compliance procedures and/or adopting or modifying existing rules.

The Commission believes that the promulgation of clear-cut and definite requirements or practices in those instances where a standard industry practice has developed would provide greater legal certainty to the industry in demonstrating compliance with the CEA. Accordingly, in certain circumstances, the Commission is proposing to replace the general application guidance and acceptable practices in part 38 with regulations that codify the relevant practices and requirements for those core principles. For some of the new core principles, the Commission also is proposing regulations that represent the best practice for complying with the core principle. For several core principles, the Commission is proposing to maintain the guidance and acceptable practices, albeit with proposed revisions that reflect developments in the industry since the passage of the CFMA, and the Commission's considerable experience since the passage of the CFMA with matters involving compliance with the core principles by a broad range of DCMs.

C. Proposed Amendments to General Regulations Under Part 38 (New Subpart A)

The Commission is proposing to reorganize part 38 to include new subparts A through X. Proposed subpart A would include the general regulation §§ 38.1 through 38.10,[18] applicable both to DCM applicants and to existing DCMs. Subparts B through X would each include relevant regulations applicable to each core principle.[19]

1. Proposed § 38.1—Scope

The proposed revisions to § 38.1 are non-substantive as they simply eliminate cross-references to other sections of the Commission's regulations that are no longer applicable, and add references to sections, most of them new, that are now applicable.

2. Proposed § 38.2—Applicable Provisions

Section 38.2 sets forth the Commission regulations that DCMs must comply with in addition to those in part 38. The proposed revisions to § 38.2 include a change to the title of the section to more accurately describe the regulation, and further updates the list of Commission regulations that are applicable to DCMs based on the new provisions under the Dodd-Frank Act, including the proposed provisions relating to real time reporting of swaps and the determination of appropriate block size for swaps which will be proposed under part 43, requirements for data element, recordkeeping and reporting of swap information to swap data repositories which will be proposed under part 45, business continuity and disaster recovery which will be proposed under part 46, designation requirements for swap data repositories which will be proposed under part 49, and position limits which will be proposed under part 151.[20]

3. Proposed § 38.3—Procedures for Designation

Current § 38.3 sets forth the application and approval procedures for new DCM applications.[21] The Commission is proposing in § 38.3 that all DCM applications, reinstatements, requests for transfer of designations, requests for withdrawal of application for designation, and vacation of designations be filed with the Secretary of the Commission in an electronic format, via the Internet, e-mail, or other means of direct electronic submission as approved by the Commission.[22]

The Commission also is proposing to eliminate the expedited approval procedures for DCM applications, such that the timing of such reviews will be governed only by the 180-day statutory review period and procedures specified in Section 6(a) of the CEA.[23] Based upon its experience since 2001, the Commission has determined that the 90-day accelerated review process is inefficient and impracticable. Specifically, the Commission has found that applicants seeking expedited review often file incomplete or draft applications, without adequate supporting materials, in the interest of meeting the expedited approval timeline. This, in turn, has required Commission staff to expend significant amounts of time reviewing incomplete or draft applications, necessitating numerous follow-up conversations with applicants, usually resulting in removal of applications from the expedited review timeline. The Commission believes that by requiring all applications to be reviewed within the 180-day review period, applicants will have sufficient time to submit complete applications for review, and to respond to Commission staff requests for additional information, resulting in a more efficient review process.[24]

To provide an applicant with more certainty of the types of information that are required to support its DCM application, the Commission proposes to redesignate Appendix A to part 38[25] to include a new application form with comprehensive instructions to guide DCM applicants and a specified lists of documents and information that must be provided as exhibits.[26] Other than the specific requirements necessitated by the revised and newly added core principles, the majority of information required under the form application consists of information that historically has been required by the Commission staff in its reviews of DCM applications under the Commission's regulations. Accordingly, proposed § 38.3(a)(1) requires that, at a minimum, all applicants must complete the application form and provide the necessary information and documentation, in accordance with the associated instructions, in order to

[18] This release does not propose any revisions to § 38.6 of the Commission's regulations.

[19] Each of these subparts begins with a regulation containing the language of the core principle.

[20] The Commission notes that because some of the proposed rulemakings are either ongoing or forthcoming, this proposed list of reserved sections under § 38.2 may be subject to further revisions pending the final rules for each respective rulemaking.

[21] In addition to these substantive revisions, many of the proposed revisions to § 38.3 are non-substantive and are intended to clarify the rule.

[22] This amendment also would ensure consistency with the electronic process used for filing rule and product submissions under parts 39 and 40 of the Commission's regulations. *See* 17 CFR parts 39 and 40.

[23] 7 U.S.C. 8(a); *see also,* Section 6(a) of the CEA, as amended by the Dodd-Frank Act.

[24] This proposal also is consistent with the Commission's proposal to eliminate the 90-day expedited review procedures for derivatives clearing organization applications under part 39 in a separate rulemaking.

[25] Appendix A currently contains the stand alone designation criteria now eliminated under the Dodd-Frank Act.

[26] The Commission also is requiring tailored application forms for the registration of Designated Clearing Organizations, Swap Execution Facilities and Swap Data Repositories.

initiate the 180-day designation review process.

The Commission is proposing new § 38.3(d) to formalize the procedures that a DCM must follow when requesting the transfer of its DCM designation and positions comprising open interest, in anticipation of a corporate event (*e.g.,* a merger, corporate reorganization, or change in corporate domicile) which results in the transfer of all or substantially all of the DCM's assets to another legal entity. Under proposed § 38.3(d)(2), the DCM would submit to the Commission a request for transfer no later than three months prior to the anticipated corporate change, with a limited exception.[27] The request shall include: (1) The underlying agreement that governs the corporate change; (2) a narrative description of the corporate change, including the reason for the change and its impact on the DCM, including its governance and operations, and its impact on the rights and obligations of market participants holding the open positions; (3) a discussion of the transferee's ability to comply with the CEA, including the core principles applicable to DCMs, and the Commission's regulations thereunder; (4) the governing documents of the transferee, including but not limited to, articles of incorporation, bylaws, operating agreements and/or partnership agreements, as applicable; (5) the transferee's rules marked to show changes from the current rules of the DCM; and (6) a list of contracts, agreements, transactions or swaps for which the DCM requests transfer of open interest.

Proposed § 38.3(d) also would require, as a condition of approval, that the DCM submit a representation that it is in compliance with the CEA, including the DCM core principles, and the Commission's regulations. In addition, the DCM would have to submit various representations by the transferee, including but not limited to: (1) That the transferee will assume responsibility for complying with all applicable provisions of the CEA and the Commission's regulations promulgated thereunder, including part 38 and Appendices thereto; (2) that the transferee will assume, maintain and enforce all rules implementing and complying with these core principles, including the adoption of the transferor's rulebook; (3) upon the transfer, all open interest in all contracts listed on the transferor will be transferred to and represent equivalent open interest in all such contracts listed on the transferee, (4) that none of the proposed rule changes will affect the rights and obligations of any participant with open positions transferred to it; and (5) it will notify market participants of any changes to the rulebook and of the transfer.

Proposed § 38.3(d) also provides that the Commission will review any requests for transfer of designation and open interest as soon as practicable, and such request will be approved or denied pursuant to a Commission order.

Proposed § 38.3(g)[28] is a new rule that is intended to ensure that all DCMs designated before the effective date of the rules proposed in this part 38 are in compliance with both the five new core principles and the revised core principles. As noted above, the Dodd-Frank Act significantly changes some of the compliance obligations of DCMs under current Section 5 of the CEA by amending the majority of the existing core principles and adding five new core principles.[29] All DCMs, including existing DCMs, must comply with the requirements of Section 5 of the CEA, as amended, as well as the applicable requirements under the Commission's regulations, including this release, upon their effective date. Accordingly, in proposed § 38.3(g), the Commission would require that each existing DCM provide the Commission with a signed certification of its compliance with each of the 23 core principles and the Commission's regulations under part 38 as amended in this release, within 60 days of the effective date of the publication of the final rules proposed in this release. The failure of any existing DCM to provide such certification shall be grounds for revocation of the DCM's designation status. While the Commission believes that 60 days is a sufficient period of time for DCMs to have rules and procedures in place to ensure compliance with the core principles and the rules proposed in this release, the Commission requests comments on whether the 60 day period is sufficient, and if not, what period of time may be more appropriate and why.

4. Proposed § 38.4—Procedures for Listing Products and Implementing Designated Contract Market Rules

The proposed amendments to § 38.4 are largely intended to conform this rule to the proposed changes to existing §§ 40.3 (Voluntary submission of new products for Commission review and approval) and 40.5(b) (Voluntary submission of rules for Commission review and approval).[30] The proposed amendments to those rules are made in the separate release pertaining to "Provisions Common to Registered Entities."[31]

5. Proposed § 38.5—Information Relating to Contract Market Compliance

On occasion, DCMs enter into equity interest transfers that result in a change in ownership. In those situations, Commission staff must determine whether the change in ownership will impact adversely the operations of the DCM or the DCM's ability to comply with the core principles and the Commission's regulations. The Commission is proposing to amend § 38.5 to ensure that DCMs remain mindful of their self-regulatory responsibilities when negotiating the terms of significant equity interest transfers, and to improve the Commission staff's ability to undertake a timely and effective due diligence review of the impact, if any, of such transfers.

In this regard, proposed § 38.5(c) would require DCMs to file with the Commission a notice of the equity interest transfer of ten percent or more, no later than the business day, as defined in § 40.1, following the date on which the DCM enters into a firm obligation to transfer the equity interest.[32] The notification must include and be accompanied by: (i) Any relevant agreement(s), including preliminary agreements; (ii) any associated changes to relevant corporate documents; (iii) a chart outlining any new ownership or corporate or organizational structure;

[27] The proposed rule would require that where a DCM does not know or could not have reasonably known three months prior to the anticipated change, it shall be required to file the request as soon as it knows of the change.

[28] In addition, proposed §§ 38.3(e) and 38.3(f) restate existing requirements with certain non-substantive, clarifying changes.

[29] *Compare* 7 U.S.C. 7(d) with section 5(d) of the CEA, as amended by the Dodd-Frank Act.

[30] Proposed § 40.3 is amended to require additional information to be provided by registered entities submitting new products for the Commission's review and approval. Proposed § 40.5(b) codifies a new standard for the review of new rules or rule amendments as established under the Dodd-Frank Act.

[31] 75 FR 67482, Nov. 2, 2010.

[32] The Commission is proposing a 10 percent threshold because it believes that a change in ownership of such magnitude may have an impact on the operations of the DCM. The Commission believes that such impact may be present even if the change in ownership does not constitute a change in control. For example, if one entity holds a minority 10 percent equity share in the DCM, it may have a more significant voice in the operation of the DCM than five entities each with a minority 2 percent equity share. Given the potential impact that a change in ownership might have on the operations of a DCM, the Commission believes that it is appropriate to require such DCM to certify after such change that it continues to comply with all obligations under the CEA and Commission regulations.

(iv) a brief description of the purpose and any impact of the equity interest transfer; and (v) a representation from the DCM that it meets all of the requirements of Section 5(d) of the Act and Commission regulations adopted thereunder. The proposed rule requires that the DCM keep the Commission apprised of the projected date that the transaction resulting in the equity interest transfer will be consummated, and must provide to the Commission any new agreements or modifications to the original agreement(s) filed pursuant to § 38.5(c). The DCM must notify the Commission of the consummation of the transaction on the day in which it occurs. The proposed rule will enable staff to consider whether any conditions contained in an equity transfer agreement(s) are inconsistent with the self-regulatory responsibilities of a DCM or with any of the core principles.[33]

Section 38.5(d) currently requires that upon a change in ownership, an acquirer of an existing DCM must certify that the exchange meets all of the requirements of the current Sections 5(b) and 5(d) of the Act, and the provisions of part 38 of the Commission's regulations. The Commission believes when there is a 10% or greater change in ownership, the DCM itself is the more appropriate entity to provide a certification of its continued compliance with all regulatory obligations. Accordingly, proposed § 38.5(c)(3)[34] would require that if there is a change in ownership[35] the DCM must certify, no later than two business days following the date on which the change in ownership occurs, that the DCM meets all of the requirements of Section 5(d) of the CEA, as amended by the Dodd-Frank Act, and the provisions of part 38 of the Commission's regulations. The proposed rule also requires that the DCM include as part of its certification whether any aspects of the DCM's operations will change as a result of the change in ownership, and if so, the DCM must provide a description of the changes. Finally, proposed § 38.5(c) provides that the certification may rely on, and be supported by, prior materials and information submitted as part of an application for designation or a required product or rule filing or new filings if necessary to update its previous filings.

6. Proposed § 38.7[36]—Prohibited Use of Data Collected for Regulatory Purposes

To fulfill their regulatory and compliance obligations, DCMs often require market participants to provide proprietary data or personal information. Proposed § 38.7 would prohibit DCMs from using such information for business or marketing purposes.[37] The Commission notes that nothing in this provision should be viewed as prohibiting a DCM from sharing such information with another DCM or SEF for regulatory purposes, where necessary.

7. Proposed § 38.8—Listing of Swaps on a Designated Contract Market

The Dodd-Frank Act permits existing DCMs to list, trade and execute swaps, provided that the DCMs do so in a manner that complies with the provisions of the CEA, as amended by the Dodd-Frank Act, and part 38, as amended. Proposed § 38.8(a) requires a DCM to notify the Commission, prior to or upon listing its first swap contract, of the manner in which it will fulfill each of the requirements under amended CEA and part 38 with respect to the listing, trading, execution and reporting of swap transactions.

Proposed § 38.8(b) requires a DCM to request and obtain from the Commission a unique, extensible, alphanumeric code for the purpose of identifying the DCM before it lists swaps. A DCM will do so pursuant to the swap recordkeeping and reporting requirements under proposed part 45 of the Commission's regulations. This requirement stems from the Commission's authority, under Section 728 of the Dodd-Frank Act, to establish standards and requirements related to reporting and recordkeeping for swaps.[38] In particular, the Commission is required to adopt consistent data element standards for "registered entities," which includes DCMs. part 45, which is being proposed in the separate Commission release "Data Recordkeeping and Reporting Requirements," will set forth the recordkeeping and reporting requirements for DCMs with respect to swaps.[39] Proposed § 38.8(b) codifies the obligations of DCMs to comply with the provisions of proposed part 45.

8. Proposed § 38.9—Boards of Trade Operating Both a Designated Contract Market and a Swap Execution Facility

As noted above, the Dodd-Frank Act created a new regulated entity, the SEF, for the listing, trading and processing of swaps. The registration and compliance requirements for SEFs will be proposed in redesignated part 37, in a forthcoming release.[40] Under the Dodd-Frank Act, a DCM may list and trade swaps pursuant to its designation as a contract market. In addition, a board of trade that operates a DCM also may operate a SEF, provided that the board of trade separately registers as a SEF and complies with the applicable SEF core principles and any Commission regulations thereunder. Proposed § 38.9 codifies the requirement that a board of trade that operates a DCM and that intends to operate a SEF must separately register pursuant to the SEF registration requirements and, on an ongoing basis, must separately comply with the SEF rules and core principles under Section 5h of the CEA, as amended by the Dodd-Frank Act, and part 37 of the Commission's regulations.

Moreover, section 5h(c) of the CEA, as amended by the Dodd-Frank Act, provides that any board of trade that is a DCM and intends to operate as an independent SEF may use the same electronic trade execution system for listing and executing swaps, provided that the board of trade makes it clear to market participants whether the electronic trading of such swaps is taking place on or through the DCM or the SEF.[41] Proposed § 38.9(b) codifies this statutory requirement.

[33] The Commission also maintains the existing provisions of § 38.5 that allow the Commission at any time to request a DCM to file a written demonstration with the Commission that it is in compliance with one or more of the core principles.

[34] The Commission is proposing to redesignate § 38.5(d) as § 38.5(c).

[35] The Commission's regulations consistently identify a financial or ownership interest of ten percent or more as material and indicative of the ability to influence the activities of an entity or trading in an account. *See, e.g.,* Core Principle 5, Acceptable Practices, and Core Principle 14, Application Guidance, in appendix B to part 38 of the Commission's regulations. 17 CFR part 38, appendix B.

[36] Current § 38.6 (Enforceability) remains unchanged.

[37] The Commission notes that in the recent notice of proposed rulemaking for Business Affiliate Marketing and Disposal of Consumer Information Rules, 75 FR 66018–01, Oct. 27, 2010 (to be codified at 17 CFR part 163) rules are proposed prohibiting FCMs (and other intermediaries) from using certain consumer information received from an affiliate to make a solicitation for marketing purposes. In addition, rules were proposed requiring FCMs to develop a written disposal program to the extent that such FCMs possess consumer information. The underlying policy for these rules is to protect the privacy of customer information. Similarly, this proposed rule is intended to protect market participant's information provided to a DCM for regulatory purposes from its use to advance the commercial interests of the DCM.

[38] *See* Section 21 of the CEA, as amended by the Dodd-Frank Act.

[39] *See* "Swap Data Recordkeeping and Reporting Requirements," Proposed Rule, 75 FR 76574 (Dec. 8, 2010).

[40] *See* CFTC Web site for additional information on the "SEF Registration Requirements and Core Principle Rulemaking, Interpretation & Guidance," at *http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_13_SEFRules/index.htm* (last visited Dec. 14, 2010).

[41] Section 5h(c) of the CEA, as amended by the Dodd-Frank Act, provides:

Continued

9. Proposed § 38.10—Reporting of Swaps Traded on a Designated Contract Market

Section 727 of the Dodd-Frank Act directs the Commission to adopt rules providing for the public availability of swap transaction and pricing data in real-time.[42] To the extent that they make swaps available for trading and execution either on a SEF or a DCM, DCMs will have real-time public reporting obligations pursuant to the Dodd-Frank Act and, therefore, must comply with the applicable provisions governing real time reporting. The Commission is proposing regulations applicable to the real time swap reporting obligations of certain entities under a separate release.[43] The real time reporting regulations are proposed to be codified under part 43 of the Commission's regulations. In addition to the real time reporting obligations, the proposed rule also requires DCMs to comply with the swap reporting and recordkeeping requirements that are being proposed by the Commission in a separate release, and are proposed to be codified under part 45 of the Commission's regulations. Accordingly, proposed § 38.10 would codify the compliance obligations of DCMs with respect to real time reporting of swap transactions and swap data recordkeeping and reporting obligations, as may be required under proposed parts 43 and 45 of the Commission's regulations, respectively.

D. Proposed New Regulations and Revised Guidance and Acceptable Practices For Compliance With the Core Principles

As noted above, this release proposes to reorganize part 38 to include subparts A through X. As proposed, each of subparts B through X will include relevant regulations applicable to the 23 core principles. In addition to the proposed new regulations, the Commission proposes to codify within each subpart the statutory language of the respective core principle.[44]

1. Subpart B—Designation as Contract Market

The Dodd-Frank Act amends Core Principle 1 to make clear that compliance with the core principles, and any other rule or regulation that the Commission may impose under Section 8a(5) of the CEA, is a necessary condition to obtain and maintain designation as a contract market.[45] Amended Core Principle 1 provides that unless otherwise determined by the Commission by rule or regulation, DCMs will continue to have reasonable discretion in establishing the manner in which they comply with the core principles. The Commission proposes to codify the statutory text of Core Principle 1 in proposed § 38.100.

2. Subpart C—Compliance With Rules

Core Principle 2, as amended by the Dodd-Frank Act, requires that a DCM establish, monitor, and enforce its rules, including rules relating to access requirements, rules regarding the terms and conditions of any contract to be traded on the contract market, and rules prohibiting abusive trading practices. A DCM also must have the capacity to detect and investigate potential rule violations, and to sanction any person that violates its rules.[46] In addition, a DCM's rules must provide it with the ability and authority to perform the obligations and responsibilities required under Core Principle 2, including the capacity to carry-out such international information sharing agreements that the Commission may require. Proposed § 38.150 implements these requirements.

For the most part, the Commission is codifying: (1) Language found in the guidance and acceptable practices for Core Principle 2 and former designation criterion 8; (2) existing DCM compliance practices that the Commission believes constitute best practices; and (3) recommendations made over the past several years by the Commission in rule enforcement reviews.[47] In addition, the Commission is proposing some practices and requirements that are new for DCMs. The Commission also looked to and incorporated into the proposed rules for Core Principle 2 certain concepts that are currently contained in part 8 of its regulations— Exchange Procedures for Disciplinary, Summary, and Membership Denial Actions. In this regard, the Commission notes that most DCMs' compliance and enforcement practices relating to Core Principle 2 obligations historically have been consistent with the rules contained in part 8.[48] Each of the proposed rules under subpart C is discussed below.

i. Proposed § 38.151—Access Requirements

Proposed § 38.151 is an example of a rule in which the Commission proposes a new requirement for DCMs.[49] Proposed § 38.151(a) requires that prior to granting a member or market participant access to its markets, the DCM must require the member or market participant to consent to its jurisdiction. The growth of electronic trading in the futures industry and the transformation of futures exchanges from traditional membership organizations to demutualized for-profit entities has changed how individuals and firms access the markets and execute trades. When open outcry dominated trading, orders were typically called in to a desk on the trading floor and members on the floor executed trades. Today, on most DCMs, one does not need to be a "member" to enter an order on an electronic trading system. Rather, clearing members can provide their customers with access to a DCM's electronic trading system and customers can enter their own orders. Depending on the type of access granted by the clearing member, the customer's order either will go through the clearing member's system for risk management before hitting the DCM's electronic trading system or directly go into the DCM's trading system.

DCMs generally require through rule and/or clearing firm connection

IDENTIFICATION OF FACILITY USED TO TRADE SWAPS BY CONTRACT MARKETS.—A board of trade that operates a contract market shall, to the extent that the board of trade also operates a swap execution facility and uses the same electronic trade execution system for listing and executing trades of swaps on or through the contract market and the swap execution facility, identify whether the electronic trading of such swaps is taking place on or through the contract market or the swap execution facility.

[42] See Sections 2(a)(13)–(14) of the CEA, as amended by the Dodd-Frank Act.

[43] *See* "Real Time Public Reporting of Swap Transaction Data," Proposed Rule, 75 FR 76140 (Dec. 7, 2010).

[44] In two instances, the language of the core principle, as codified, was slightly revised to add references to the CEA where the statutory language simply cited to the CEA section without citing to the statute. These non-substantive edits were made to §§ 38.100 and 38.1200.

[45] 7 U.S.C. 7; *see also* Section 5(d)(1) of the CEA, as amended by the Dodd-Frank Act.

[46] As noted above, Section 735 of the Dodd-Frank Act amends Section 5 of the CEA to eliminate DCM designation criteria and amends several core principles, including Core Principle 2. Core Principle 2 was amended to include language formerly found in Designation Criterion 8—Ability to Obtain Information, and to specifically require that a DCM have the ability to detect, investigate, and sanction rule violations.

[47] Commission staff conducts periodic RERs of all DCMs. RERs examine DCM compliance with specific core principles over a one-year target period. Commission staff's analyses, conclusions and recommendations regarding any identified deficiencies are included in a publicly available written report.

[48] Section 38.2 of the Commission's regulations exempts DCMs from all Commission rules not specifically reserved. The part 8 rules were not reserved.

[49] Generally, § 38.151 is being proposed pursuant to the Commission's general rulemaking authority under Section 8a(5) of the CEA (providing the authority to "promulgate such rules * * * reasonably necessary * * * to accomplish any of the purposes of" the CEA), and Section 3 of the CEA (providing that the purposes of the Act include the promotion of "fair competition among boards of trade, other markets and market participants"). 7 U.S.C. 5, 12a(5).

agreements that prior to a clearing member granting a customer access to the DCM's electronic trading system, the clearing member secure its customer's agreement to abide by, and be subject to, the DCM's rules. Nevertheless, DCMs do not view themselves as having the jurisdiction needed to compel these market participants to participate in the investigation and disciplinary process. Although DCMs have the option of requiring a clearing firm to bar a customer from accessing the DCM if the DCM believes that the customer committed a rule violation, most DCMs will first request that the customer submit to its jurisdiction and participate in the investigation and disciplinary process before exercising this option.

Trading on a DCM is a privilege that is subject to conditions and entails certain responsibilities. The Commission believes that if a participant is granted the privilege of trading on a DCM, the participant should not only be required to abide by the DCM's rules, but the participant also must consent to the DCM's jurisdiction and participate in both the investigatory and disciplinary process. The Commission recognizes that this requirement will require clearing firms to amend their existing customer agreements to secure customers' agreements to submit to a DCM's jurisdiction. Accordingly, although DCMs would be required to implement proposed § 38.151(a) either by rule and/or modification of connection agreements by the effective date of the final rule, the proposed rule permits DCMs to allow their clearing firms up to 180 days to secure the necessary modifications to existing customer agreements.

Proposed § 38.151(b) requires that a DCM provide its members, market participants and ISVs with impartial access to its markets and services. This includes: 1) access criteria that are impartial, transparent, and applied in a non-discriminatory manner, and 2) comparable fee structures for members, market participants and independent software vendors ("ISV"),[50] receiving equal access to, or services from the DCM. The purpose of the proposed impartial access requirements is to prevent DCMs from using discriminatory access requirements as a competitive tool against certain participants. Access to a DCM should be based on the financial and operational soundness of a participant, rather than discriminatory or other improper motives.[51] Any participant should be able to demonstrate financial soundness either by showing that it is a clearing member of a DCO that clears products traded on that DCM or by showing that it has clearing arrangements in place with such a clearing member. Furthermore, granting impartial access to participants that satisfy a DCM's access requirements may enhance the DCM's liquidity and the overall transparency of the swaps and futures markets.

A DCM can satisfy the requirement that membership and participation criteria are impartial, transparent, and non-discriminatory by establishing clear and impartial guidelines and procedures for granting access to its facilities and publishing such guidelines and procedures on its Web site. Such requirements may establish different categories of market participants, but may not discriminate within a particular category. Fee structures may differ among categories if such fee structures are reasonably related to the cost of providing access or services to a particular category. For example, if a certain category requires greater information technology or administrative expenses on the part of the DCM, then a DCM may recoup those costs in establishing fees for that category of member or market participant.

Proposed § 38.151(c) (Limitations on Access) requires a DCM to establish and impartially enforce rules governing any decision by the DCM to deny, suspend, or permanently bar a member's or market participant's access to the contract market. While paragraph (b) of proposed § 38.151 requires impartiality in a DCM's decision to grant access, paragraph (c) addresses the converse situation where a DCM wishes to deny access, or to revoke the access of members or market participants who already possess it. Proposed § 38.151(c) gives specific examples of when such situations might arise, including DCM disciplinary proceedings or emergency actions. As with decisions to grant access, any decision by a DCM to deny, suspend, or permanently bar a member's or market participant's access to the DCM must be impartial and applied in a non-discriminatory manner.

ii. Proposed § 38.152—Abusive Trading Practices Prohibited

Proposed § 38.152 requires that a DCM prohibit enumerated abusive trading practices. The listed practices are a compilation of abusive trading practices that DCMs already prohibit. A DCM permitting intermediation must prohibit specific trading practices, including trading ahead of customer orders, trading against customer orders, accommodation trading, and improper cross-trading. Specific trading practices that must be prohibited by all DCMs include front-running, wash trading, pre-arranged trading, fraudulent trading, money passes and any other trading practices that the DCM deems to be abusive. In addition, a DCM also must prohibit any other manipulative or disruptive trading practices prohibited by the CEA or by the Commission pursuant to Commission regulation.[52]

iii. Proposed § 38.153—Capacity To Detect and Investigate Rule Violations

Proposed § 38.153 is based on the current application guidance for Core Principle 2.[53] The proposed rule requires that a DCM have arrangements and resources for effective rule enforcement. This includes the authority to collect information and examine books and records of members and market participants.[54] By its terms, Core Principle 2 requires a DCM to have, in addition to appropriate resources for trade practice surveillance

[50] The Commission notes that examples of independent software vendors include: smart order routers, trading software companies that develop front-end trading applications, and aggregators of transaction data. Smart order routing generally involves scanning of the market for the best-displayed price and then routing orders to that market for execution. Software that serves as a front-end trading application is typically used by traders to input orders, monitor quotations and view a record of the transactions completed during a trading session. Aggregators of transaction data provide access to news, analytics and execution services. The Commission believes that transparency and trading efficiency would be enhanced as a result of innovations in this field for market services. For instance, certain providers of market services with access to multiple trading systems or platforms could provide consolidated transaction data from such trading systems or platforms to market participants.

[51] The Commission believes that the requirement to provide impartial access requires DCMs to avoid the creation of exclusive membership standards that focus on high net worth. Therefore, any participant should be able to demonstrate financial soundness either by showing that it is a clearing member of a DCO that clears products traded on that DCM or by showing that it has clearing arrangements in place with such a clearing member.

[52] Section 747 of the Dodd-Frank Act amends Section 4c(a) of the CEA by adding three disruptive practices which make it: unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that–

(A) Violates bids or offers;

(B) Demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or

(C) Is, is of the character of, or is commonly known to the trade as, 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution).

[53] 17 CFR part 38, App. B, Core Principle 2, Application Guidance at ¶ 1.

[54] The language in the current application guidance requires that a DCM "have arrangements and resources for effective trade practice surveillance programs[.]" *Id.*

programs, appropriate resources to enforce all of its rules.

The proposed rule also requires a DCM to have the authority to examine books and records for all market participants rather than limiting that authority to "non-intermediated market participants" as such authority was limited in the former application guidance. A DCM can best administer its compliance and rule enforcement obligations if it has the ability to reach the books and records of all market participants, rather than a subset of market participants.

iv. Proposed § 38.154—Regulatory Services Provided by a Third Party

The CEA provides that a DCM may comply with applicable core principles by delegating relevant functions to a registered futures association or another registered entity.[55] The Commission also has described acceptable "contracting" arrangements for the performance of core principle functions by third-parties.[56] In this context, the term "contracting" implies a lesser transference of authority to the third-party than does "delegating." In all cases, however, the Commission has specified, as required under the CEA,[57] that DCMs remain responsible for carrying out any function delegated or contracted to a third party and that DCMs must ensure that the services received will enable them to remain in compliance with the CEA's requirements.

In recent years, the Commission has gained much experience in administering the delegation and contracting regime for regulatory services. Many DCMs, especially those that were designated after passage of the CFMA, employ third-party regulatory service providers to meet one or more core principle obligations. In administering this regime, the Commission has found that DCM applicants have questions as to the manner and degree to which their staffs must remain involved in regulatory decisions when they utilize third-party providers. Accordingly, the Commission is proposing new § 38.154 to supplement its previous guidance on delegation and contracting arrangements to clarify its expectations in this regard. The proposed rule is equally applicable to delegations and contracting, and to arrangements DCMs have with regulatory service providers that are registered futures associations or other registered entities. For purposes of proposed § 38.154, the applicable self-regulatory functions include: trade practice surveillance; market surveillance; real-time market monitoring; investigations of possible rule violations; and disciplinary actions.

The proposed rule requires that DCMs utilizing third-party regulatory service providers must ensure that their providers have sufficient capacity and resources to render timely and effective regulatory services. The DCM also must oversee the quality of the contracted regulatory services and must retain *exclusive* authority with respect to certain regulatory decisions. These regulatory decisions include cancellation of trades, the issuance of disciplinary charges against members or market participants, and denials of access to the trading platform for disciplinary reasons. Conversely, the proposed rule also specifies that a decision to open an investigation of a possible rule violation must be made solely by a regulatory service provider, and all instances where a DCM's actions differ from those recommended by its regulatory provider must be documented and explained in writing.

v. Proposed § 38.155—Compliance Staff and Resources

As noted above, Core Principle 2 requires that a DCM enforce compliance with its rules and have the capacity to detect, investigate, and sanction violations. Having adequate staff to perform a DCM's compliance and enforcement responsibilities is essential to the effectiveness of its self-regulatory programs, including market surveillance, audit trail, trade practice surveillance, and disciplinary programs.

A DCM's ability to enforce speculative limits, monitor for manipulation, complete timely investigations, conduct annual open outcry and electronic audit trail reviews, as well as perform other regulatory duties, is compromised if a DCM does not have sufficient staff. Thus, examining the size and experience of a DCM's compliance staff is a critical component of RERs carried out by Commission staff. In several RERs, staff has recommended, and the Commission has accepted, findings that DCMs: (1) increase their compliance staff levels, and (2) monitor the size of their staffs and increase the number of staff appropriately as trading volume increases, new responsibilities are assigned to compliance staff, or internal reviews demonstrate that work is not completed in an effective or timely manner.[58]

Those recommendations have formed the basis for proposed § 38.155. The proposed rule requires that a DCM maintain sufficient compliance resources to conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time monitoring. It also requires that a DCM monitor its staff size annually to ensure that it is appropriate to effectively perform those functions. Staff size also must be sufficient to address market or trading events and to complete investigations in a timely manner.

The Commission is not proposing that staff size be determined based on a specific formula. Rather, the Commission proposes to leave to the discretion of each individual DCM to determine the size of the staff it needs to effectively perform its self-regulatory responsibilities. In making this determination, the proposed rule requires that a DCM take into account specific facts and circumstances (*e.g.,* volume, the number of new contracts, *etc.*), as well as any other factors suggesting the need for increased resources. Factors that may suggest the need for increased compliance resources are a prolonged surge in trading volume or a prolonged period of price volatility. A DCM must have sufficient staff to address unusual or unanticipated events while continuing to effectively conduct its routine self-regulatory duties.

vi. Proposed § 38.156—Automated Trade Surveillance System

All currently active DCMs, or their third-party service providers, maintain automated surveillance systems to conduct trade practice surveillance. These systems vary in degree of sophistication, but typically generate alerts on a trade date plus one day (T+1) basis to help staff focus on potential violations and anomalies found in trade data.[59] They also provide a DCM's compliance staff the ability to sort and query voluminous amounts of data. In performing their surveillance responsibilities, DCMs engage in various analyses to profile trading activity and conduct investigations to detect and prosecute possible trading abuses. These functions all require the collection of order and trade data and the ability to

[55] 7 U.S.C. 7a–2(b); *see also,* section 5c(b)(1) of the CEA, as amended by the Dodd-Frank Act.

[56] *See* 66 FR 42256, 42266, Aug. 10, 2001.

[57] *See* 7 U.S.C. 7a–2(b)(2); *see also,* Section 5c(b)(2) of the CEA, as amended by the Dodd-Frank Act.

[58] *See* Rule Enforcement Review of the Minneapolis Grain Exchange (Aug. 27, 2009); Rule Enforcement Review of ICE Futures U.S. (Feb. 2, 2010); and Rule Enforcement Review of the Chicago Board of Trade and the Chicago Mercantile Exchange (Sep. 13, 2010).

[59] These systems typically differ from those systems used for real-time market monitoring. The requirements for real-time market monitoring can be found in proposed § 38.157.

process that data in various ways for analysis.

Proposed § 38.156 reflects the substantial growth in U.S. futures trading volume since the CFMA was adopted in 2000. The approximate trading volume for U.S. futures exchanges (including futures and options on futures) was 596 million contracts in 2000, 2 billion contracts in 2005, and 3.2 billion contracts in 2010. In view of this growth in volume, combined with new participants in the markets, such as high frequency traders, it is critical that DCMs have automated tools that, at a minimum, have the capability to generate alerts, profile trading activity, and sort and query data to conduct trade practice surveillance. The Commission has found, in performing its oversight responsibility of monitoring the markets to ensure market integrity and customer protection, that effectively monitoring this large amount of volume requires automated tools.[60] A DCM's automated surveillance system must have specific characteristics for it to be able to detect and prosecute the abusive trading practices enumerated in proposed § 38.152. A DCM's automated surveillance system must maintain all trade and order data, including order modifications and cancellations. The system must process this data on a T+1 basis. In addition, a DCM's automated trade surveillance system must provide users with the ability to compute, retain and compare trading statistics; compute profit and loss; and reconstruct the sequence of trading activity.

vii. Proposed § 38.157—Real-time Market Monitoring

Proposed § 38.157 codifies existing practices at DCMs for real-time monitoring of electronic trading. The practices codified in proposed § 38.157 reflect the growth of electronic trading in the U.S. futures markets, as well as the Commission's experience in designating new contract markets since passage of the CFMA. All DCMs that were designated post-CFMA trade exclusively on electronic trading platforms.

The purpose of real-time monitoring of electronic trading is to ensure orderly trading and to identify and correct any market or system anomalies promptly. The proposed rule requires that any DCM price adjustment or trade cancellation process be clear and transparent to the market and subject to clear, fair and publicly-available standards.

viii. Proposed § 38.158—Investigations and Investigation Reports

Proposed § 38.158 is largely a compilation of requirements found in §§ 8.06 and 8.07 of the Commission's regulations, with some modifications. Paragraph (a) of the proposed rule requires that a DCM have procedures to conduct investigations of possible rule violations. Paragraph (b) requires that an investigation be completed within a timely manner. A timely manner is defined to be 12 months after an investigation is opened, absent mitigating circumstances. This differs from § 8.06(b) of the Commission's regulations, which provides that an investigation be "completed within four months, unless significant reasons exist to extend it beyond such period." In its experience in conducting RERs, the Commission has found that while simple, straight-forward investigations typically are completed in less than four months, many DCM investigations involve fact patterns requiring more in-depth and sophisticated analysis. Depending on the complexity of a matter, an investigation frequently may take between four and 12 months to complete.

While it is not typical for an investigation to take longer than one year to complete, certain circumstances may justify an investigation taking longer than one year. These include the complexity of the investigation, the number of firms or individuals involved, the number of potential violations, the amount of trade data requiring analysis and, in some instances, the amount of video recordings to be reviewed and analyzed.[61]

Paragraphs (c) and (d) of proposed § 38.158 set forth the elements and information that must be included in an investigation report when there is or there is not a reasonable basis for finding a rule violation. While the proposed language is similar to §§ 8.07(a) and (b) of the Commission's regulations, there are two notable differences.

First, proposed § 38.158(c) requires that when DCM compliance staff believes there is a reasonable basis for finding a violation, the investigation report must include the potential wrongdoer's disciplinary history. Second, proposed § 38.158(d) requires that if a DCM's compliance staff recommends that a warning letter be issued, the investigation report must also include the potential wrongdoer's disciplinary history.[62] Requiring disclosure of a member's or market participant's prior disciplinary history in the above-described circumstances is consistent with recommendations made in RERs.[63] The Commission believes that prior disciplinary history is critical information that a disciplinary committee should consider when either issuing a warning letter or assessing an appropriate penalty as part of any settlement decision or hearing.[64] In practice, when a DCM's compliance department believes there is a reasonable basis to find a violation, the investigation report is forwarded to a disciplinary committee for action. Therefore, the Commission believes that the investigation report is the most logical place to include disciplinary history.

Proposed § 38.158(e) provides that a DCM may authorize its compliance staff to issue a warning letter or to recommend that a disciplinary committee issue a warning letter. The proposed rule is substantively identical to Commission § 8.07(c), except that it prohibits a DCM from issuing more than one warning letter for the same violation during a rolling 12-month period. Currently, many DCMs use summary fine programs to enforce their audit trail rules. Typically, such programs allow compliance staff to issue summary fines for trade timing, order ticket and trading card violations. Such summary fine schemes generally start with a warning letter for the first offense. While a warning letter may be appropriate for a first-time violation, the Commission does not believe that more than one warning letter in a rolling 12-month period for the same or similar violation is ever appropriate. A policy of issuing repeated warning letters, rather than issuing meaningful sanctions, to members and market participants who repeatedly violate the same or similar rules denigrates the effectiveness of a

[60] In this regard, the Commission is in the midst of modifying its own automated surveillance systems for both trade practice surveillance and market surveillance.

[61] *See* Rule Enforcement Review of ICE Futures U.S. (Feb. 2, 2010), and Rule Enforcement Review of the Chicago Board of Trade and the Chicago Mercantile Exchange (Sep. 13, 2010). Some exchanges, such as CBOT and CME, have video cameras on their open outcry trading floors.

[62] In some instances, even though there is not sufficient evidence to recommend disciplinary action, a DCM's compliance staff may believe that a rule violation occurred.

[63] *See* 2000 Rule Enforcement Review of the New York Mercantile Exchange.

[64] As noted below in the discussion of proposed § 38.158(c), a DCM's disciplinary committee should review a member's complete disciplinary history when determining appropriate sanctions and impose meaningful sanctions on members who repeatedly violate the same or similar rules to discourage recidivist activity.

DCM's rule enforcement program.[65] The proposed rule is consistent with what Commission staff has advised DCM applicants and recommendations made in RERs.[66]

ix. Proposed § 38.159—Ability To Obtain Information

Proposed § 38.159 expands on the Core Principle 2 requirement that a DCM have the ability and authority to obtain necessary information to perform its rule enforcement obligations, including the capacity to carry out any international information sharing agreements required by the Commission. The proposed rule provides that information sharing agreements can be established with other DCMs or SEFs, or that the Commission can act in conjunction with a DCM to carry out such information sharing. This language is virtually identical to the language found in the guidance for former Designation Criterion 8.[67]

x. Proposed § 38.160—Additional Rules Required

Proposed § 38.160 requires a DCM to adopt and enforce any additional rules that it believes are necessary to comply with the requirements of this subpart C.

3. Subpart D—Contracts Not Readily Subject to Manipulation

The Dodd-Frank Act did not make any amendments to current Core Principle 3—Contracts Not Readily Subject to Manipulation. Historically, DCMs complied with the requirements of Core Principle 3 by using as guidance the provisions of Guideline No. 1, contained in Appendix A to part 40. The Commission proposes certain revisions to the former Guideline No. 1, including: (1) Amending the provision to include swap transactions, (2) re-titling the guidance as "Demonstration of compliance that a contract is not readily susceptible to manipulation," and (3) redesignating the provision as Appendix C of part 38. Proposed § 38.201 refers applicants and DCMs to the guidance in Appendix C to part 38 for purposes of demonstrating to the Commission their compliance with the requirements of § 38.200. Proposed guidance under Appendix C to part 38 would replace Guideline No. 1 under Appendix A to part 40.

The amended guidance provides greater detail to DCMs regarding the relevant considerations in demonstrating compliance with Core Principle 3 when designing a contract and submitting supporting documentation and data to the Commission at the time the DCM submits: (1) The terms and conditions of a new contract under §§ 40.2 or 40.3, or (2) amendments to terms and conditions under §§ 40.5 or 40.6.

In general, the guidance provides that the settlement or delivery procedures adopted by a DCM for a futures contract should reflect the underlying cash market. The objective is to ensure that a given futures contract is not readily susceptible to manipulation and that it will provide a reliable pricing basis and promote cash/futures price convergence. Accordingly, the terms and conditions should conform to prevailing commercial practices and provide for adequate deliverable supply.

For cash-settled contracts, the cash-settlement procedure should be based on a reliable price reference series that accurately reflects the underlying market value, is not readily susceptible to manipulation, and is commonly used by industry/market participants as a price reference. Therefore, the calculation methodology of the price reference series, if applicable, must be submitted as supporting documentation. In that regard, for a price reference series that is based on an index or survey of prices or rates, this would include the index or survey methodology used to determine the level of the index used as the price reference. Furthermore, the views and opinions of prospective market users of the contracts should be given considerable weight in the contract design process. The more accurately a listed contract's terms and conditions reflect the underlying cash market in that commodity, the more likely the contract will perform the intended risk management and/or price discovery functions. Finally, a DCM should ensure that the terms and conditions of listed contracts remain consistent with the guidance set forth herein. These concepts are set forth in the guidance in Appendix C to part 38.

The guidance in Appendix C to part 38 is comprised of best practices that were developed over the past three decades by the Commission and other market regulators in their review of product submissions. The Commission first adopted a Guideline for product submissions on November 3, 1982[68] and since then has modified it from time to time. Furthermore, the Commission's Guideline served as the basis for "Guidance on Standards of Best Practice for the Design and/or Review of Commodity Contracts," endorsed by the International Organization of Securities Commissioners ("IOSCO") in its Tokyo Communiqué (October 1997).[69] The Guidance recognizes that the proper design of the terms and conditions of contracts reduces the susceptibility of such contracts to market abuses, including manipulation, and enhances the economic utility of such contracts to commercial users. Accordingly, the Guidance for designing futures contracts focuses on such issues as a contract's economic utility (*i.e.,* a contract should meet risk management needs of potential users and/or promote price discovery of the underlying commodity), the contract's correlation with the cash market (*i.e.,* the contract terms and conditions generally should reflect the operation of the underlying cash market and avoid impediments to delivery), a contract's settlement and delivery reliability (*i.e.,* the settlement and delivery procedures should reflect the underlying cash market and promote price convergence), the contract's responsiveness to the views of potential market users, and the contract's transparency (*i.e.,* the contract's terms and conditions, as well as relevant information concerning delivery and pricing, should be readily available to market authorities and to market users).

Appendix C to part 38 is intended to act as a source for new and existing DCMs to reference for best practices when developing new products to list for trading. Specifically, Appendix C to part 38 provides guidance regarding: (1) The forms of supporting information a new contract submission should include; (2) how to estimate deliverable supplies; (3) the contract terms and conditions that should be specified for physically delivered contracts; (4) how to demonstrate that a cash-settled contract is reflective of the underlying cash market, is not readily subject to manipulation or distortion, and is based on a cash price series that is reliable, acceptable, publicly available and timely; (5) the contract terms and conditions that should be specified for cash-settled contracts; (6) the requirements for options on futures contracts; (7) the terms and conditions for non-price based futures contracts; and (8) the terms and conditions for

[65] For purposes of this rule, the Commission does not consider a "reminder letter" or such other similar letter to be any different than a warning letter.

[66] *See* 1998 Rule Enforcement Review of Kansas City Board of Trade; and, Rule Enforcement Review of the Minneapolis Grain Exchange (Aug. 27, 2009).

[67] 17 CFR Part 38, App. A, Designation Criterion 8, Guidance.

[68] *See* 47 FR 49832, 49838, Nov. 3, 1982.

[69] *See* Tokyo Commodity Futures Markets Regulators' Conference (October, 1997), *http://www.cftc.gov/ucm/groups/public/@internationalaffairs/documents/file/oia_tokyorpt.pdf* (last visited Oct. 25, 2010).

swap contracts. Currently, DCMs generally conduct market research in a manner discussed in Appendix C.

4. Subpart E—Prevention of Market Disruption

The Dodd-Frank Act amended current Core Principle 4 by: (i) Changing the title of the core principle from "Monitoring of Trading" to "Prevention of Market Disruptions;" and (ii) specifying the methods and procedures DCMs must employ in discharging their obligations under Core Principle 4. The amendments to Core Principle 4 emphasize that DCMs must take an active role, not only in monitoring trading activities within their markets, but in preventing market disruptions. Accordingly, the proposed rules under subpart E of part 38 codify the relevant provisions of the current Application Guidance and Acceptable Practices for Core Principle 4 in current Appendix B to part 38, and include new requirements that clarify and strengthen a DCM's responsibilities under the amended core principle.

i. Proposed § 38.251—General Requirements

As noted above, the Dodd-Frank Act amended Section 5(d)(4) of the CEA by adding new language to Core Principle 4 to require DCMs to conduct real-time monitoring of trading and to have the ability to comprehensively and accurately reconstruct trading.[70] Accordingly, proposed § 38.251 (General Requirements) would require that the DCM have the ability to conduct real-time monitoring of trading and comprehensive and accurate trade reconstructions. Intra-day trade monitoring must include the capacity to detect abnormal price movements, unusual trading volumes, impairments to market liquidity, and position-limit violations.

As noted above in its discussion of the need for automated tools in connection with Core Principle 2 requirements, the Commission believes that it would be difficult, if not impossible, to monitor for market disruptions in contract markets with high transaction volume and a large number of trades unless the DCM has installed automated trading alerts to detect many types of potential violations of exchange or Commission rules. Accordingly, the Commission proposes in § 38.251 to require that, where the DCM cannot reasonably demonstrate that its manual processes are effective in detecting and preventing abuses, the DCM must implement automated trading alerts to detect potential problems.

We invite comment on whether in any rule the Commission may adopt in this matter DCMs should be required to monitor the extent of high frequency trading, and whether automated trading systems should include the ability to detect and flag high frequency trading anomalies.

ii. Proposed § 38.252—Additional Requirements for Physical Delivery Contracts

The Commission has observed a number of physically-delivered futures contracts where the convergence of the futures price and the cash market price of the underlying commodity have been problematic.[71] Price convergence refers to the process whereby the price of a physically-delivered futures contract converges to the spot price of the underlying commodity, as the futures contract nears expiration (a cash-settled contract, by definition, converges to the underlying price series at expiration). The hedging effectiveness of a physically-delivered futures contract depends in part upon the extent to which the futures price reliably converges to the comparable cash market price, or to a predictable differential to the comparable cash market price. The delivery mechanism for physically-delivered futures contracts is the critical link that drives price convergence. To the extent that delivery of a commodity at futures expiration occurs and the delivered commodity is merchandised in the physical marketing channel, arbitrage should ensure that the price of the futures contract converges to the price of the commodity in the physical marketing channel. Impediments to futures delivery, or the delivery of an instrument that permits a long futures position holder to defer moving the physical commodity into normal marketing channels, may weaken the crucial link between cash markets and the futures market, resulting in a lack of reliable price convergence.[72]

Therefore, for physical delivery contracts, proposed § 38.252 specifically requires that, among other things, DCMs must monitor each contract's terms and conditions as to whether there is convergence of the futures price to the cash price of the underlying commodity and take meaningful corrective action, including to address conditions that interfere with convergence, or if appropriate, change contract terms and conditions, when lack of convergence impacts the ability to use the markets for making hedging decisions and for price discovery.

The Commission requests comments on what other factors, in addition to the delivery mechanism, a DCM should be required to consider in determining whether convergence is occurring.

iii. Proposed § 38.253—Additional Requirements for Cash-Settled Contracts

Over the past several years, there has been a growth in markets that are linked, for example, where the settlement price of one market is linked to the prices established in another market. As a result, traders may have incentives to disrupt or manipulate prices in the reference market in order to influence the prices in the linked market. Accordingly, proposed § 38.253 would require that, where a DCM contract is settled by reference to the price of a contract or instrument traded in another venue, including a price or index derived from prices on another exchange, the DCM must have rules that require the traders on the DCM's market to provide the DCM with their positions in the reference market as the traders' contracts approach settlement. In the alternative, § 38.253 provides that the DCM may have an information sharing agreement with the other venue or designated contract market.

iv. Proposed § 38.254—Ability To Obtain Information

The current acceptable practice for Core Principle 4 provides that DCMs, at a minimum, should have routine access to the positions and trading of their market participants. To ensure that the DCM has the ability to properly assess

[70] *See* Section 735 of the Dodd-Frank Act.

[71] The Commission notes that the lack of convergence and its adverse impact on the ability to effectively hedge in some agricultural futures markets has been the subject of several meetings of the Commission's Agricultural Advisory Committee. Where there is a lack of convergence, this has resulted in extremely weak bases, *i.e.,* cash prices well below equivalent futures prices, disadvantaging short hedgers and resulting in abnormally large quantities of futures deliveries that diverted grain from normal commercial channels and tied up warehouse space. The lack of convergence likely sends the wrong price discovery signals to the market. *See,* Materials from Meeting of the CFTC's Agricultural Advisory Committee (AAC) (October 29, 2009), *http://www.cftc.gov/About/CFTCCommittees/AgriculturalAdvisory/aac_102909agenda.html; see also,* the AAC Subcommittee on Convergence in Agricultural Commodity Markets Report and Recommendations (October 29, 2009), *http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/reportofthesubcommitteeonconve.pdf.*

[72] For example, specifying a shipping certificate with an indefinite life as the futures delivery instrument that permits a long futures position holder to avoid taking delivery in the physical marketing channel, which, in certain circumstances, may result in weak or erratic convergence between the futures price and the cash price.

the potential for price manipulation, price distortions, and the disruption of the delivery or cash-settlement process, proposed § 38.254 provides that each DCM require that traders in their market keep records, including records of their activity in the underlying commodity and related derivative markets and contracts, and make such records available, upon request, to the designated contract market. The Commission's own market surveillance staff, which has similar authority to obtain information from large traders (under § 18.05 for futures and options and proposed § 20.6 for swaps), has found that access to such information is vital to an effective surveillance program.

v. Proposed § 38.255—Risk Controls for Trading

Proposed § 38.255 requires that a DCM have effective risk controls to reduce the potential risk of market disruptions and ensure orderly market conditions. In the current futures markets, DCMs have implemented a variety of risk controls to avoid market disruptions through restrictions on order entry, including daily price limits, price/quantity bands, and trading pauses. Most commonly used by DCMs for futures contracts in physical commodities (outside of the spot month) and futures contracts in broad-based equity indexes (in coordination with circuit breakers on national security exchanges) are daily price limits, which restrict the total price movement allowed on any given trading day, calculated as a limit above and below the prior day's futures settlement price.[73] Under daily price limits, futures can continue to trade within the limit up/down prices, but no trading can take place above or below the daily price limit. Some DCMs also have rules for the automatic expansion of the daily price limit after consecutive days of limit bid/offer prices. Some electronic trading platforms also have "reasonability tests" and/or "price bands" for order entry, which do not allow an order to enter the trade matching system if it is outside a predetermined price range or is of a particularly large size.[74] Finally, some trading platforms use trading pauses to halt trading for a short period of time during certain market conditions. Trading pauses are used,[75] most commonly, for trading in equity index products.

The CME's GLOBEX system also has a risk control, commonly referred to as "stop logic functionality," that implements a pause of a few seconds in the order matching system to protect against cascading stop orders—the domino effect of one stop order triggering others. The stop logic functionality pauses trading when the last transaction price would have triggered a series of stop loss orders that, if executed, would cause the market to trade outside of predefined values, which typically consist of values that are the same as the "no bust" range[76] established for a market.

In order to prevent market disruptions due to sudden volatile price movements, proposed § 38.255 requires DCMs to have in place effective risk controls, including but not limited to pauses and/or halts to trading in the event of extraordinary price movements that may result in distorted prices or trigger market disruptions. Risk controls such as trading pauses and halts can, among other things, allow time for participants to analyze the market impact of new information that may have caused a sudden market move, allow new orders to come into a market that has moved dramatically, and allow traders to assess and secure their capital needs in the face of potential margin calls. Moreover, where a contract market can be a proxy or substitute for similar markets on the DCM or on other trading venues, including where a contract is based on the price of an equity security or the level of an equity index, risk controls should be coordinated with those on the similar markets or trading venues, to the extent possible. The desirability of coordination of various risk controls, for example, "circuit breakers" in equities and their various derivatives including futures and options, recently has been the subject of discussions by regulators and the industry.

The Commission believes that pauses and halts are effective risk management tools and must be implemented by DCMs to facilitate orderly markets. These basic risk controls also have proven to be effective and necessary in preventing market disruptions. The Commission requests comments on what types of pauses and halts are necessary and appropriate for particular market conditions. The Commission recognizes that pauses and halts are only one category of risk controls and that additional controls may be necessary to further reduce the potential for market disruptions. Such controls may include price collars or bands,[77] maximum order size limits,[78] stop loss order protections,[79] kill button,[80] and others. The Commission is considering mandating in this rulemaking risk controls that are appropriate and/or necessary. Accordingly, the Commission invites comments on the appropriateness of these and other controls that could supplement trading halts or pauses. The Commission also invites comments on the following additional questions:

- What other DCM risk controls are appropriate or necessary to reduce the risk of market disruptions?
- Which risk controls should be mandated and how?

vi. Proposed § 38.256—Trade Reconstruction

The Dodd-Frank Act added language to Core Principle 4 that designated contract markets must have the ability to comprehensively and accurately reconstruct all trading on its trading facility. These audit-trail data and reconstructions must also be made available to the Commission in a form, manner, and time as determined by the Commission. Proposed § 38.256 codifies these requirements.

vii. Proposed § 38.257—Regulatory Service Provider

Proposed § 38.257 provides that a designated contract market must comply with the regulations in this section

[73] Option contracts on futures may have different daily price limits than the underlying futures.

[74] For example, the GLOBEX electronic trading system for the NYMEX crude oil futures contract generally will not accept an order 75 points above or below the last traded price nor will it accept an order for a quantity larger than 999 contracts.

[75] The NYMEX Henry Hub Natural Gas (NG) futures has a 5 minute pause in trading when a daily price limit—up or down—is hit, then trading resumes at a higher limit. However, this provision does not apply during the last 60 minutes of regular trading hours. *See* NYMEX rule 220.08.

[76] Under most exchanges' trade cancellation rules, trades considered to have been executed in error may be cancelled. Where the trade is within the "no bust range" for the specified futures contract, which range is determined by the exchange under its rules, the exchange will allow the trade to stand.

[77] Price bands would prevent clearly erroneous orders from entering the trading system, including "fat finger" errors, by automatically rejecting orders priced outside of a range of reasonability.

[78] Maximum order size limitations prevent entry into the trading system of an order that exceeds a maximum quantity established by the DCM.

[79] Stop loss orders would be triggered if the market declines to a level pre-selected by the person entering the order. This mechanism would provide that when the market declines to the trader's pre-selected stop level for such an order, the order would become a limit order executable only down to a price within the range of reasonability permitted by the system, instead of becoming a market order.

[80] The kill button gives clearinghouses associated with the DCM the ability to delete open orders and quotes and reject entry of new orders or quotes in instances where a trader breaches its obligations with the clearinghouse. FIA Market Access Risk Management Recommendations, p. 10 (April 2010).

through a dedicated regulatory department, or by delegation of that function to a regulatory service provider, over which the designated market has supervisory authority.

viii. Proposed § 38.258—Additional Rules Required

Proposed § 38.258 requires a DCM to adopt and enforce any additional rules that it believes are necessary to comply with the requirements of subpart E.

5. Subpart F—Position Limitations or Accountability

Core Principle 5 under Section 5(d)(5) requires that DCMs adopt for each contract, as is necessary and appropriate, position limitations or position accountability. The Dodd-Frank Act amended Core Principle 5 by adding that for any contract that is subject to a position limitation established by the Commission pursuant to Section 4a(a) of the CEA, the DCM shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission. The Federal position limits established by the Commission currently are codified in part 150. In a separate release, as required by the Dodd-Frank Act, the Commission will consider replacing part 150 (Limits on Positions) with new part 151 (Limits on Positions) to establish Federal position limits for certain exempt and agricultural commodities that currently are not subject to Federal position limits.[81] In that release, the Commission will propose to require that exchanges adopt their own position limits for all commodities (whether such commodities are subject to Federal limits or not), with an alternative of adopting position accountability rules in lieu of position limits for contracts in major currencies and certain excluded commodities. Proposed § 38.301 requires that each DCM must comply with the requirements of part 151 that the Commission adopts in order to be in compliance with Core Principle 5.

6. Subpart G—Emergency Authority

The Dodd-Frank Act made minor, non-substantive changes to Core Principle 6 under Section 5(d)(6) of the CEA. Based upon its experience, and in recognition of the fact that DCMs may have different procedures and guidelines for taking emergency action, the Commission believes that it is appropriate to maintain an expanded version of the existing guidance and add an acceptable practice under its regulations for purposes of complying with this core principle. As a result, the Commission proposes to retain most of the former Application Guidance found in Appendix B to part 38 of the Commission's regulations, with some revisions and additions. Proposed § 38.351 refers applicants and DCMs to the guidance and acceptable practices in Appendix B to part 38 for purposes of demonstrating to the Commission their compliance with the requirements of subpart G. Specifically, a DCM is required to have rules providing it with the authority to intervene as necessary to maintain fair and orderly trading and to prevent or address manipulation or disruptive trading practices, whether the need for intervention arises exclusively from the DCM's own market or as part of a coordinated, cross-market intervention. The increased tendency for similar, if not identical, contracts to be traded on more than one venue, that in the future may include a SEF, demonstrates the importance of coordinated interventions. Accordingly, the Commission believes that there should be an increased emphasis on cross-market coordination of emergency actions. The guidance also provides that the DCM rules should include procedures and guidelines to avoid conflicts of interest in accordance with new provisions proposed in § 40.9 and to include alternate lines of communication and approval procedures in order to be able to address, in real time, emergencies that may arise. This latter provision is a result of the expansion of electronic markets and the speed of order execution. As a result of fast-paced trading systems, there is a need for DCMs to be able to react quickly to market events and intervene without delay. Thus, the proposed guidance acknowledges this trend with this provision. The proposed guidance also clarifies that the DCM must also have rules that allow it to take such market actions as may be directed by the Commission.

The Commission's experience and industry practice have demonstrated that there are some specific best practices that should be followed, and these best practices are incorporated in an acceptable practice. Specifically, the DCM should have procedures and guidelines for decision-making and implementation of emergency intervention in the market. The DCM should have the authority to liquidate or transfer open positions in the market,[82] suspend or curtail trading in any contract, require market participants in any contract to meet special margin requirements and allow it to take such market actions as the Commission may direct.

7. Subpart H—Availability of General Information

Core Principle 7 requires that DCMs make available to the public accurate information concerning the contract market's rules and regulations, contracts and operations. The Dodd-Frank Act amended Core Principle 7 by adding a provision requiring the board of trade to make public the rules and specifications describing the operation of the DCM's electronic matching platform or trade execution facility.[83] Since passage of the CFMA, the types of information and the various practices for providing information have become standardized across the industry as DCMs have adopted practices that comply with the current guidance and acceptable practices for Core Principle 7. Accordingly, proposed § 38.401 in subpart H codifies these practices. In addition, the Commission proposes several additional provisions to ensure that pertinent information is available to the Commission, market participants and the public, as described below.

i. Proposed § 38.401(a)—General

Proposed § 38.401(a) requires DCMs to have in place procedures, arrangements and resources for disclosing to market authorities, market participants and the public accurate and relevant information pertaining to: (i) Contract terms and conditions, (ii) rules and regulations applicable to the trading mechanism, and (iii) rules and specifications pertaining to the operation of the electronic matching platform or trade execution facility. Among other types of information, DCMs must ensure that market authorities, market participants and the public have available all material information pertaining to new product listings, new or amended governance, trading and product rules, or other changes to information previously disclosed by the DCM, within the time period prescribed in proposed § 38.401. As described in § 38.401(a) of the regulation, DCMs must provide the required information to market

[81] *See* CFTC Web site for additional information on the Position Limits rulemaking, at *http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_26_PosLimits/index.htm* (last visited Dec. 14, 2010).

[82] In situations where a swap is traded on more than one platform, emergency action to liquidate or transfer open interest must be directed, or agreed to, by the Commission or Commission staff.

[83] This requirement, while new to the text of Core Principle 7, was previously required as part of former Designation Criteria 4.

participants and the public by posting such information on their Web site, as set forth in proposed § 38.401(c).

ii. Proposed § 38.401(b)—Accuracy Requirement

Proposed § 38.401(b) requires that each DCM have procedures in place to ensure that any information or communication with the Commission is accurate and complete, and further that no false or misleading information is submitted and that no material information is omitted. Similarly, each DCM must have procedures in place to ensure the accuracy and completeness of any information made available to market participants and the public, including information that is made available on its Web site.

iii. Proposed § 38.401(c)—Notice of Regulatory Submissions

The Commission historically has required DCMs to update their rulebooks upon the effectiveness of a rule amendment, product listing or rule certification that has been filed with the Commission. While proposed § 38.401(c) maintains the general requirement for posting rules in the DCM rulebook upon their effectiveness, the Commission believes that market participants and the public would benefit from notifications of proposed rule amendments, product listing (or de-listings) and rule certifications in advance of their taking effect.[84] Accordingly, proposed § 38.401(c) requires each DCM to post on its Web site all rule filings and submissions that it makes to the Secretary of the Commission. This information should be posted on the DCM's Web site on the same day that such information is transmitted to the Commission. Where applicable, the DCM Web site should make clear that the posted submissions are pending before the Commission. For example, a DCM's Web site may contain a separate Web page for "regulatory filings" or "rule certifications" for posting submissions or certifications pertaining to new product listings, new rules, rule amendments or changes to previously-disclosed information. This requirement will provide market participants with advance notice of rule amendments and certifications, consistent with the goal of Core Principle 7 to make pertinent information available to market participants and the public. This posting requirement is in addition to the obligation of DCMs to update their Rulebooks upon the effectiveness of a rule submission or certification.

To the extent that a DCM requests confidential treatment of certain information filed or submitted to the Commission, the proposed rule requires the DCM to post the public portions of the filing or submission.

iv. Proposed § 38.401(d)—Rulebook

As noted above, consistent with the current acceptable practices for Core Principle 7, all DCMs must post and routinely update their rulebooks, which appear on their Web sites. Currently, each DCM updates its rulebook the day that a new product is listed or a new or amended rule takes effect. The vast majority of DCM Web sites also are readily accessible to the public and the information is available by visitors to the Web site without requiring registration, log-in, or user name or password. Proposed § 38.401(d) merely codifies these existing practices.[85]

8. Subpart I—Daily Publication of Trading Information

Core Principle 8 requires that DCMs make available to the public accurate information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market. The Dodd-Frank Act did not amend Core Principle 8. Accordingly, in proposed § 38.451, the Commission reiterates the current acceptable practice that requires mandatory compliance with § 16.01, "Trading volume, open contracts, prices and critical dates."

However, in order to conform to the Dodd-Frank Act, certain changes were made to § 16.01 regarding the information a reporting market will record and publish on futures and options contracts, and on swap and swaption contracts.

Specifically, the Commission proposes to amend § 16.01(d) to require reporting markets to report information in paragraphs (a)(1) through (6) of § 16.01. Prior to the enactment of the Dodd-Frank Act, reporting markets were required only to report separately the following information enumerated in paragraphs (a)(1) through (5) of current § 16.01 for futures and options: The option delta, where delta system is used, total gross open contracts, excluding from futures those contracts against which notices have been stopped; for futures, open contracts against which delivery notices have been stopped on that business day; the total volume of trading, excluding transfer trades or office trades; and the total volume of futures exchanged for commodities or for derivatives positions that are included in the total volume of trading.

The Commission proposes to require reporting markets to also report to the Commission the information found in paragraph (a)(6) that is "the total volume of block trades that are included in the total volume of trading." Previously such information was only required to be reported to the public but not separately to the Commission. The Commission believes that having block trade volumes reported separately to it would be useful, particularly in analyzing whether a contract market is in compliance with Core Principle 9 (Execution of Transactions). Because reporting markets currently are required to make block trade volumes available to the public, it should not be an unreasonable burden for the reporting market to submit that information separately to the Commission.

Under the Dodd-Frank Act, DCMs are able to list and trade swaps. Accordingly, amendments to part 16 specify the type of information that DCMs or SEFs must publish daily regarding the swaps contracts traded. Specifically, DCMs and SEFs would be required to publish for their swaps contracts all the information included in proposed § 16.01 (a) (1) through (6) for each trading day for each swap, class of swaps, swaption or class of swaptions as appropriate. For swap contracts that are standard-sized contracts (i.e., contracts that have a set contract size for all contracts), volume and open interest for swaps and swaptions shall be reported in terms of number of contracts traded, just as futures contracts currently are reported. For swap contracts that are non-standard-sized contracts (i.e., contracts whose contract size can vary for each transaction) the volume and open interest should be reported in terms of total notional value traded for that trading day. In addition, § 16.01(b) is amended to require each DCM or SEF to publish for each trading day, by commodity and contract month or by tenor of the swap, the opening price, high price, low price and settlement price of the swap or swaption contract. The Commission is seeking comments on end-of-day price reporting for swaps. Specifically, the Commission seeks comments on the following issues:

- For interest rate swaps, because the tenor on an interest rate swap can be one of thousands of possible periods, what would be an appropriate manner

[84] This is especially relevant when the Commission determines to stay the certification of a DCM submission, as provided by the Dodd-Frank Act, for a 90-day review period, thereby triggering a public comment period.

[85] As noted above, the requirement to maintain an accurate and updated rulebook does not relieve DCMs of their obligations under paragraph (c) to post on their Web sites all rule filings and submissions submitted to the Commission.

to display end-of-day prices for each interest rate swap?

• Would certain end-of-day swap price reporting be more meaningful than others? If so, which methods of price reporting would be more meaningful and why?

• Would certain end-of-day swap price reporting be misleading? If so, which methods of price reporting would be misleading and why?

9. Subpart J—Execution of Transactions

The Dodd-Frank Act amended Core Principle 9 to require, among other things, that a board of trade must provide a competitive, open and efficient market and mechanism for executing transactions "that protects the price discovery process of trading in the centralized market of the board of trade.[86] The amended core principle also provides that off exchange transactions are permitted for bona fide business purposes if authorized by the board of trade's rules.[87]

In assessing a DCM's initial and ongoing compliance with Core Principle 9, the Commission currently considers several criteria, including, among others, the methodology and mechanisms of the DCM's trading system to ensure fair and orderly trading and the rules the DCM may have for permissible transactions executed off the centralized market. In so doing, the Commission has looked at § 1.38 of the Commission's regulations, which sets forth a requirement that all purchases and sales of a commodity for future delivery or a commodity option on or subject to the rules of a DCM should be executed by open and competitive methods. There is an exception to this "open and competitive" requirement if the transaction is in compliance with the rules of the DCM that specifically provide for the non-competitive execution of such transactions.[88] In addition, the current guidance for Core Principle 9 provides that a competitive, open and efficient market and mechanism for execution of transactions includes: (1) The DCM's methodology for entering orders and executing transactions; (2) that appropriate objective testing and review of automated systems should occur initially and periodically to ensure proper system functioning, adequate capacity and security; and (3) that a DCM that determines to allow block trades should ensure that such trades do not operate in a manner that compromises the integrity of prices or price discovery in the relevant market.[89]

In light of the Dodd-Frank Act amendments to Core Principle 9 and the Commission's experience in implementing Core Principle 9 since enactment of the CFMA, the Commission proposes to adopt certain regulations in subpart J of the Commission's regulations to establish requirements that a DCM must meet in order to comply with amended Core Principle 9. Specifically, new regulations are proposed to clarify the amended core principle's mandate requiring the protection of the price discovery function of trading on a DCM's centralized market. Other regulations codify practices that have become standard and adopted over the years by the industry. In addition, the Commission re-proposes certain guidance and acceptable practices that were published by the Commission in the September 2008 Notice of Proposed Rulemaking pertaining to "Execution of Transactions: Regulation 1.38 and Guidance on Core Principle 9" [90] (hereafter "2008 Core Principle 9 Proposed Rulemaking") for purposes of informing DCMs of how they may comply with certain other aspects of amended Core Principle 9.[91]

In short, the Commission proposes to adopt the following regulations, guidance and acceptable practices for Core Principle 9, as amended by the Dodd-Frank Act:

• New § 38.501 proposes to codify in part 38 the requirements that are currently contained in § 1.38 of the Commission's regulations, with amendments that were initially proposed in the 2008 Core Principle 9 Proposed Rulemaking along with relevant updates. Section 1.38 of the Commission's regulations would be eliminated.

• New § 38.502 addresses the specific requirements associated with protecting the price discovery function of trading on a DCM's centralized market as now specifically imposed by the Dodd-Frank Act. The proposed rule imposes: (i) Minimum requirements for trading on the centralized market for contracts listed on DCMs, (ii) mandatory delisting of contracts if the requirements of trading are not met, (iii) specified procedures for treatment of contracts existing prior to the effective date of this section, and (iv) limited exemptions for certain contracts that the Commission, upon a petition of the DCM, permits to remain listed under specified circumstances.

• New §§ 38.503 and 38.504 propose to codify certain requirements for block trades for futures and swaps and § 38.505 addresses other off-exchange transactions. These provisions codify practices that Commission staff has previously required and that have become industry practices. In particular, these proposed rules set forth block trade requirements for futures contracts and options, including who may enter into block trade transactions, conditions for block trades between affiliated parties, aggregation, recordkeeping and reporting procedures. In addition, in proposed § 38.505, the Commission proposes to adopt rules for off-exchange transactions that involve exchange of derivatives for related position, specifically describing what constitutes a bona fide trade and reporting requirements for such trades. Proposed § 38.504 addresses certain block trading requirements specifically for swaps traded on the DCM, and proposed § 38.506 addresses transfer and office trades.

• A new acceptable practice would provide a safe harbor methodology for DCMs to follow in determining the minimum size of block transactions for individual contracts. The acceptable practice also would provide a safe harbor relating to the manner of pricing block trades. By proposing this acceptable practice the Commission

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[86] 7 U.S.C. 7; *see also* Section 5(d)(9) of the CEA, as amended by the Dodd-Frank Act.

[87] This language was taken from former Designation Criterion 3.

[88] The Commission notes that the CFMA, which was enacted after promulgation of § 1.38, modified Section 3 of the current CEA to require that transactions subject to the CEA provide "a means for managing and assuming price risks, discovering prices, or disseminating pricing information through trading in liquid, fair and financially secure trading facilities." The CFMA also specifically listed some of the types of transactions that could be executed off the centralized market, including exchange of futures for swaps, and allowing a futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of a contract market or derivatives clearing organization. 7 U.S.C. 7(b)(3).

[89] The current acceptable practice for Core Principle 9 identifies an example of the type of party that would be an acceptable party to carry out the testing and review of an electronic trading system. The Commission notes that under its proposed rulemaking, all rules relating to the type of testing and review required for trading systems would be set forth under new Core Principle 20, System Safeguards, discussed infra at Section II.D.20.

[90] 73 FR 54097, Sep. 18, 2008. That proposed rulemaking was a re-proposal of some rules, guidance and acceptable practices pertaining to Regulation 1.38 and Core Principle 9, initially proposed on July 1, 2004. *See* 69 FR 39880, July 1, 2004. There were no final rulemakings to either of these proposals.

[91] In 2009, before those proposed rules were finalized, Congress initiated the legislative process that culminated in the Dodd-Frank Act. Accordingly, a number of the proposed rules contained in this release consist of regulations that were initially proposed in the 2008 Core Principle 9 Proposed Rulemaking, with relevant updates.

recognizes the need for flexibility as the appropriate minimum size and pricing of block trades vary among contracts and across DCMs.

i. Proposed § 38.501—General Requirements

Current § 1.38 of the Commission's regulations requires, subject to certain exceptions, "that all purchases and sales of a commodity for future delivery, and of any commodity option, on or subject to the rules of a DCM shall be executed openly and competitively by open outcry or posting of bids and offers or by other equally open and competitive methods * * * provided, however, that this requirement shall not apply to transactions that are executed noncompetitively in accordance with written rules of the contract market * * *" [92] The 2008 Core Principle 9 Proposed Rulemaking proposed certain revisions to § 1.38. Specifically, in addition to simplifying the language, the 2008 Core Principle 9 Proposed Rulemaking proposed to update the language of § 1.38 to more accurately identify the types of transactions that may be executed off a contract market's centralized market under the rules of a DCM.[93] The 2008 Core Principle 9 Proposed Rulemaking also would make it clear that under § 1.38, DCMs may self-certify (not just seek approval for) rules or rule amendments related to transactions off the centralized marketplace. Both of these changes were proposed to the language of regulation § 1.38 to incorporate updates made to the CEA in 2000 by the CFMA.

As noted above, the existing provisions of current § 1.38 will be incorporated in proposed § 38.501, including previously proposed amendments, with some updates. These updates include language that adds to the types of transactions that may be executed off of a DCM's centralized market. In addition, the proposed rule replaces the term "exchange of futures for commodities or for derivatives positions" with the term "exchange of derivatives for a related position." This term is more descriptive of the panoply of off-exchange transactions currently offered by DCMs, including exchange for physicals, exchange for swaps, exchange for risk or exchange of futures for futures. This term also will encompass other types of off-exchange transactions, not limited to futures. Finally, because swaps may now be traded on DCMs, the proposed rule will reference swaps.

ii. Proposed § 38.502—Minimum Centralized Market Trading Requirement

As noted, the Dodd-Frank Act amended Core Principle 9 to specifically require that in the execution of transactions, "the price discovery function of trading in the centralized market" must be protected.[94] The amended core principle recognizes that trading in the centralized market provides a price discovery function, and specifically requires that the execution of transactions be in a manner that protects that price discovery process.

The Commission notes that, under the current regulatory landscape, some DCMs have listed contracts for the purpose of providing a clearing solution for privately negotiated bi-lateral swap trades or trades made on exempt commercial markets. The DCMs accept these trades as futures contracts by converting them, through their block trade or exchange-for-swaps (or other exchange of derivatives for a related position) rules, to economically equivalent futures contracts in order for them to be cleared by their derivatives clearing organization. The vast majority of those contracts are not executed openly or competitively on the centralized market, but rather are effected away from the DCM's centralized market.[95] Despite the lack of trading on the centralized market these contracts still manage to achieve open interest over sustained periods of time.

A DCM that trades contracts that have a disproportionate percentage of their trading volume attributable to off-exchange activity and little or no open and competitive, centralized market trading would not appear to be in compliance with amended Core Principle 9. Specifically, where all or most transactions in a DCM contract are executed off the centralized market, there is no price discovery taking place on the DCM such that the protection of the price discovery process of trading in the centralized market is not satisfied.

The Commission notes that, while amended Core Principle 9 recognizes the primacy of trading on the centralized market for price discovery, it does not bar off exchange transactions. Congress reaffirmed that the rules of the DCM may authorize bona fide off-exchange transactions. Thus, in implementing the provisions of the Dodd-Frank Act, the Commission seeks to protect the price discovery process of trading on the DCM's centralized market while permitting DCMs to authorize off-exchange transactions where necessary and appropriate for bona fide business purposes. Accordingly, the Commission's proposal provides for permissible off-exchange transactions, but only to the extent that such transactions do not compromise the price discovery process of trading in the centralized market. If off-exchange transactions become the exclusive or predominant method of establishing or offsetting positions in a particular market, the price discovery process in the centralized market will be jeopardized.

a. Minimum Centralized Market Trading Percentage Requirement

The Commission believes that a significant amount of trading in any contract listed on a DCM must occur on the centralized market in order to meet the requirements of Core Principle 9. The Commission believes that setting a minimum percentage of trading that must take place on the centralized market is an appropriate method of implementing this provision in order to provide clarity and legal certainty to DCMs. Accordingly, the Commission is proposing to establish a minimum on-exchange trading threshold of 85 percent.

In considering the minimum threshold of trading on the centralized market, the Commission reviewed data regarding the amount of off-exchange transactions in 570 listed DCM

[92] 17 CFR 1.38 (2009).

[93] The proposed language for § 1.38(b)(1) identified "transfer trades, office trades, block trades, inter-exchange spread transactions, or trades involving the exchange of futures for commodities or for derivatives positions, if transacted in accordance with written rules of a contract market that provide for execution away from the centralized market and that have been certified to or approved by the Commission." This release proposes updates to this list.

[94] 7 U.S.C. 7; *see also* section 5(d)(9) of the CEA, as amended by the Dodd-Frank Act.

[95] Under current CEA section 4d(a)(2), funds supporting customer trades executed on a designated contract market must be segregated from other funds, including proprietary funds, of a future commission merchant ("FCM") or clearinghouse. Customers often desire to comingle funds in this segregated account primarily to take advantage of lower margins due to off-setting positions. Current CEA section 4d(a)(2) provides a venue for achieving this by allowing the Commission to issue orders exempting an FCM or clearinghouse from the segregation requirement in appropriate situations. The DCM must go through the process of petitioning the Commission for an exemption, and providing the necessary information and data for the Commission to make a decision. The Commission's process for issuing Section 4d orders necessarily entails careful and measured review, and accordingly, can be time-intensive. The Commission believes that rather than seeking 4d orders for off-exchange products, certain DCMs have resorted to listing those products as futures despite their unlikely prospects for central marketplace trading, to achieve the same results as the Section 4d process to the possible detriment of the centralized market. *See also,* section 4d(a)(2) of the CEA, as amended by the Dodd-Frank Act.

contracts.[96] Those contracts represented actively traded futures products on eight DCMs and included a wide cross-section of products with open interest. The data illustrated that the trading volume in the 570 contracts could be grouped into two main categories.[97] In one category, involving 410 of the contracts, mostly involving energy, forex and weather contracts, almost all or all of the trading over a three month period occurred off-exchange. As noted above, the Commission believes that the price discovery process in the centralized market is jeopardized where off-exchange transactions become the exclusive or predominant method of establishing or offsetting positions in a particular market. Since there was no centralized market trading in those contracts, the Commission did not consider these 410 contracts in its analysis of the appropriate minimum centralized market trading requirement. In the second largest category, involving 128 contracts from all asset classes which included contracts with large and small open interest, the average amount of off-exchange trading over the three-month period ranged from 0% to 15%. The Commission believes that this second category of contracts, where there was actual centralized market trading to observe, provides a reasonable basis for establishing a minimum centralized market trading requirement. Accordingly, from this second category the Commission took the upper range of the maximum average amount of off-exchange trading, and proposes that a maximum of 15% of total trading volume of a contract would be an allowable amount of off-exchange trading in order to protect the price discovery process of trading on the centralized market.

The Commission believes that requiring at least 85% of a contract's volume to be traded on the centralized market will balance the goal of protecting the price discovery process of trading in the centralized market, with the goal of allowing off-exchange transactions for bona fide business purposes. The Commission invites comments on the minimum centralized market trading percentage requirement proposed herein. In particular, the Commission requests that commenters providing alternative percentage requirements or alternative approaches also provide data that supports any alternative percentage or other approach.

b. Centralized Market Trading Percentage Calculation

In order to determine the percentage of on and off exchange trading in a contract, DCMs must measure the average percentage of trading in each contract over a sufficient period of time. Indeed, the data collected by the Commission indicates that for those contracts that have significant trading on the centralized market, the amount of off-exchange trading varies from day to day. The Commission proposes that a reasonable time period over which to measure and determine a contract's on-exchange trading volume is 12 months.

Thus, for new contracts listed after the effective date of the minimum centralized market trading percentage requirement in 38.502(a), the Commission proposes that DCMs determine the amount of on-exchange trading in each contract at the conclusion of the 12 month period following the contract's initial listing on the exchange, and again on every 12 month anniversary going forward. The designated contract market must calculate the centralized market trading percentage for each listed contract within thirty days following the conclusion of the 12 month anniversary of each contract's listing. The Commission notes that in order to be in compliance with Core Principle 9, the DCM has the burden of reviewing the on and off-exchange trading for each of its contracts over the relevant period to determine whether it is subject to delisting. The Commission notes that as part of its oversight, it also will be reviewing trading data of contracts. For contracts and contract months listed prior to the effective date of § 38.502(a), the Commission proposes that the DCM must initially calculate the centralized market trading percentage in each of its contracts within thirty days of the effective date of this minimum centralized market trading rule. The initial calculation for each existing contract must be based on the trading volume in the contract during the 12 month period immediately preceding the effective date of this rule.[98] Thereafter, the DCM must calculate the centralized market trading percentage in each such contract within thirty days of the 12 month anniversary of the initial calculation.

c. Mandatory Delisting

As noted above, the minimum centralized market trading requirement would permit DCMs to list only those contracts that have a minimum average over a 12 month period of 85% trading on the centralized market. Accordingly, subject to the relief provided for existing contracts and the other limited exemptions noted in paragraphs (d) and (e) of proposed § 38.502 below, proposed § 38.502(c) requires that for those contracts that do not meet the minimum centralized market trading percentage requirement, the DCM has the following options, which it must effectuate within ninety days of the centralized market trading percentage calculation: (i) If the DCM operates a SEF, it can delist the swap contract from the DCM and transfer open swap positions to the SEF; (ii) the DCM can transfer the swap contract(s) to another SEF that accepts the contract; or (iii) the DCM can trade the contract on the DCM for liquidation purposes only.

The Commission notes that contracts that may be required to be delisted have a potential alternative venue as Congress created, in the Dodd-Frank Act, the SEF,[99] a new trading facility for the trading, processing and execution of swaps.[100] Among other requirements,

[96] Commission staff collected data on the amount of off-exchange trading that took place over the three month period from May 2010 through July 2010, for 570 contracts listed on eight designated contract markets (CME, CBOT, NYMEX, COMEX, ICEUS, One Chicago, Kansas City Board of Trade and the Minneapolis Grain Exchange) and covering 10 asset classes (agricultural, alternative markets (i.e., environmental products), currency, energy, financial, index, interest rates, metal, real estate and weather). In collecting data, Commission staff attempted to sample a cross-section of trading data from the eight DCMs. The data collected represents samples of: (i) Active contracts in the main asset classes (financials, energy, agricultural, index, currency, weather, real estate, and metals); (ii) particular contracts that historically have not traded on the centralized market (i.e., certain energy contracts, currency); (iii) commodities that as a group trade differently from other commodities (i.e., cocoa, coffee); (iv) commodities that are prominent on certain exchanges (i.e., wheat on the Kansas City Board of Trade and the Minneapolis Grain Exchange), (v) "softs" and (vi) other products on ICE Futures U.S. Commission staff began collecting data in early August 2010 for the period May 2010 through July 2010. This time period was chosen because it represented the most current and straightforward data available at the time Commission staff began collecting data.

[97] A third category, consisting of a small number of contracts with trading volume between 15–60%, is discussed further below.

[98] As noted in the discussion under subpart J of this release, if a contract has been listed for less than a 12 month period, the Commission proposes that a DCM may seek an exemption as to that contract(s) and obtain a maximum of 12 additional months to calculate its centralized market trading for that contract(s).

[99] The SEF Core Principles, under Section 5h of the CEA, as amended by the Dodd-Frank Act, do not include a counterpart to the DCM Core Principle 9 requirement to protect the "price discovery process of trading in the centralized market of the board of trade."

[100] The Commission notes that based upon a letter sent to Chairman Gensler from the Wholesale Markets Brokers' Association ("WMBA"), the Commission understands that many of the participants that currently facilitate the privately negotiated contracts that are listed, but not traded, on a designated contract market intend to establish SEFs, confirming that this is an appropriate alternative forum for such contracts. The

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the Dodd-Frank Act requires SEFs to facilitate the clearing and settlement of swaps.[101] Accordingly, parties seeking clearing and segregated account status for swaps may achieve these objectives on a SEF.[102] The Commission invites comments as to these proposals.

d. Treatment of Contracts Listed as of the Effective Date of This Section

Proposed § 38.502(d) provides relief from the provisions of § 38.502(c) for contracts listed on a DCM as of the effective date of this section. The Commission understands that many contracts and contract months listed on a DCM before the effective date of the proposed rule may not meet the proposed minimum centralized market trading percentage requirement and, therefore, would be subject to mandatory delisting upon the effective date of the rules in this section ("affected contracts"). The Commission also notes that delisting a large number of these affected contracts within a short period of time may be difficult and result in potential financial consequences. Accordingly, the Commission proposes a transition process for the affected contracts to be liquidated in a fair and orderly manner. Specifically, the Commission proposes in § 38.502(d) that affected contracts that do not meet the minimum centralized market trading requirement may continue to be listed on the DCM until all open positions in such contracts and contract months are closed or liquidated. Trading in such contracts will be allowed but only to close or liquidate a position.[103]

In essence then, after the effective date of the proposed rules in this section, affected contracts that are listed before the effective date of this rule and that do not meet the minimum centralized market trading requirement will not be required to delist or liquidate within 90 days as required by the proposed rule. Instead, all affected contracts will be allowed to continue to be listed, and either traded on the DCM for liquidation purposes only, through offsetting trades, or held until settlement at contract expiration. These affected contracts would, therefore, either close out at contract expiration or when open interest in the contract reaches zero. For any affected contracts that may not have been listed and traded for a full 12 month period on the effective date of the proposed rule, proposed § 38.502(e) proposes additional relief, as described below.

The Commission points out that with respect to this transition period, trades in the affected contracts must comply with the provisions of Section 2(h)(8) of the CEA, as amended by the Dodd-Frank Act, once effective. Thus, while a DCM will be allowed to continue to list and trade in its existing contracts for purposes of liquidating respective futures positions, upon the effective date of amended CEA Section 2(h)(8), the closing out of that position with an associated swaps position must be accomplished in compliance with the requirements of amended CEA Section 2(h)(8). To that end, such swaps positions can only be executed on a SEF or DCM, or with a bilateral off-exchange trade either as a block trade, or where the trade is exempt from the provisions of amended CEA Section 2(h)(8) because one party to the trade includes an end user.[104]

The Commission invites comments on its proposal and also invites alternative proposals on how to address those DCM contracts listed prior to the effective date of these rules.

e. Exemption Upon Petition

As noted above, the data collected by the Commission illustrates a category of contracts that experienced an average off-exchange trading volume greater than 15% but less than 100% over the three month period. The Commission recognizes that there are contracts that may experience off-exchange trading averages that are above the proposed 15% maximum off-exchange trading and that circumstances surrounding those contracts may warrant an exemption from the minimum centralized market trading percentage requirement. For example, there may be situations where a newly-listed contract initially may have little on-exchange trading, and may fail to meet the minimum centralized market trading requirement for the initial 12 month period despite experiencing a steady increase in trading volume over time. In those situations, it may be appropriate to provide the DCM with an opportunity to petition for an exemption to this requirement for a maximum of a 12 month period. Proposed § 38.502(e)(1) reflects such an exemption.

In order to promote legitimate petitions, the proposed rule specifically provides that the DCM must demonstrate in its petition that such contract has achieved an average of at least 50% trading volume on the centralized market over the preceding 12 month period, and also must make an adequate showing that the contract, if granted the exception, is likely to attain the minimum trading requirement within the following 12 month period. The Commission also recognizes that some affected contracts that are listed as of the effective date of the proposed rule may not have been listed and traded for a full 12 month period at such time, potentially requiring the DCM to calculate the contract's on-exchange trading based on some shorter period of time. In those situations, the Commission believes it is only fair to allow such contracts additional time, if desired, to determine whether the minimum centralized market trading percentage requirement is met. As such, the Commission proposes in § 38.502(e)(2) to allow a DCM in this situation to petition the Commission to exempt a contract from the requirements of proposed § 38.502(d) for a maximum period of 12 months. Under proposed § 38.502(e)(3) petitions seeking an exemption from the mandatory delisting requirement in § 38.502(c) must be submitted to the Commission within thirty-five days of the 12 month anniversary of the listing of such contract, or for affected contracts

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Commission, however, takes notice of the fact that the WMBA also proposes a much broader reading of Core Principle 9 contending, among other things, that the requirements of Core Principle 9 apply only to transactions that are traded on a DCM and not to transactions, such as exchanges of futures for swaps, that are submitted in compliance with DCM rules; that the Commission should consider other execution models that are competitive open and efficient; that compliance with Core Principle 9 does not require that all trades submitted to a DCM be executed on the DCM's proprietary electronic trading network; and that Core Principle 9 should not be applied in the same way to futures, which may be traded by retail investors, as it may be applied to OTC products that are only eligible to be traded by Eligible Contract Participants. Letter to Chairman Gary Gensler from WMBA dated September 10, 2010.

[101] CEA Section 5h(f)(7), as amended by the Dodd-Frank Act. In addition, this requirement accommodates the creation of Cleared Swaps Customer Collateral account with bankruptcy protection. Additionally, the Commission may permit the netting of futures and swaps within such account. *See* CEA Section 4d(f)(3)(B), as amended by the Dodd-Frank Act.

[102] The Commission notes that swaps cleared through an FCM and associated collateral are protected in bankruptcy as commodity contracts. *See* section 724(b) of the Dodd Frank Act (to be codified at 11 U.S.C. 761(4)(F)). Moreover, to achieve benefits of portfolio margining, a designated contract market may still petition for an order pursuant to section 4d(a)(2) of the CEA to permit such swap transactions to be commingled in the segregated customer account for exchange traded transactions, or an order pursuant to CEA section 4d(f)(3)(B) to permit related exchange traded futures transactions to be commingled in the segregated customer account for swaps.

[103] It is possible that a trader may not desire to close out a position. Since the position is carried at the clearing house, a trader may instead decide to keep the position in the clearing house until expiration. Traders with existing positions as of the effective date of the rules in this section will be permitted to maintain these positions in the respective margin account.

[104] *See generally,* section 2(h) of the CEA, as amended by the Dodd-Frank Act.

seeking an exemption because they have been listed for less than 12 months, thirty-five days after the effective date of this section. The filing of a petition shall toll the mandatory delisting requirement until such time that a decision is made. The Commission invites comments on all aspects of this proposed rule.

We specifically request comment on how the proposals related to the requirement that 85 percent or greater of volume of a contract must be traded on the DCM's centralized market will affect the ability of market participants to take advantage of efficiencies like portfolio margining for swaps and futures positions. We also request comment on any negative consequences this proposal may have on the trading of swaps and related transactions like exchange of futures for swaps? The Commission also is requesting comments on whether any other exemptions should be considered for contracts that do not meet the minimum centralized market trading percentage threshold of on-exchange trading volume but nevertheless appear to serve a price discovery function, and what factors should be considered in making the exemption determination. For example, would it be acceptable for a contract market to provide evidence of the frequency to which cash market bids, offers or transactions in a commodity are directly based on, or are determined by referencing the prices generated by trading the subject contract on the designated contract market? Finally, the Commission also requests comments, with supporting information, on whether the Commission should consider any other exemptions from proposed § 38.502.

iii. Proposed § 38.503—Block Trades on Futures Contracts

As noted above, in addition to updates to § 1.38, the 2008 Core Principle 9 Proposed Rulemaking [105] proposed revised guidance and acceptable practices relating to block transactions for futures and options. The Commission proposes to codify some of the provisions in the guidance and acceptable practices relating to block trading that are, to a large degree, already current industry practice. The Commission believes that codifying these block trading requirements will result in greater regulatory certainty and consistency for DCMs. As discussed below, the Commission proposes, however, to maintain guidance and acceptable practices with respect to a DCM's determination of block sizes and block pricing for futures contracts, as it is expected that the determination of block sizes and pricing will evolve as both the industry and the Commission continue to gain experience in this area.

Consistent with the requirements set forth in current § 1.38 and amended Core Principle 9, proposed § 38.503(a) would require that a board of trade that permits block trade transactions on futures contracts must have rules governing such transactions. As proposed in the 2008 Core Principle 9 Proposed Rulemaking, this regulation will require that the rules limit block trades to large transactions and impose minimum size requirements. The proposed rule also states that the block trade size must be certified or approved by the Commission.

The Commission recognizes that the minimum size thresholds for block trades in a contract may change over time due to changes in sizes of trades in the centralized market and the market's volume and liquidity. Accordingly, proposed § 38.503(b) proposes that block trade size must be reviewed on an annual basis. Any necessary adjustments must be made to new and existing contracts.

Proposed § 38.503(c) codifies the 2008 Core Principle 9 Proposed Rulemaking proposal to limit block trade parties for futures, options and swaps to eligible contract participants ("ECPs") as that term is defined in Section 1a(18) of the CEA, as amended by the Dodd-Frank Act. However, the rule makes clear that commodity trading advisors acting in an asset managerial capacity and investment advisors that have over $25 million in assets under management, including foreign persons performing equivalent roles, are allowed to carry out block trades for non-ECP customers. The proposed rule also prohibits any person from conducting a block trade on behalf of a customer, unless the person receives instruction or prior consent to do so from the customer.[106]

Proposed § 38.503(d) codifies the concepts in the 2008 Core Principle 9 Proposed Rulemaking with respect to affiliated parties for futures, options on futures and options on commodities. The proposed rule defines an "affiliated party," for purposes of block trades on futures, as a party that directly or indirectly through one or more persons, controls, is controlled by, or is under common control with another party. As noted in the 2008 Core Principle 9 Proposed Rulemaking, appropriate safeguards are important for block trades between affiliated parties, because transactions between two closely related parties are more susceptible to abuse, such as setting unreasonable prices, artificially boosting volume, money passing, or wash trading. This is because it is possible that two related parties are not motivated by their own separate interests, but by the interests of a person or entity that may control both of the parties. Thus, under proposed § 38.502(d)(3), block trades can take place between affiliated parties under the following conditions: (i) The block trade prices must be based on a competitive market price, either by falling within the contemporaneous bid/ask spread on the centralized market or calculated based on a contemporaneous market price in a related cash market; (ii) each party must have a separate and independent bona fide business purpose for engaging in the trades; and (iii) each party's decision to enter into the block trade must be made by a separate and independent decision-maker. As noted in the 2008 Core Principle 9 Proposed Rulemaking, the Commission believes that the proposed rules for block trades between affiliated parties strike an appropriate balance between allowing such trades and ensuring that each party is acting independently when it agrees to enter into such a transaction.

Proposed § 38.503(e) codifies the practices proposed in the 2008 Core Principle 9 Proposed Rulemaking relating to aggregation of orders. The proposed rule prohibits aggregation of orders for different trading accounts in order to satisfy the minimum block size requirement, except if done by a commodity trading advisor acting in an asset manager capacity or an investment advisor who has $25 million in total assets under management.

Proposed § 38.503(f) and (g) set forth the requirements for recordkeeping and reporting of block trades for futures and options. As to recordkeeping, proposed § 38.502(f) reflects the provisions contained in § 1.38(b) with certain updates. Thus, as is the current requirement, persons handling, executing, clearing, or carrying transactions off the centralized market must follow the rules of the DCM, including providing the appropriate identification of such transactions to the DCM. In addition, the proposed rule codifies the concept initially proposed in the 2008 Core Principle 9 Proposed Rulemaking that the DCM must have rules for keeping appropriate records.

[105] The Commission first proposed amendments to section 1.38 and guidance with respect to Core Principle 9 in July 2004. *See* 69 FR 39,880, Jul. 1, 2004.

[106] All of these requirements mirror block trade rules previously approved by the Commission. The Commission approved block trade rules of the Cantor Financial Futures Exchange, Inc. on February 11, 2000; the Commission also approved Chicago Mercantile Exchange block trade rules on May 19, 2000.

Proposed § 38.503(f) requires that parties to, and members facilitating, block trades keep accurate block trade records that comply with Core Principles 10 and 18 and the associated regulations.[107] The proposed rule also requires that block trade orders and records must be accessible to the DCM, the Commission or the Department of Justice, upon request.

Proposed § 38.503(g) reflects a revised approach from the 2008 Core Principle 9 Proposed Rulemaking pertaining to the reporting of block trades. While the 2008 Core Principle 9 Proposed Rulemaking proposed that block trades be reported to the contract market within a reasonable time, proposed § 38.503(g) codifies the practice already enforced by a great majority of DCMs by requiring that DCMs have up to 5 [108] minutes to report block trades.[109] The Commission believes that this is an appropriate amount of time for reporting block trades and balances the goals of providing transparency while enabling market participants involved in block trades with time to hedge risks associated with such trades. The Commission seeks comments as to whether this is an appropriate time period or whether and why another time period is more appropriate.

In addition, proposed § 38.503(g) requires DCMs to publicize the details on block trades immediately upon the receipt of the transaction report, and to publicize daily the total quantity of the block trades that are included in the total volume of trading under the procedures set forth in § 16.01.

Proposed § 38.503(h) refers applicants and DCMs to the guidance in Appendix B to part 38 for purposes of determining block size and pricing determinations. As noted above, the Commission is proposing amended guidance and acceptable practices in Appendix B of part 38 pertaining to block size and block pricing. The Commission believes that a one-size fits all approach to determining block size and pricing is inappropriate for block trades as it is expected, as noted above, that the determination of block sizes and pricing will evolve as both the industry and the Commission continue to gain experience in this area. Accordingly, the Commission is re-proposing, with some changes, the acceptable practices that were proposed in the 2008 Core Principle 9 Proposed Rulemaking regarding establishing an acceptable minimum block size.

The 2008 Core Principle 9 Proposed Rulemaking proposed replacing an earlier-proposed numerical test with the concept that, in establishing requirements for minimum block size, it was more appropriate to utilize a procedural approach that takes into consideration the purposes for allowing blocks and the trading in the particular contract. The 2008 Core Principle 9 Proposed Rulemaking explained that one of the bases for permitting block trades to be transacted off the centralized market is that prices attendant to the execution of large transactions on the centralized market may diverge from prevailing market prices that reflect supply and demand of the commodity. This is because the centralized market may not provide sufficient liquidity to execute large transactions without additional costs that may reflect the cost of executing the trade. Consequently, reporting these prices as conventional market trades would be misleading to the public. As explained in the 2008 Core Principle 9 Proposed Rulemaking, another basis for allowing block trades is that such trades facilitate hedging by providing a means for commercial firms to transact large orders without the need for significant price concessions, and resulting price uncertainty for parties to the transaction that would occur if transacted on the centralized market. Finally, a procedural approach is more appropriate because the size of a typical trade varies between contracts, and is dependent on the liquidity in the centralized market and other commercial factors.

Given these reasons, the Commission previously proposed a standard whereby the minimum block trade sizes should be larger than the size at which a single buy or sell order is customarily able to be filled in its entirety at a single price in that contract's centralized market, and exchanges should determine a fixed minimum number of contracts needed to meet this threshold. The Commission is re-proposing this acceptable practice with some modifications. Specifically, the Commission proposes that block trade sizes should be a number larger than the size at which a single buy or sell order is customarily able to be filled in its entirety without incurring a substantial price concession. The Commission believes this is a more appropriate threshold because in less liquid markets even a small number of trades could have a slight movement on price and would not present an accurate picture of the market.

In the 2008 Core Principle 9 Proposed Rulemaking, the Commission also proposed, as part of the acceptable practice, certain factors that the DCM could consider in determining the appropriate minimum block size. These factors included the market's volume, liquidity and depth, a review of typical trade sizes and/order sizes and any input it may receive from floor brokers, floor traders and/or market users regarding, for example, what size order is generally too large to fill without major price concessions. The Commission believes that these factors are likely to lead to an appropriate block size and thus proposes them as acceptable practices in this release. In addition, the Commission is proposing that DCMs also take into account, as an additional factor, the block sizes on comparable swap products. This additional factor is necessary and appropriate in light of the inclusion of swap trading and execution on DCMs and SEFs, and the corresponding swap block rules discussed below.

The Commission proposes similar acceptable practices for determining the acceptable minimum size for block trades in new futures contracts and options. However, because a new contract will not have any trading history, the Commission proposes that the acceptable minimum block trade size in such contracts is the trade size that the DCM reasonably anticipates will not be able to be filled in its entirety in the contract's centralized market, without major price concessions. In determining an acceptable block size, the DCM should consider centralized market data in a related futures contract, the same contract traded on another exchange, or trading activity in the underlying cash market. For the reasons discussed above, the DCM should also consider, as an additional factor, the block sizes on comparable swap products.

The Commission also re-proposes in this release the acceptable practices proposed in the 2008 Core Principle 9 Proposed Rulemaking relating to the pricing of blocks. The proposed acceptable practice requires that block trades between non-affiliated parties must be at a fair and reasonable price. The proposed acceptable practices set forth the factors that could be considered by DCMs in determining what is fair and reasonable, including:

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[107] An acceptable practice under this regulation is set forth in proposed appendix B of part 38 and provides that records kept in accordance with the requirements of FASB Statement No. 133 ("Accounting for Derivative Instruments and Hedging Activities"), as amended by FASB Statement No. 161 ("Disclosures About Derivative Instruments and Hedging Activities—An amendment of FASB Statement No. 133") are acceptable records.

[108] The Commission notes that for a few contracts with lower liquidity, such as weather and housing, CME allows for a 15 minute reporting time.

[109] *See* 73 FR 54,097, at note 18, Sep. 18, 2008 (noting CBOT Rule 331.05(d), CMD Rule 526(F); NYMEX Rule 6.21C).

(1) The size of the block, (2) the price and size of other block trades in any relevant markets at the applicable time, and (3) the circumstances of the market or the parties to the block trade. The proposed acceptable practice states that relevant markets include the DCM itself, the underlying cash markets and/or related futures or option markets. As noted in the proposed acceptable practices, if the contract market rule requiring a fair and reasonable price includes the circumstances of the parties or of the market, a block trade participant can execute a block transaction at a price that is away from the market provided that the participant retains documentation to demonstrate that the price was indeed fair and reasonable under the participant's or market's particular circumstances. In addition, the proposed acceptable practices note that block trades between affiliated parties are subject to the pricing requirements in § 38.503(d).

iv. Proposed § 38.504—Block Trades on Swap Contracts

The Dodd-Frank Act amended the CEA to expand the list of products that may be traded on a DCM to include swaps, in addition to futures and options contracts. The Commission recognizes that there exists certain inherent differences between futures and options, on the one hand, and swaps on the other, which may necessitate that DCMs apply different rules to these products. While the Commission generally believes that the same block trade rules should apply to futures, options and swaps listed and traded on the DCM, the Commission proposes that characteristics of swaps do warrant a different approach for purposes of determining minimum block size. In addition, the Dodd-Frank Act provides specific statutory requirements for reporting of swap block transactions. The rules governing each of these requirements are currently being addressed in a forthcoming Commission release titled "Real Time Reporting," which is proposing rules that will be codified in part 43 of the Commission's regulations.[110] Accordingly, DCMs must comply with the provisions of proposed part 43 for purposes of setting the minimum size of swap block trades, and for reporting swap block trades. Proposed § 38.504 provides that DCMs must have rules that require compliance with these rules for swaps traded on their markets.

[110] *See supra* note 43.

v. Proposed § 38.505—Exchange of Derivatives for Related Position

In the 2008 Core Principle 9 Proposed Rulemaking, the Commission proposed acceptable practices relating to exchange of futures for related position transactions. The acceptable practices proposed in that rulemaking were based on previous publications by the Commission, including the 1987 EFP Report prepared by the Commission's then-Division of Trading and Markets and the Commission's 1998 EFP Concept Release.[111] Proposed § 38.505 codifies the practices that the Commission historically has required from DCMs with respect to these types of transactions.

As an initial matter, proposed § 38.505 (a) revises the nomenclature for referring to transactions that have been referred to in the past as "exchange of futures for commodities or derivatives positions," to refer to all such transactions under the umbrella term "exchange of derivatives for related position" ("EDRP"). The Commission believes that this is a more accurate and descriptive term as it will include transactions not limited to futures, such as swaps. Proposed § 38.505(a) codifies the requirements and characteristics of a bona fide EDRP and is based on Commission standards that have developed over the years. Specifically, the proposed rule sets forth the elements of a bona fide EDRP to include separate but integrally related transactions, price correlation and quantitative equivalence of the two legs, an actual transfer of ownership of the commodity or derivatives position and both legs transacted between the same two parties.

As to pricing of these transactions, proposed § 38.505 maintains the methodology set forth in the acceptable practices proposed in the 2008 Core Principle 9 Proposed Rulemaking.[112] Accordingly, the proposed rule provides that the price differential between the two legs should reflect commercial realities, and at least one leg of the transaction should be priced at the prevailing market price.

Further, proposed § 38.505(b) codifies the requirements applicable to bona fide transitory exchange of derivatives for related position transactions. A transitory exchange of derivatives for a related position transaction involves both an EDRP and an off-setting transaction to one of the legs of that transaction. As codified in § 38.504(b), the proposed rule will permit parties to an EDRP to engage in a separate transaction that offsets a leg of the EDRP if the offsetting transaction results in an actual transfer of ownership and demonstrates other indicia of being a bona fide transaction, and the offsetting transaction is able to stand on its own as a commercially appropriate transaction; that is, there must be no obligation on either party that the offsetting transaction will require the execution of a related EDRP, or vice versa.

Proposed § 38.505(c) prohibits DCMs from permitting a contingent exchange of derivative for a related position transaction where the exchange of derivative for the related position is contingent upon an offsetting transaction.

In the 2008 Core Principle 9 Proposed Rulemaking, the Commission proposed that EDRP transactions be reported to the DCM within a reasonable time. Given the continuous changes and advancements in electronic trading over the years, the Commission believes that such trades also should be reported in a five minute time period, as is proposed for block trades. Thus, proposed § 38.505(d) requires that such trades be reported to the market within five minutes of consummation. The Commission invites comments on this proposal and, in particular, if and why any other time period should be allowed.

Proposed § 38.505(e) codifies the acceptable practice proposed in the 2008 Core Principle 9 Proposed Rulemaking requiring the DCM to follow procedures set forth in current section 16.01 to publicize daily the total quantity of exchange for derivatives for related position.

vi. Proposed § 38.506—Office Trades and Transfer Trades

In the 2008 Core Principle 9 Proposed Rulemaking, the Commission noted that transfer trades and office trades move existing positions between accounts and are bookkeeping in nature. Such transactions, therefore, do not affect the price discovery process of the centralized market because they do not establish or offset positions. The Commission will not require these transactions to follow the publication requirements under § 16.01 as required for blocks and EDRPs. Instead, proposed § 38.506 requires that records of such

[111] *See* Division of Trading and Markets, Report on Exchanges of Futures for Physicals (1987) (the "1987 EFP Report"); Regulation of Non-Competitive Transactions Executed on or Subject to the Rules of a Contract Market, 63 FR 3708, Jan. 26, 1998 (the "1998 EFP Concept Release").

[112] The Commission is codifying the EDRP pricing methodology based on its experience over the past years in determining the reasonability of EDRP pricing.

transactions be kept in accordance with the recordkeeping regulation § 1.31.

10. Subpart K—Trade Information

Section 5(d)(10) of the CEA, as amended by the Dodd-Frank Act, requires DCMs to capture, verify, and retain detailed trade information (*i.e.,* audit trail data) for all transactions in their markets. Amended Core Principle 10—Trade Information is almost identical to the requirements contained in the current Core Principle 10. Both the amended and current Core Principle 10 require DCMs to maintain rules and procedures that provide for the recording and safe storage of all identifying trade information in a manner that enables the DCM to assist in the prevention of customer and market abuses and provide evidence of any rule violations. Because the amended core principle has almost identical statutory text, the Commission interprets amended Core Principle 10 as imposing the same substantive content as its predecessor.[113]

The application guidance and acceptable practices for current Core Principle 10 provide the basis of the Commission's proposed audit trail regulations in proposed subpart K, particularly proposed §§ 38.551 (Audit Trail Required) and 38.552 (Elements of an Acceptable Audit Trail Program), summarized below. In addition, the proposed rules update the guidance and acceptable practices in that the proposed regulations address audit trail requirements for electronic trading. The Commission notes that the proposed rules for electronic trading audit trails are substantially similar to the long-standing requirements for open-outcry trading. However, because those requirements reflected a time when electronic trading accounted for less than 10 percent of U.S. futures volume, they did not explicitly address electronic trading.[114]

The proposed rules also draw on recent RERs analyzing DCMs' compliance with former Core Principle 10. In the context of RERs, staff has made a number of findings and recommendations regarding DCMs' audit trail enforcement programs, including recommendations regarding more frequent audit trail reviews and larger sanctions for audit trail violations. Staff also has directed DCMs to develop audit trail programs for electronic trading that are comparable in rigor and scope to their audit trail programs for open-outcry trading.[115] These findings and recommendations, including those with respect to electronic trading audit trails, are reflected in proposed § 38.553, also summarized below.

Whether applicable to open-outcry or to electronic trading, the proposed rules in subpart K seek to ensure that DCMs capture, verify, and retain sufficient order and trade-related information for DCM staff to detect possible trading violations and other market and customer abuses. They also require DCMs to possess specific resources and capabilities with respect to their audit trails. These include the ability to promptly reconstruct all transactions and the ability to track customer orders from the time of receipt through fill, allocation, or any other disposition. The proposed rules also require a DCM's audit trail program to collect original source documents, to build a transaction history database, and to develop an electronic analysis capability with respect to all trade information in that database. DCMs also must possess a safe storage capability with respect to their audit trail data. Finally, they must develop meaningful enforcement programs to ensure member and market participant compliance with all applicable audit trail requirements. In each respect, the Commission's proposed rules are consistent with its long-standing requirements and expectations regarding reliable, complete, and effective audit trails. The specific requirements of the proposed rules implementing amended Core Principle 10 are summarized below.

i. Proposed § 38.551—Audit Trail Required

Proposed § 38.551 is based on the application guidance and acceptable practices for former Core Principle 10.[116] It establishes the overarching requirements for DCMs' audit trail programs to ensure that DCMs can appropriately monitor and investigate any potential customer and market abuse. Proposed § 38.551 provides that the audit trail data captured by DCMs must be sufficient to reconstruct all transactions within a reasonable period of time, and to provide evidence of any rule violations that may have occurred. The proposed rule also provides that audit trails must be sufficient to track customer orders from the time of receipt through fill, allocation, or other disposition. Audit trail data must include both order and trade information. Proposed § 38.551 applies equally to open-outcry and electronic trading.

ii. Proposed § 38.552—Elements of an Acceptable Audit Trail Program

Proposed § 38.552 prescribes the four elements of an acceptable audit trail program. These elements are necessary to ensure that a DCM can capture and retain sufficient trade-related information, can reconstruct trading promptly, and has the necessary tools to detect and deter potential customer and market abuses through its audit trail. First, proposed § 38.552(a) requires that a DCM's audit trail include original source documents, defined to include unalterable, sequentially-identified records on which trade execution information is originally recorded, whether manually or electronically. It also requires that customer order records demonstrate the terms of the order, the account identifier that relates to the account owner, and the time of the order entry. Finally, proposed § 38.552(a) requires that, for open-outcry trades, the time of report of order of execution must also be captured in the audit trail.

Second, proposed § 38.552(b) requires that a DCM's audit trail program must include a transaction history database. A transaction history database facilitates rapid access and analysis of all original source documents, thereby aiding DCMs in monitoring for customer and market abuses. Proposed § 38.552(b) also specifies the trade information that must be included in a transaction history database. Mandatory information includes a history of all orders and trades; all data input in the trade

[113] The Commission previously expressed the regulatory requirements of former Core Principle 10 through its application guidance for that core principle. *See* 17 CFR part 38, App. B, Application Guidance and Acceptable Practices for Core Principle 10. It also provided additional insight regarding the core principle through detailed acceptable practices that all DCMs could use to demonstrate compliance with former Core Principle 10. The acceptable practices explained that "the goal of an audit trail is to detect and deter customer and market abuse." *Id.* at (b)(1). It also outlined the elements of an effective audit trail. Those elements included original source documents, which help to establish the accuracy and authenticity of an audit trail. They also included a transaction history database and electronic analysis capability, which allow a DCM to more easily access and review audit trail data to identify possible trading abuses and rule violations. Finally, the acceptable practices pointed to a DCM's safe storage capability, emphasizing that audit trail data must be stored in a manner that protects it from unauthorized alteration, accidental erasure, or other loss.

[114] This figure is based on fiscal year 2000, as reported in the Commission's FY 2009 Performance and Accountability Report, p. 14.

[115] *See* Rule Enforcement Review of the Minneapolis Grain Exchange (August 27, 2009), and Rule Enforcement Review of ICE Futures U.S. (Feb. 2, 2010).

[116] 17 CFR Part 38, App. B, Core Principle 10, Application Guidance and Acceptable Practices.

matching system for clearing; the categories of participants for which trades are executed (i.e., customer type indicator or "CTI" codes); timing and sequencing data sufficient to reconstruct trading; and identification of each account to which fills are allocated.

Third, proposed § 38.552(c) requires that a DCM's audit trail program have electronic analysis capability for all data in its transaction history database. This requirement helps ensure effective use of audit trail data by requiring appropriate tools to use in conjunction with a DCM's transaction history database. Proposed § 38.552(c) also provides that a DCM's electronic analysis capability must allow it to reconstruct trades in order to identify possible rule violations.

Finally, proposed § 38.552(d) requires that a DCM's audit trail program include the ability to safely store all audit trail data, and to retain it in accordance with the recordkeeping requirements of DCM Core Principle 18 and the associated regulations under part 38. Safe storage capability enables a DCM to properly preserve and protect the audit trail data so that it is readily available for the DCM to use in any future investigation or inquiry into possible violations of DCM rules. Safe storage capability requires a DCM to protect its audit trail data from unauthorized alteration, accidental erasure or other loss.

iii. Proposed § 38.553—Enforcement of Audit Trail Requirements

Proposed § 38.553 prescribes the elements of an effective audit trail enforcement program. The proposed rule is organized in two parts. First, proposed § 38.553(a) requires a DCM to develop an effective audit trail enforcement program. An effective enforcement program must, at a minimum, review all members and market participants annually to verify their compliance with all applicable audit trail requirements.

Proposed § 38.553(a) is further divided into two paragraphs. Paragraph (a)(2) of proposed § 38.553 establishes minimum review criteria for open-outcry trading. It requires that DCMs conduct annual reviews of all members and market participants to verify their compliance with their trade timing, order ticket and trading card requirements. Similarly, paragraph (a)(1) sets forth minimum review criteria for an electronic trading audit trail. It requires annual examinations by DCMs of randomly selected samples of front-end audit trail data from order routing systems to ensure the presence and accuracy of required audit trail data. In addition, paragraph (a)(1) requires that DCMs: Review the processes used by members and market participants to assign and maintain exchange user identifications; review usage patterns of the user identifications; and review account numbers and Customer Trading Identification codes in trade records to test for accuracy and improper usage. The Commission notes that, compared to the corresponding requirements for open-outcry trading, audit trail and audit trail enforcement requirements for electronic trading are still evolving, and that the Commission's expectations in this area, pursuant to amended Core Principle 10, are likely to evolve as well.

Second, proposed § 38.553(b) requires DCMs to develop programs to ensure effective enforcement of their audit trail and recordkeeping requirements. It applies equally to both open-outcry and electronic trading. Proposed § 38.553(b) requires DCMs' enforcement programs to identify members and market participants that routinely fail to comply with the requirements of Core Principle 10. DCMs also must levy meaningful sanctions when deficiencies are found. Sanctions may not include more than one warning letter or other non-financial penalty for the same violation within a rolling twelve-month period.

11. Subpart L—Financial Integrity of Transactions

Core Principle 11, as amended by the Dodd-Frank Act, retains the provisions of current Core Principle 11.[117] This core principle requires that a DCM establish and enforce rules and procedures for ensuring the financial integrity of transactions entered into, on or through the facilities of the contract market, including the clearing and settlement of the transactions with a DCO. Amended Core Principle 11 also requires that a DCM establish and enforce rules to ensure: (i) The financial integrity of any futures commission merchant ("FCM") and introducing broker ("IB"); and (ii) the protection of customer funds. Because textually the language is almost the same, the Commission is interpreting the provisions as it has in the past. Proposed §§ 38.600 through 38.607, largely codify language found in the existing application guidance for current Core Principle 11 and former Designation Criterion 5.[118] However, based upon its past experience, the Commission is proposing some new practices and requirements for DCMs in implementing amended Core Principle 11.

Proposed § 38.601 would require that all transactions executed on or through a DCM, other than transactions in security futures products, be cleared through a Commission-registered DCO. This proposed rule codifies current practice, as well as the requirements of amended Core Principle 11 to mandate clearing. The Commission interprets the mandatory clearing requirement in Section 723(a)(3) of the Dodd-Frank Act[119] to mean that a DCO must clear a swap for any DCM or SEF that requests such clearing services, so long as the DCO offers the swap for clearing. In addition, a DCO that is clearing particular swaps must also clear the same swaps when listed on DCMs or SEFs, whether affiliated or unaffiliated, on a nondiscriminatory basis.

Proposed §§ 38.602 and 38.603 provide that DCMs must adopt rules establishing minimum financial standards for both member FCMs and IBs and non-intermediated market participants, as well as rules for the protection of customer funds, including the segregation of customer and proprietary funds, the custody of customer funds, the investment standards for customer funds, intermediary default procedures and related recordkeeping. Proposed § 38.604 requires that a DCM must routinely receive and promptly review financial and related information from its members and conduct ongoing financial surveillance of the risk created by the positions the customers of an FCM take on the DCM. To meet this requirement, the DCM must have rules pertaining to minimum financial standards of intermediaries that include, among other things, rules prescribing minimum capital requirements for

[117] There were no substantive changes to the amended Core Principle 11 from the current one. The amended core principle reads as follows: The board of trade shall establish and enforce—(A) rules and procedures for ensuring the financial integrity of transactions entered into on or through the facilities of the contract market (including the clearance and settlement of the transactions with a derivatives clearing organization); and (B) rules to ensure: (i) The financial integrity of any (I) futures commission merchant, and (II) introducing broker; and (ii) the protection of customer funds.

[118] Former Designation Criterion 5 stated that "the board of trade shall establish and enforce rules and procedures for ensuring the financial integrity of transactions entered into by or through the facilities of the contract market, including the clearance and settlement of the transactions with a derivatives clearing organization." 17 CFR part 38, App. A.

[119] Among other things, section 723(a)(3) of the Dodd-Frank Act adds a new section 2(h)(1) to the CEA that provides that: (i) All swaps that are required to be cleared be cleared by a Commission-registered DCO; and (ii) a DCO must have open access rules, including rules providing for the non-discriminatory clearing of a swap executed bilaterally on or through the rules of an unaffiliated DCM or SEF.

member FCMs and IBs.[120] Rules or procedures pertaining to protection of customer funds must include, among other things, that each DCM must continually survey the obligations of each FCM created by the positions of its customers, and, as appropriate, compare those obligations to the financial resources of the FCM. The DCM should use this information to protect customer funds by, for example, taking appropriate steps to verify that its member FCMs have sufficient capital to continue to guarantee the positions of each customer. If the obligations of a member FCM appear excessive as compared to the capital of such FCM, a DCM should take appropriate action, including contacting the FCM or the FCM's designated self-regulatory organization.

Proposed § 38.605 requires DCMs as self-regulatory organizations ("SRO") to comply with the standards of amended § 1.52 to ensure the financial integrity of intermediaries by establishing and carrying out an SRO program for the examination and financial supervision of intermediaries. Section 1.52, as proposed to be amended in this release, sets forth the required elements of SRO supervisory programs and permits one or more SROs to establish, subject to Commission approval, a joint audit plan to provide for the SRO supervision of members of more than one SRO. Proposed amendments to § 1.52 include references to existing guidance to SROs contained in the Division of Trading and Markets Financial and Segregation Interpretations 4–1 and 4–2, which currently guide the practices of members of the Joint Audit Committee operating a joint audit plan that has been approved by the Commission.[121]

Proposed § 38.606 would provide that DCMs may satisfy their financial surveillance responsibilities under proposed §§ 38.604 and 38.605 by outsourcing such responsibilities to a registered futures association or other regulated entity. Proposed § 38.606 would provide that a DCM must ensure that the regulatory service provider has the capacity and resources to conduct the necessary financial surveillance, and would further provide that the DCM remains responsible for compliance with its financial surveillance obligations notwithstanding the use of a regulatory service provider.

As noted above, amended Core Principle 11 provides that a DCM must establish and enforce rules to, among other things, ensure both the financial integrity of any FCM, and the protection of customer funds. With an increasing number of DCMs permitting the customers of an FCM to transmit orders directly to the DCM in real time, the ability of an FCM to control and monitor its level of risk may become compromised. In this automated trading environment, the only controls that effectively can enforce limitations on risk are automated controls.[122] Proposed § 38.607 would require a DCM that allows customers direct access to its contract market to implement certain direct access controls and procedures in order to provide member FCMs with tools to manage their financial risk. The proposed rule contemplates that an FCM would continue to have primary responsibility for overall risk management, but that the DCM would be required to establish an automated risk management system permitting an FCM to set appropriate risk limits for each customer with direct access to the contract market. As an SRO, the DCM would be responsible for implementing and enforcing rules requiring the FCM to use the provided controls and procedures appropriately. The specific type of pre-trade controls implemented by a DCM shall be a matter for determination by the DCM, its member FCMs, and the DCM's DCO. This proposed rule requiring direct access controls and procedures where direct access is permitted is consistent with current international guidance.[123] The Commission requests comments on the proposed rule, and specifically on the following questions:

- Whether DCMs should provide additional controls to permit FCMs to manage their risks? If so, what specific direct access controls and procedures should DCMs implement?
- Should such controls be mandatory?

12. Subpart M—Protection of Markets and Market Participants

Section 735 of the Dodd-Frank Act amends Core Principle 12. Current Core Principle 12 states that the board of trade shall establish and enforce rules to protect market participants from abusive practices committed by any party acting as an agent for the participants. The amended Core Principle 12 requires that the DCM establish and enforce rules to protect markets and market participants from abusive practices committed by any party, including abusive practices committed by a party acting as an agent for a participant, and promote fair and equitable trading on the contract market. The current guidance for this core principle[124] provides that a DCM should have methods and resources appropriate to the nature of the trading system and the structure of the market to detect trade practice and market abuses, and to prohibit, detect and discipline intermediary behavior that is abusive, fraudulent, noncompetitive or unfair, in connection with the execution of trades.

The Commission believes that compliance with this core principle requires the DCM to implement trade practice and market surveillance programs and provide a competitive, open and efficient market and mechanism for executing transactions in accordance with other core principles and the regulations thereunder. To provide clarity and certainty of these requirements, the Commission proposes § 38.651 that specifically states compliance requirements, including the core principles that must be followed. Specifically, a trade practice surveillance program should be conducted in accordance with Core Principle 2 and the associated regulations in subpart C of this part 38, which would require, among other things, that a DCM prohibit certain enumerated abusive and disruptive trading practices, have arrangements and resources for effective rule enforcement and enforce compliance with its rules and have the capacity to detect, investigate, and sanction violations.

A market surveillance program should include monitoring the market to prevent manipulation, price distortion and disruptions of daily trading and the physical delivery or cash-settlement process. A market surveillance program should be conducted in accordance with Core Principle 4 and the associated regulations in subpart E of this part 38 that would require, among other things, that the DCM demonstrate the capability of conducting real-time monitoring of trading and comprehensive and accurate

[120] An FCM that is a clearing member will also have additional obligations to the DCO as a result of its clearing membership.

[121] *See* 73 FR 52832, Sept. 11, 2008 (requesting comments prior to the Commission's approval of the most recent Joint Audit Committee agreement, which approval was granted March 18, 2009).

[122] International Organization of Security Commissions [IOSCO], Final Report of the IOSCO Technical Committee, Principles for Direct Electronic Access to Markets, at 4, IOSCO Doc. FR08/10 (August 12, 2010).

[123] *Id.*

[124] The current guidance for Core Principle 12 provides that "a designated contract market should have rules prohibiting conduct by intermediaries that is fraudulent, noncompetitive, unfair, or an abusive practice in connection with the execution of trades and a program to detect and discipline such behavior. The contract market should have methods and resources appropriate to the nature of the trading system and the structure of the market to detect trade practice abuses." 17 CFR part 38, App. B.

trade reconstructions and require that traders in their markets keep records, including their activity in the underlying commodity and related derivative markets. Effectively monitoring the market would require sufficient, well trained market surveillance staff and, where appropriate, automated tools to assist in the monitoring of the market for, among other things, potential market disruptions. Such automated tools should be capable of providing automated trading alerts to detect many types of potential violations of exchange or Commission rules.

Finally, in order to promote fair and equitable trading, the DCM must establish and enforce trading rules with adequate specificity to include, among other things, providing to market participants, on a fair, equitable and timely basis, information regarding prices, bids and offers. The DCM should provide a competitive, open and efficient market and mechanism for executing transactions in accordance with Core Principle 9 and the associated regulations in subpart J of this part 38 that, among other things, recognizes that trading in the centralized market provides a price discovery function and would specifically require that the execution of transactions be in a manner that protects that price discovery process.

13. Subpart N—Disciplinary Procedures

Section 735 of the Dodd-Frank Act amends the disciplinary procedure requirements applicable to DCMs in two significant ways. First, Section 735(a) eliminates all DCM designation criteria, including Designation Criterion 6 (Disciplinary Procedures).[125] Second, Section 735(b) creates a new Core Principle 13 (Disciplinary Procedures) that is devoted exclusively to exchange disciplinary proceedings, and that captures disciplinary concepts inherent in both Designation Criterion 6 and in current DCM Core Principle 2 (Compliance with Rules).[126] The rules proposed under subpart N implement new Core Principle 13.[127]

The proposed rules in subpart N are consistent with current disciplinary practices at most DCMs. They reflect disciplinary concepts formerly found in Designation Criterion 6 and the guidance and acceptable practices for former Core Principle 2. The proposed rules also are similar to the text of the disciplinary procedures in part 8 of the Commission's regulations.[128] In general, the Commission's proposed rules seek to ensure a fair, prompt, and effective disciplinary program. They require meaningful sanctions against persons and entities that violate DCM rules. The proposed rules also provide numerous procedural safeguards to ensure fairness for all respondents in disciplinary actions. Finally, they require full customer restitution in any disciplinary matter where customer harm is demonstrated.

In those cases where the proposed rules place new requirements on DCMs with respect to their disciplinary procedures, such requirements are derived from findings and recommendations made by Commission staff through its RERs. Proposed § 38.701 (Enforcement Staff), for example, requires a DCM to have sufficient staff and resources to effectively and promptly prosecute possible violations of exchange rules. It also requires a DCM to monitor the size and workload of its enforcement staff annually, and to increase its enforcement resources and staff as appropriate. The text of proposed rule 38.701 mirrors that of proposed rule 38.155, which requires DCMs to retain sufficient compliance staff and resources to comply with new DCM Core Principle 2—Compliance with Rules.[129]

Other proposed requirements in subpart N that are based on findings and recommendations in recent RERs include a requirement that disciplinary panels improve their written documentation in disciplinary decisions and settlements.[130] These heightened documentation requirements appear in proposed § 38.703 (Review of Investigation Report), proposed § 38.709 (Settlement Offers), and proposed § 38.711 (Decisions), all of which require that the facts and analysis supporting disciplinary settlements and decisions be explained carefully and in writing by the relevant disciplinary panel. The Commission believes that improved written documentation, as required by the proposed rules, will yield a number of significant benefits. Disciplinary panels will be required to focus their analysis more carefully in order to articulate the rationale for their decisions. DCM enforcement staff will gain a better understanding of the evidentiary expectations to which different disciplinary panels adhere. DCM enforcement staff and respondents will both have an improved record to base any appeals they may wish to file. Finally, improved written documentation of the facts and analysis supporting settlements and disciplinary decisions will help facilitate subsequent review of DCMs' disciplinary programs by the Commission.

Proposed § 38.714 (Disciplinary Sanctions), further provides that all disciplinary penalties imposed by a DCM or its disciplinary panels must be commensurate with the violations committed, and be sufficient to deter recidivist activity. This proposed rule reflects DMO staff's concerns with respect to the adequacy of disciplinary sanctions in cases it has examined through its RER process.[131] Finally, proposed § 38.715 (Summary Fines for Violations of Rules Regarding Timely

[125] *See* § 735(a) of the Dodd-Frank Act.

[126] *Compare* current CEA § 5(b)(6) and § 5(d)(2) with CEA § 5(d)(13) as amended by the Dodd-Frank Act.

[127] Prior to the passage of the Dodd-Frank Act, the standards for DCMs' disciplinary practices were found in Designation Criterion 6 and the statutory language, guidance, and acceptable practices for former Core Principle 2. Designation Criterion 6 required that a DCM establish and enforce disciplinary procedures that authorized it to discipline, suspend, or expel members or market participants that violated the rules of the DCM, or similar methods for performing the same functions, including delegation of the functions to third parties. Paragraph (a)(2) of the application guidance for former Core Principle 2 required DCMs to have the "arrangements, resources, and authority [necessary] for effective rule enforcement," and the "authority and ability to discipline and limit, or suspend the activities of a member or market participant pursuant to clear and fair standards." 17 CFR part 38, App. B, Application Guidance for Core Principle 2 at (a)(2). In addition, paragraph (b)(4) of the former core principle's acceptable practices required any DCM that wished to take advantage of the acceptable practice's safe harbor to have "prompt and effective disciplinary action for any violation * * * found to have been committed." 17 CFR part 38, App. B, Acceptable Practices for Core Principle 2 at (b)(4). Paragraph (b)(4) also referenced part 8 of the Commission's regulations as an example that DCMs could follow to comply with Core Principle 2. 17 CFR 8.01 *et seq.* In its experience, the Commission has found that many DCMs' disciplinary programs do in fact model the disciplinary structures and processes in part 8. While the acceptable practices for former Core Principle 2 offered the disciplinary procedures in part 8 as an example of appropriate disciplinary procedures, DCMs were exempt from part 8 pursuant to § 38.2. The disciplinary procedures proposed herein do not re-subject DCMs to part 8, but rather propose new disciplinary procedures for inclusion in part 38.

[128] *See supra* note 47.

[129] *See* Rule Enforcement Review of the Minneapolis Grain Exchange (Aug. 27, 2009), Rule Enforcement Review of ICE Futures U.S. (Feb. 2, 2010), and Rule Enforcement Review of the Chicago Board of Trade and the Chicago Mercantile Exchange (Sep. 13, 2010) for findings and recommendations pertaining to the adequate staff size of DCM compliance departments.

[130] *See* Rule Enforcement Review of the New York Mercantile Exchange (Sep. 16, 2004) and Rule Enforcement Review of the Chicago Board of Trade and the Chicago Mercantile Exchange (Sep. 13, 2010). The structure of disciplinary panels is discussed in the context of proposed § 38.702, below.

[131] *See* Rule Enforcement Review of the New York Mercantile Exchange (Sep. 16, 2004); Rule Enforcement Review of the Kansas City Board of Trade (June 16, 2006); and Rule Enforcement Review of the Minneapolis Grain Exchange (Aug. 27, 2009).

Submission of Records, Decorum, or Other Similar Activities) makes clear that a DCM should issue no more than one warning letter in a rolling 12-month period before sanctions are imposed, again reflecting DMO staff's concerns with respect to the adequacy of sanctions imposed. Proposed subpart N is divided into a total of 16 rules, each of which is described in detail below.

i. Proposed § 38.701—Enforcement Staff

Proposed § 38.701 requires that a DCM establish and maintain sufficient enforcement staff and resources to effectively and promptly prosecute possible rule violations within the jurisdiction of the contract market. A DCM must also monitor the size and workload of its enforcement staff annually and increase its resources and staff as appropriate. The Commission recognizes that at some DCMs, compliance staff also serves as enforcement staff. That is, they both investigate cases and present them before disciplinary panels. These proposed rules are not intended to prohibit that practice.

The Commission believes that adequate staff and resources are essential to the effective performance of a DCM's disciplinary program. As noted previously, this is reflected in DMO staff's findings and recommendations in recent RERs, in which DMO staff recommended that DCMs increase their compliance staff levels and monitor the size of their staff and increase the number of staff appropriately as trading volume increases, new responsibilities are assigned to compliance staff, or internal reviews demonstrate that work is not completed in an effective or timely manner.

Proposed § 38.701 also provides that a DCM's enforcement staff may not include members of the exchange or persons whose interests conflict with their enforcement duties. Moreover, a member of the enforcement staff may not operate under the direction or control of any person or persons with trading privileges at the contract market. These provisions seek to ensure the independence of enforcement staff, and help promote disciplinary procedures that are free of potential conflicts of interest.

ii. Proposed § 38.702—Disciplinary Panels

Proposed § 38.702 requires a DCM to establish one or more Review Panels and one or more Hearing Panels (together, "disciplinary panels") to fulfill its obligations under this section. The composition of both panels must meet the composition requirements of proposed § 40.9(c)(3)(ii)[132] and may not include any members of the DCM's compliance staff, or any person involved in adjudicating any other stage of the same proceeding. Paragraph (b) of the proposed rule provides that a Review Panel must be responsible for determining whether a reasonable basis exists for finding a violation of contract market rules, and for authorizing the issuance of a notice of charges against persons alleged to have violated exchange rules. If a notice of charges is issued, then Paragraph (c) of the proposed rule helps to ensure an impartial hearing by requiring a separate Hearing Panel to adjudicate the matter and issue sanctions. The Commission notes that, while proposed § 38.702 requires DCMs to empanel distinct bodies to issue charges and to adjudicate charges in a particular matter, DCMs may determine for themselves whether their Review and Hearing Panels are separate standing panels or ad hoc bodies whose members are chosen from a larger "disciplinary committee" to serve in one capacity or the other for a particular disciplinary matter.

iii. Proposed § 38.703—Review of Investigation Report

Proposed § 38.703 requires a Review Panel to promptly review an investigation report received pursuant to proposed § 38.158(c). In addition, a Review Panel must take action on any investigation report received within 30 days of such receipt. The Commission believes that prompt action by all disciplinary panels is necessary for an effective disciplinary program. Among other considerations, prompt disciplinary action provides the best opportunity for witnesses to recall conversations, facts, and other information relevant to the matter. In addition, prompt and effective disciplinary action provides a clear signal to the market and to market participants that violations of exchange rules will not be tolerated by the DCM.

After receipt of the investigation report, if a Review Panel determines that additional investigation or evidence is needed, it must promptly direct the compliance staff to conduct further investigation. In the alternative, if a Review Panel determines that no reasonable basis exists for finding a violation, or that prosecution is unwarranted, it may direct that no further action be taken. This determination must include a written statement setting forth the facts and analysis supporting the decision. Finally, if a Review Panel determines that a reasonable basis exists for finding a violation and adjudication is warranted, it must direct that the person or entity alleged to have committed the violation be served with a notice of charges.

iv. Proposed § 38.704—Notice of Charges

Proposed § 38.704 describes the minimally acceptable contents of a notice of charges ("notice") issued by a Review Panel. The notice must adequately state the acts, conduct, or practices in which the respondent is alleged to have engaged; state the rule, or rules, alleged to have been violated; and prescribe the period within which a hearing on the charges may be requested. Further, the notice must also advise the respondent charged that he is entitled, upon request, to a hearing on the charges. Pursuant to paragraphs (a) and (b) of the proposed rule, the DCM may adopt rules providing that (1) the failure to request a hearing within the time prescribed in the notice, except for good cause, may be deemed a waiver of the right to a hearing; and (2) the failure to answer or deny expressly a charge may be deemed to be an admission of such charge.

v. Proposed § 38.705—Right to Representation

Proposed § 38.705 requires that, upon being served with a notice of charges, a respondent must have the right to be represented by counsel or any other representative of his choosing in all succeeding stages of the disciplinary process. Together with proposed §§ 38.704 (requiring an adequate notice of charges to the respondent), 38.708 (conferring the right to hearing), and 38.710 (hearing procedures), 38.705 is one of the primary proposed rules in subpart N that helps ensure basic fairness for respondents in disciplinary proceedings.

[132] Section 40.9(c)(3)(ii), as proposed in the separate release titled Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, provides that "Each Disciplinary Panel shall include at least one person who would not be disqualified from serving as a Public Director by § 1.3(ccc)(1)(i)–(vi) and (2) of this chapter (a "Public Participant"). Such Public Participant shall chair each Disciplinary Panel. In addition, any registered entity specified in paragraph (c)(3)(i) of this section shall adopt rules that would, at a minimum: (A) Further preclude any group or class of participants from dominating or exercising disproportionate influence on a Disciplinary Panel and (B) Prohibit any member of a Disciplinary Panel from participating in deliberations or voting on any matter in which the member has a financial interest." *See* 75 FR 63732, Oct. 18, 2010.

vi. Proposed § 38.706—Answer to Charges

Proposed § 38.706 provides that a respondent must be given a reasonable period of time to file an answer to a charge. In general, paragraphs (a) through (c) of the proposed rule provide that the rules of the DCM may require that: (1) The answer must be in writing and include a statement that the respondent admits, denies or does not have and is unable to obtain sufficient information to admit or deny each allegation; (2) failure to file an answer on a timely basis shall be deemed an admission of all allegations in the notice of charges; and (3) failure in an answer to deny expressly a charge shall be deemed to be an admission of such charge.

vii. Proposed § 38.707—Admission or Failure to Deny Charges

Proposed § 38.707 provides that, if a respondent admits or fails to deny any of the violations alleged in a notice of charges, then a Hearing Panel may find that the violations admitted or not denied have in fact been committed. If a DCM adopts a rule concerning the admission or failure to deny charges, then Sections (a) through (c) of the proposed rule provide that: (1) The Hearing Panel must impose a sanction for each violation found to have been committed; (2) the DCM must promptly notify the respondent in writing of any sanction to be imposed and advise the respondent that they may request a hearing on such sanction within the period of time stated in the notice; and (3) the rules of the DCM may provide that if the respondent fails to request a hearing within the period of time stated in the notice, then the respondent will be deemed to have accepted the sanction.

viii. Proposed § 38.708—Denial of Charges and Right to Hearing

Proposed § 38.708 provides that in every instance where a respondent has requested a hearing on a charge that he or she denies, or on a sanction set by the Hearing Panel pursuant to proposed § 38.707, the respondent must be given the opportunity for a hearing in accordance with the requirements of proposed § 38.710. The DCM's rules may provide that, except for good cause, the hearing must be concerned only with those charges denied or sanctions set by the Hearing Panel under proposed § 38.707 for which a hearing has been requested.

ix. Proposed § 38.709—Settlement Offers

Proposed § 38.709 provides the procedures a DCM must follow if it permits the use of settlements to resolve disciplinary cases. Section (a) of the proposed rule states that the rules of a DCM may permit a respondent to submit a written offer of settlement any time after an investigation report is completed. The disciplinary panel presiding over the matter may accept the offer of settlement, but may not alter the terms of the offer unless the respondent agrees. In addition, Section (b) of the proposed rule provides that the rules of the DCM may allow a disciplinary panel to permit the respondent to accept a sanction without admitting or denying the rule violations upon which the sanction is based.

Section (c) of proposed § 38.709 states that a disciplinary panel accepting a settlement offer must issue a written decision specifying the rule violations it has reason to believe were committed, and any sanction imposed, including any order of restitution where customer harm has been demonstrated. Importantly, Section (c) also provides that if an offer of settlement is accepted without the agreement of a DCM's enforcement staff, the decision must carefully explain the disciplinary panel's acceptance of the settlement. Finally, Section (d) of proposed § 38.709 allows a respondent to withdraw his or her offer of settlement at any time before final acceptance by a disciplinary panel. If an offer is withdrawn after submission, or is rejected by a disciplinary panel, the respondent must not be deemed to have made any admissions by reason of the offer of settlement and must not be otherwise prejudiced by having submitted the offer of settlement.

x. Proposed § 38.710—Hearings

Proposed § 38.710 requires a DCM to adopt rules that provide certain minimum requirements for any hearing conducted pursuant to a notice of charges. In general, Sections (a)(1) through (a)(7) of the proposed rule require the following requirements: (1) A fair hearing; (2) authority for a respondent to examine evidence relied on by enforcement staff in presenting the charges contained in the notice of charges; (3) the DCM's enforcement and compliance staffs must be parties to the hearing and the enforcement staff must present its case on those charges and sanctions that are the subject of the hearing; (4) the respondent must be entitled to appear personally at the hearing, have the authority to cross-examine persons appearing as witnesses at the hearing, and call witnesses and present evidence as may be relevant to the charges; (5) the DCM must require persons within its jurisdiction who are called as witnesses to participate in the hearing and produce evidence; (6) a copy of the hearing must be made and become a record of the proceeding if the respondent has requested a hearing; and (7) the rules of the DCM may provide that the cost of transcribing the record must be borne by a respondent who requests a transcript. Additionally, proposed paragraph (b) specifies that the rules of the DCM may provide that a sanction be summarily imposed upon any person within its jurisdiction whose actions impede the progress of a hearing.

xi. Proposed § 38.711—Decisions

Proposed § 38.711 details the procedures that a Hearing Panel must follow in rendering disciplinary decisions. The proposed rule requires that all decisions include: (1) A notice of charges or a summary of the charges; (2) the answer, if any, or a summary of the answer; (3) a summary of the evidence produced at the hearing or, where appropriate incorporation by reference in the investigation report; (4) a statement of findings and conclusions with respect to each charge, and a careful explanation of the evidentiary and other basis for such findings and conclusions with respect to each charge; (5) an indication of each specific rule with which the respondent was found to have violated; and (6) a declaration of any penalty imposed against the respondent, including the basis for such sanctions and the effective date of such sanctions.

xii. Proposed § 38.712—Right to Appeal

Proposed § 38.712 provides the procedures that a DCM must follow in the event that the DCM's rules authorize an appeal of adverse decisions in all or in certain classes of cases. Notably, the proposed rule requires a DCM that permits appeals by disciplinary respondents to also permit appeals by its enforcement staff. This provision reflects the Commission's belief that DCM enforcement staff must have the discretion to appeal disciplinary panel decisions that, for example, do not adequately sanction a respondent's violative conduct.

For DCMs that permit appeals, the language in paragraphs (a) through (d) of proposed § 38.712 generally requires the DCM to: (1) Establish an appellate panel that is authorized to hear appeals; (2) ensure that the appellate panel composition is consistent with

§ 40.9(c)(iv) of the Commission's regulations and does not include any members of the DCM's compliance staff, or any person involved in adjudicating any other stage of the same proceeding; (3) except for good cause shown, conduct the appeal or review solely on the record before the Hearing Panel, the written exceptions filed by the parties, and the oral or written arguments of the parties; and (4) issue a written decision of the board of appeals and provide a copy to the respondent promptly following the appeal or review proceeding.

xiii. Proposed § 38.713—Final Decisions

Proposed § 38.713 requires that each DCM establish rules setting forth when a decision rendered under this subpart N will become the final decision of the DCM.

xiv. Proposed § 38.714—Disciplinary Sanctions

Proposed § 38.714 requires that every disciplinary sanction imposed by a DCM must be commensurate with the violations committed and must be clearly sufficient to deter recidivism or similar violations by other market participants. Additionally, the proposed rule requires that, in the event of demonstrated customer harm, any disciplinary sanction must include full customer restitution. In evaluating appropriate sanctions, the proposed rule requires the DCM to take into account a respondent's disciplinary history.[133]

xv. Proposed § 38.715—Summary Fines for Violations of Rules Regarding Timely Submission of Records, Decorum, or Other Similar Activities

Proposed § 38.715 permits a DCM to adopt a summary fine schedule for violations of rules relating to timely submission of accurate records required for clearing or verifying each day's transactions, decorum, attire, or other similar activities. A DCM may authorize its compliance staff to summarily impose minor sanctions against persons within the DCM's jurisdiction for violating such rules. The proposed rule makes clear that a DCM should issue no more than one warning letter in a rolling 12-month period for the same violation before sanctions are imposed. Additionally, the proposed rule specifies that a summary fine schedule must provide for progressively larger fines for recurring violations.

xvi. Proposed § 38.716—Emergency Disciplinary Actions

Proposed § 38.716 provides that a DCM may impose a sanction, including a suspension, or take other summary action against a person or entity subject to its jurisdiction upon a reasonable belief that such immediate action is necessary to protect the best interest of the marketplace. The proposed rule also provides that any emergency action taken by the DCM must be in accordance with certain procedural safeguards that protect the respondent, including the right to be served with notice before the action is taken or otherwise at the earliest possible opportunity after action has been taken; the right to be represented by legal counsel in any proceeding subsequent to the emergency disciplinary action; the right to a hearing as soon as reasonably practical; and the right to receive a written decision on the summary action taken by the DCM.

14. Subpart O—Dispute Resolution

Under the Dodd-Frank Act current Core Principle 13 is not substantively changed but it is renumbered as Core Principle 14. This core principle governs the obligations of DCMs to implement and enforce a dispute resolution program for their market participants and market intermediaries.[134] Currently, compliance with the core principle is guided by application guidance and acceptable practices in Appendix B of part 38. Based upon the Commission's experience over the last 10 years, this guidance has been successful in enabling DCMs to structure the appropriate dispute resolution program for themselves. Accordingly, the Commission proposes to maintain the guidance and acceptable practices, adding only clarifying changes that do not revise the substantive obligations of DCMs with respect to this core principle.

15. Subpart P—Governance Fitness Standards

The Dodd-Frank Act redesignated former current Core Principle 14 as Core Principle 15. The language of this core principle remains unchanged and requires the DCM to establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market, and any other persons with direct access to the facility (including any parties affiliated with any of the persons described in this core principle). This release proposes to codify the statutory text of the core principle in proposed § 38.800. The applicable regulations implementing this core principle will be proposed in a forthcoming rulemaking, expected to be completed by the statutory deadline of July 15, 2011.[135]

16. Subpart Q—Conflicts of Interest

The Dodd-Frank Act redesignated current Core Principle 15 (Conflicts of Interest) as Core Principle 16. However, in all other respects, Dodd-Frank did not substantively amend the core principle. This release proposes to codify the statutory text of the core principle in proposed § 38.850. The applicable regulations implementing this core principle were proposed in a separate release titled "Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest."[136]

17. Subpart R—Composition of Governing Boards of Contract Markets

The Dodd-Frank Act redesignated the former Core Principle 16 (Composition of Governing Boards of Mutually Owned Contract Markets) as Core Principle 17. In addition, current Core Principle 16 was amended by: (i) Changing the title of the core principle to "Composition of Governing Boards of Contract Markets"; and (ii) revising the scope of the core principle such that it now requires the governance arrangements of all DCMs to be designed to permit the consideration of the views of market participants.[137] This release proposes to codify the statutory text of the core principle in proposed § 38.900. The applicable regulations implementing this core principle will be proposed in a forthcoming rulemaking, which is expected to be completed by the statutory deadline of July 15, 2011.[138]

18. Subpart S—Recordkeeping

The Dodd-Frank Act designated current Core Principle 17 (Recordkeeping) as Core Principle 18. In almost all respects, Dodd-Frank did not substantively amend the Core Principle. Under current Core Principle 17, DCMs

[133] Proposed § 38.158(c), which is being proposed as part of this release with respect to Core Principle 2, requires that a copy of a member or market participant's disciplinary history be included in the compliance staff's investigation report.

[134] 17 CFR part 38, App. B.

[135] *See* CFTC Web site for additional information on the "Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities, Additional Requirements Regarding the Mitigation of Conflicts of Interest," at *http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/DF_9_DCOGovernance/index.htm* (last visited Dec. 14, 2010).

[136] 75 FR 63732, Oct. 18, 2010.

[137] Former Core Principle 16, which applied only to mutually owned DCMs, required such DCMs to ensure that the composition of their governing boards included market participants.

[138] See supra note 131.

are required to maintain records of all activities related to their business as DCMs, in a form and manner acceptable to the Commission, "for a period of 5 years." [139] The Commission adopted acceptable practices for this core principle by stating that DCMs could comply with the core principle by complying with § 1.31 of the Commission's regulations ("§ 1.31"). Section 1.31 establishes recordkeeping requirements for all books and records required to be kept under the CEA, whether by a DCM or otherwise and requires that books and records be kept "for a period of 5 years." [140] The Commission proposes to maintain compliance with § 1.31 as a primary component of compliance with this core principle, and proposes to incorporate the requirements in § 1.31 into proposed § 38.951.

One notable change in the amended core principle is that while current Core Principle 17 requires that records be retained for 5 years, the amended Core Principle (18) now requires that records be retained for "at least 5 years." [141] Accordingly, proposed § 38.951 permits the Commission to extend DCMs' recordkeeping requirements beyond the five years otherwise required of all entities by § 1.31, should it elect to do so. Thus, by its terms, the proposed rule requires DCMs to "maintain records of all activities relating to the business of the contract market, in a form and manner acceptable to the Commission, for a period of at least 5 years." In addition, DCMs must "maintain such records, including trade records and investigatory and disciplinary files, in accordance with the requirements of § 1.31 [of the Commission's regulations]."

By incorporating § 1.31, and more specifically, by incorporating § 1.31(a), proposed § 38.951 effectively requires that DCMs' books and records be readily accessible for the first two years of the minimum five-year statutory period and be open to inspection by any representatives of the Commission or the United States Department of Justice. The DCM, at its own expense, must promptly provide either a copy or the original book or record upon request.

Proposed § 38.951 also effectively incorporates current § 1.31(b)'s description of the permissible methods of storing books and records. Consequently, a DCM may store its books and records on either micrographic media, such as microfilm or microfiche or any similar medium, or electronic storage media as defined by § 1.31(b)(1)(ii).[142] DCMs must, at all times, have the facilities to immediately produce the micrographic media or electronic storage media images and be prepared to present legible hard-copy images of such records. Additionally, DCM's must keep only Commission-required records on the media, store a duplicate of the record at a separate location, and organize and maintain an accurate index of all information maintained on both the original and duplicate storage media. DCMs that use electronic storage media are also required to develop and maintain an audit system to track the initial entry of original or duplicate records and any subsequent changes made thereafter.

Finally, proposed § 38.951 also incorporates §§ 1.31(c) and 1.31(d). Section 1.31(c) of the Commission's regulations requires record-keepers who employ an electronic storage system to certify with the Commission that the system meets the requirements of an electronic storage media as defined in § 1.31(b)(1)(ii). Section 1.31(d) states that trading cards, documents on which trade information is originally recorded in writing, certain written orders, and paper copies of certain electronically filed forms and reports with original signatures must be retained in hard-copy for the requisite time period. The proposed rule also requires a DCM to comply with the requirements of proposed § 45.1—"Swap Recordkeeping Requirements"—if applicable to the DCM.

19. Subpart T—Antitrust Considerations

Current Core Principle 18 governs the antitrust obligations of DCMs.[143] The Dodd-Frank Act renumbered this core principle as Core Principle 19, but in all other respects the statutory text of the core principle is the same. The Commission believes that the existing guidance to this Core Principle remains appropriate. Accordingly, other than to codify the statutory text of Core Principle 19 into the proposed § 38.1000, the Commission at this time is not proposing any amendments to the relevant guidance under part 38.

Proposed § 38.1001 refers applicants and DCMs to the guidance in Appendix B to part 38 for purposes of demonstrating to the Commission their compliance with the requirements of proposed § 38.1000.20.

20. Subpart U—System Safeguards

Proposed § 38.1051 establishes system safeguards requirements for all DCMs, pursuant to new Core Principle 20 added under the Dodd-Frank Act. Core Principle 20, codified in § 38.1050 requires DCMs to: (1) Establish and maintain a program of risk oversight to identify and minimize sources of operational risk through the development of appropriate controls and procedures and the development of automated systems that are reliable, secure, and have adequate scalable capacity; (2) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the DCM; and (3) periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail. The rules proposed under subpart U implement these requirements.

Because automated systems play a central and critical role in today's electronic financial market environment, oversight of core principle compliance by DCMs with respect to automated systems is an essential part of effective oversight of both futures and swaps markets. Sophisticated computer systems are crucial to a DCM's ability to meet its obligations and responsibilities. Safeguarding the reliability, security, and capacity of such systems is also essential to mitigation of systemic risk for the nation's financial sector as a whole. This is particularly true in light of the fact that the over-the-counter swaps market is estimated to have in excess of $600 trillion in outstanding contracts, roughly 40 times the gross domestic product of the United States.[144] The ability of DCMs to recover and resume trading promptly in the event of a disruption of their operations is highly important to the U.S. economy. Ensuring the resilience of the automated systems of DCMs is a vitally important

[139] *See* 7 U.S.C. 7(d)(17).

[140] 17 CFR 1.31(a)(1).

[141] *Compare* 7 USC 7(d)(17) with Section 5(d)(18) of the CEA as amended by the Dodd-Frank Act (emphasis added).

[142] Among other criteria, § 1.31(b)(1)(ii) defines electronic storage media as "any digital storage medium or system that preserves the records exclusively in a non-rewritable, non-erasable format [and] verifies automatically the quality and accuracy of the storage media recording process * * *."

[143] Part 38 contains guidance governing compliance with Core Principle 18. 17 CFR part 38, App. B.

[144] These figures derived from Bank for International Settlements, BIS Quarterly Review, June 2010, Page A121, Table 19 at *http://www.bis.org/statistics/otcder/dt1920a.pdf.*; *see also,* Bureau of Economic Analysis news release, BEA 10–47, issued September 30, 2010 at *http://www.bea.gov/newsreleases/national/gdp/gdpnewsrelease.htm.*

part of the Commission's mission, and will be crucial to the robust and transparent systemic risk management framework established by the Dodd-Frank Act. DCM compliance with generally accepted standards and best practices with respect to the development, operation, reliability, security and capacity of automated systems can reduce the frequency and severity of automated system security breaches or functional failures, thereby augmenting efforts to mitigate systemic risk. Notice to the Commission concerning systems malfunctions, systems security incidents, or any events leading to the activation of a DCM's business continuity-disaster recovery ("BC–DR") plan will assist the Commission's oversight and its ability to assess systemic risk levels. It would present unacceptable risks to the U.S. financial system if futures and swaps markets that comprise critical components of the world financial system were to become unavailable for an extended period of time for any reason, and adequate system safeguards are crucial to mitigation of such risks.

Based on the aforementioned, the rules proposed under § 38.1051 would require a DCM's program of risk analysis and oversight to address five categories of risk analysis and oversight, including information security; BC–DR planning and resources, capacity and performance planning; systems operations; systems development and quality assurance; and physical security and environmental controls. The proposed rules specifically would require each DCM to maintain a BC–DR plan and BC–DR resources sufficient to enable resumption of trading and of all of the responsibilities and obligations of the DCM during the next business day following any disruption of its operations, either through sufficient infrastructure and personnel resources of its own or through sufficient contractual arrangements with other DCMs or disaster recovery service providers. The proposed rules also would require each DCM to notify Commission staff of various system security-related events; to provide relevant documents to the Commission; and to conduct regular, periodic, objective testing and review of its automated systems. Moreover, the proposed rules would require each DCM, to the extent practicable, to coordinate its BC–DR plan with those of the members and market participants upon whom it depends to provide liquidity, to initiate coordinated testing of such plans, and to take into account in its own BC–DR plan, the BC–DR plans of relevant telecommunications, power, water, and other essential service providers.

21. Subpart V—Financial Resources

The Dodd-Frank Act added new Core Principle 21. This core principle requires that a DCM must have adequate financial resources to discharge its responsibilities. The new core principle also requires that boards of trade must maintain financial resources sufficient to cover operating costs for a period of at least one year, calculated on a rolling basis.

The Commission notes that a DCM is the first entity in the trading process to ensure that trading occurs in a liquid, fair, and financially secure trading facility. For instance, a DCM must have, among other things, adequate trade practice and market surveillance, disciplinary, recordkeeping, and alternate dispute resolution programs in place in order to comply with the relevant core principles. In order to fulfill these responsibilities, a DCM must have appropriate minimum financial resources on hand and on an ongoing basis to sustain operations for a reasonable period of time. Furthermore, DCMs must have sufficient resources at any given time to allow them, if necessary, to close out trading in a manner not disruptive to the market.

Proposed § 38.1101 sets out financial resource requirements for DCMs, to implement new Core Principle 21. Under proposed § 38.1101, DCMs that also operate as DCOs are also subject to the financial resource requirements for DCOs in proposed § 39.11.[145]

i. Proposed § 38.1101 (a)—General Requirements

Proposed § 38.1100 recites the language of Core Principle 21, as set forth in Section 5(d)(21) of the CEA, as amended by the Dodd-Frank Act. Proposed § 38.1101(a)(1) and (3) would require DCMs to maintain sufficient financial resources to cover operating costs for at least one year, calculated on a rolling basis—i.e., at all times. The DCM must have sufficient financial resources to cover operating costs for at least one year from any particular point in time. The one year period is required under the amended core principle, and the Commission considers one year an appropriate timeframe given the potential need to allow contracts to expire and to allow the DCM's business to wind down in an orderly fashion. The Commission believes that this requirement will provide a clear baseline for financial resources, thus enhancing the financial integrity of the markets.[146]

The one-year period also is consistent with established accounting standards, under which an entity's ability to continue as a going concern comes into question if there is evidence that the entity may be unable to continue to meet its obligations in the next 12 months without substantial disposition of assets outside the ordinary course of business, restructuring of debt, externally forced revisions of its operations, or similar actions.[147]

ii. Proposed § 38. 1101(b)—Types of Financial Resources

Under proposed § 38.1101(b), financial resources available to DCMs to satisfy the applicable financial requirements would include the DCM's own capital (assets in excess of liabilities) and any other financial resource deemed acceptable by the Commission. A DCM would be able to request an informal interpretation from Commission staff on whether a particular financial resource would be acceptable to the Commission. The Commission invites commenters to recommend particular financial resources for inclusion in the final regulation.

iii. Proposed § 38.1101(c)—Computation of Financial Resource Requirement

Proposed § 38.1101(c) would require a DCM at the end of each fiscal quarter to make a reasonable calculation of the financial resources it needs to meet the

[145] Commission regulation § 39.11 establishes requirements that a DCO will have to meet in order to comply with DCO Core Principle B (Financial Resources), as amended by the Dodd-Frank Act. Amended Core Principle B requires a DCO to possess financial resources that, at a minimum, exceed the total amount that would enable the DCO to meet its financial obligations to its clearing members notwithstanding a default by the clearing member creating the largest financial exposure for the DCO in extreme but plausible conditions; and enable the DCO to cover its operating costs for a period of 1 year, as calculated on a rolling basis. *See* 75 FR 63113, Oct. 14, 2010.

[146] Some foreign regulatory authorities already have similar requirements for the equivalent entities they regulate. For example, the UK Financial Services Authority's ("FSA") recognition requirements for UK recognized investment exchanges and UK recognized clearing houses (collectively, "UK recognized bodies") include the maintenance of financial resources sufficient to ensure that the UK recognized body would be able to complete an orderly closure or transfer of its business without being prevented from doing so by insolvency or lack of available funds. Section 2.3.7 of the FSA Recognition Requirements calls for a UK recognized body to have at all times liquid financial assets amounting to at least six months' operating costs and net capital of at least that amount.

[147] *See* American Institute of Certified Public Accountants Auditing Standards Board Statement of Auditing Standards No. 59, The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern, as amended.

requirements of proposed § 38.1101(b). In the first instance, the DCM would have reasonable discretion in determining a methodology it uses to make the calculation. However, the Commission may review the methodology and require changes as appropriate.

iv. Proposed § 38.1101(d)—Valuation of Financial Resources

Proposed § 38.1101(d) would require DCMs, no less frequently than at the end of each fiscal quarter, to calculate the current market value of each financial resource used to meet their obligations under these proposed rules. Additionally, the DCMs would be required to perform the valuation at other times as appropriate. This provision is designed to address the need to update valuations in circumstances where there may have been material fluctuations in market value that could impact a DCM's ability to meet its obligations on a rolling basis as required by proposed § 38.1101(a). When valuing a financial resource, a DCM would be required to reduce the value, as appropriate, to reflect any market or credit risk specific to that particular resource, *i.e.,* apply a haircut.[148] The Commission would permit each DCM to exercise its discretion in determining the applicable haircuts. However, such haircuts are subject to Commission review and must be acceptable to the Commission.

v. Proposed § 38.1101(e)—Liquidity of Financial Resources

Proposed § 38.1101(e) would require DCMs to maintain unencumbered liquid financial assets, such as cash or highly liquid securities, equal to at least six months' operating costs. The Commission believes that having six months' worth of unencumbered liquid financial assets would give a DCM time to liquidate the remaining financial assets it would need to continue operating for the last six months of the required one-year period. If a DCM does not have six months' worth of unencumbered liquid financial assets, it would be allowed to use a committed line of credit or similar facility to satisfy this requirement.

The Commission notes that a committed line of credit or similar facility is not listed in proposed § 38.1101(b) as a financial resource available to a DCM to satisfy the requirements of proposed § 38.1101(a). A DCM may only use a committed line of credit or similar facility to meet the liquidity requirements set forth in proposed § 38.1101(e).

vi. Proposed § 38.1101(f)—Reporting Requirements

Under proposed § 38.1101(f), at the end of each fiscal quarter, or at any time upon Commission request, DCMs would be required to report to the Commission: (i) the amount of financial resources necessary to meet the requirements set forth in the regulation; and (ii) the value of each financial resource available to meet those requirements. A DCM would also have to provide the Commission with a financial statement, including the balance sheet, income statement, and statement of cash flows, of the DCM or of its parent company (if the DCM does not have an independent financial statement and the parent company's financial statement is prepared on a consolidated basis).

Proposed § 38.1101(f) requires a DCM to provide the Commission with sufficient documentation that explains the methodology it used to calculate its financial requirements and the basis for its determinations regarding valuation and liquidity. The DCM also must provide copies of any agreements establishing or amending a credit facility, insurance coverage, or any similar arrangement that evidences or otherwise supports its conclusions. The sufficiency of the documentation would be determined by the Commission in its sole discretion. The DCM would have 17 business days[149] from the end of the fiscal quarter to file the report, but would also be able to request an extension of time from the Commission.

The Commission invites comments on all these proposed rules relating to requirements for financial resources for DCMs.

22. Subpart W—Diversity of Boards of Directors

The Dodd-Frank Act added new Core Principle 22, requiring that publicly traded DCMs must endeavor to recruit individuals to serve on their board of directors from among a broad and culturally diverse pool of qualified candidates. This release proposes to codify the statutory text of the core principle in proposed § 38.1150. This core principle will be addressed in a forthcoming release that is expected to be completed by the statutory deadline of July 15, 2011.

23. Subpart X—Securities and Exchange Commission

The Dodd-Frank Act added new Core Principle 23, requiring that DCMs keep any records relating to swaps defined in CEA Section 1a(47)(A)(v), as amended by the Dodd-Frank Act, open to inspection and examination by the Securities and Exchange Commission ("SEC").[150] Consistent with the text of this core principle, the Commission proposes guidance under part 38 that provides that each DCM should have arrangements and resources for collecting and maintaining accurate records pertaining to any swap agreements defined in section 1a(47)(A)(v) of the amended CEA.

Proposed § 38.1201 refers applicants and DCMs to the guidance in Appendix B to part 38 for purposes of demonstrating to the Commission their compliance with the requirements of Proposed § 38.1200, which codifies the text of the core principle.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")[151] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. The rules adopted herein will affect designated contract markets. The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its rules on small entities in accordance with the RFA.[152] The Commission previously determined that designated contract markets are not small entities for the purpose of the RFA.[153] Therefore, the Chairman, on behalf of the Commission, pursuant to 5 U.S.C. 605(b) certifies that the proposed rules will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

This proposed rulemaking contains information collection requirements. The Paperwork Reduction Act (PRA)[154] imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. The Commission is

[148] A "haircut" is a deduction taken from the value of an asset to reserve for potential future adverse price movements in such asset.

[149] This filing deadline is consistent with the deadline imposed on FCMs for the filing of monthly financial reports. *See* 17 CFR 1.10(b).

[150] 7 U.S.C. 7; *see also* Section 5(d)(23) of the CEA, as amended by the Dodd-Frank Act.

[151] 5 U.S.C. 601 *et seq.*

[152] 47 FR 18618–21, Apr. 30, 1982.

[153] *Id.*

[154] 44 U.S.C. 3501 *et seq.*

proposing to amend Collection 3038–0052 to allow for an increase in response hours for the proposed rulemaking amending part 38, which captures associated proposed amendments to rules 1.52 and 16.01, as required under the Dodd-Frank Act.[155] The Commission therefore is submitting this proposal to the Office of Management and Budget (OMB) for its review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for this collection is "Part 38—Designated Contract Markets" (OMB Control number 3038–0052). Responses to this collection of information would be mandatory. The Commission will protect proprietary information according to the Freedom of Information Act (FOIA) and 17 CFR part 145, "Commission Records and Information." In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the Act, from making public "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers."[156] The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.[157]

1. Additional Information Provided by Designated Contract Markets

The proposed rules require each respondent to file information with the Commission. For instance, contract markets must file applications and supporting documents and information with the Commission for designation pursuant to Commission rule 38.3. Designated contract markets must either request approval or certify rules and products with the Commission pursuant to Commission rule 38.4. Designated contract markets must disclose information related to prices, volume, open interest and certain trading information pursuant to Core Principle 8 (Daily Publication of Trading Information).[158]

Commission staff previously estimated 300 hours average response time from each respondent for this collection of information for designation and compliance purposes pursuant to part 38. Based on its experience with administering registered entities' submission requirements since implementation of the Commodity Futures Modernization Act of 2000,[159] Commission staff believes that the response time for designation and compliance would generally increase by 10% with the implementation of swaps trading on designated contract markets pursuant to Section 723(a)(3) of the Dodd-Frank Act and the addition of new core principles with which designated contract markets must comply. Commission staff estimates that it would receive filings from 17 respondents.[160] Accordingly, the additional burden in terms of hours would be 30 additional hours per respondent and 510 additional hours annually for all respondents for designation and compliance.

In addition to the general increase noted above, pursuant to the proposed rulemaking, respondents are subject to new Core Principle 21 (Financial Resources) that requires the respondent to have adequate financial, operational and managerial resources.[161] In order to demonstrate compliance with Core Principle 21, each respondent will need to file specific reports to the Commission on a quarterly basis, which would result in four quarterly responses per respondent per year. Commission staff estimates that each respondent would expend 10 hours to prepare each filing required under the proposed regulations. As noted above, Commission staff estimates that it would receive filings from 17 respondents. Accordingly, the additional burden in terms of hours would be 40 additional hours annually per respondent and 680 additional hours annually for all respondents to comply with Core Principle 21.

Commission staff estimates that respondents could expend up to an additional $3,640 annually based on an hourly wage rate of $52 (30 hours + 40 hours × $52) to comply with the proposed rules. This would result in an aggregated additional cost of $61,880 per annum (17 respondents × $3,640).

OMB Control Number 3038–005.

Estimated Number of Respondents: 17.

Quarterly Responses by Each Respondent: 4.

Total Quarterly Responses by Each Respondent: 68.

Estimated Additional Average Hours per Response: 70.

Aggregate Annual Hourly Reporting Burden: 1190.

2. Information Collection Comments

Copies of the submission from the Commission to OMB are available by visiting RegInfo.gov. The Commission will consider public comments on this proposed collection of information in:

(1) Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;

(2) Evaluating the accuracy of the estimated burden of the proposed collection of information, including the degree to which the methodology and the assumptions that the Commission employed were valid;

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

(4) Minimizing the burden of the proposed information collection requirements on designated clearing organizations, designated contract markets, and swap execution facilities, including through the use of appropriate automated, electronic, mechanical, or other technological information collection techniques, *e.g.,* permitting electronic submission of responses.

Organizations and individuals desiring to submit comments on the proposed information collection requirements should contact the Office of Information and Regulatory Affairs, Office of Management and Budget, by fax at (202) 395–6566 or by e-mail at *OIRAsubmission@omb.eop.gov.* Please provide the Commission with a copy of submitted comments so that they may be summarized and addressed in the final rulemaking. Refer to the Addresses section of this notice of proposed rulemaking for comment submission instructions to the Commission.

OMB is required to make a decision concerning the proposed information collection requirements between 30 and 60 days after publication of this Release in the **Federal Register**. Therefore, a comment to OMB is best assured of receiving full consideration if OMB receives it within 30 days of publication of this Release. Nothing in the foregoing affects the deadline enumerated above for public comment to the Commission on the proposed rules.

C. Cost Benefit Analysis

Section 15(a) of the CEA [162] requires that the Commission consider the costs and benefits of its actions before issuing a regulation under the Act. By its terms, Section 15(a) does not require the Commission to quantify the costs and

[155] Dodd Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[156] 7 U.S.C. 12.

[157] 5 U.S.C. 552a.

[158] *See* Section 735(b) of the Dodd-Frank Act.

[159] Public Law 106–554, 114 Stat. 2763 (2000).

[160] The number of designated contract markets increased from 13 to 17 since the last amendment to Collection 3038–0052.

[161] *See* section 735(b) of the Dodd-Frank Act.

[162] 7 U.S.C. 19(a).

benefits of a new rule or determine whether the benefits of the rulemaking outweigh its costs; rather, Section 15(a) requires the Commission to "consider" the costs and benefits of its actions.

Section 15(a) of the CEA further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. Accordingly, the Commission could, in its discretion, give greater weight to any one of the five considerations and could, in its discretion, determine that, notwithstanding its costs, a particular rule was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.

Summary of Proposed Requirements

The proposed rulemaking would change the criteria applicants for designation as a contract market must meet by: (1) Eliminating all of the existing eight designation criteria and incorporating those criteria into various DCM core principles; (2) revising, in some instances, the wording of the 18 pre-existing DCM core principles; and (3) adding five additional DCM core principles. In addition to revising the DCM core principles, the Dodd-Frank Act requires that the trading or processing of clearable swaps must occur only on a registered DCM or SEF.[163] This rulemaking will implement, in part 38 of the Commission's regulations, these amended provisions of the Act relevant to DCMs. Specific provisions include a proposal to replace guidance and acceptable practices associated with certain core principles with regulations. The Commission also is proposing several procedural changes for new applications for designation as a contract market, including the elimination of the expedited approval procedures and the creation of a DCM application form. Under the proposal, the timing of reviews of designation applications would be governed only by the 180-day statutory review period.

Costs

As highlighted by recent events in the global credit markets, transacting of swaps in unregulated, over-the-counter markets does not contribute to the goal of stability in the broader financial markets. The public would continue to be at risk to such financial instability if certain derivatives were allowed to trade over the counter rather than on regulated exchanges. Designated contract markets that determine to list swaps for trading will be subject to core principles for trading of swaps just as they are for futures contracts. If swaps were allowed to continue to be transacted bilaterally, rather than on the centralized market of a DCM, price discovery and transparency in the swaps markets would continue to be inhibited.

Under the proposed rulemaking, designated contract markets will be required to comply with five additional core principles for trading futures and option contracts. Moreover, designated contract markets that determine to list standardized swaps for trading will be required to comply with the same core principles as for trading futures contracts. These procedures are mandatory pursuant to the Dodd-Frank Act and any additional costs associated with these procedures are required by the implementation of the Dodd-Frank Act. The Commission is also proposing to replace guidance and acceptable practices associated with certain core principles with regulations. While these new regulations generally codify existing industry practice, bringing their procedures into full compliance with these new regulations may impose some costs on DCMs.

Regarding new applications for designation as a contract market, the Commission is proposing several procedural changes, including the elimination of the expedited approval procedures, such that the timing of such reviews would be governed only by the 180-day statutory review period. This may impose costs on DCM applicants that may have to wait longer for designation than under current procedures. However, in light of the difficulties in submitting a complete application under the expedited procedures, few DCMs have been eligible for designation under the expedited procedures, so these costs should be limited.

Benefits

The Commission believes that the benefits of the rulemaking are significant. The proposed regulations provide for the transacting of swaps on DCMs. DCMs will compete with swap execution facilities to list new standardized swaps contracts, while certain customized swaps will continue to transact bilaterally. This competition will benefit the marketplace. Providing market participants with the ability to trade standardized swaps openly and competitively additionally will provide market participants with enhanced price transparency resulting in greater protection of market participants and the public.

The proposed regulations also require DCMs that determine to list swaps for trading will have to coordinate with DCOs so that the swaps may be listed swaps for clearing. This will subject the swaps to the DCO's risk management and margining procedures, which addresses the consideration of sound risk management practices and will add to the financial integrity of the swaps markets.

The proposed regulations eliminate all of the existing eight designation criteria and incorporate those criteria into various existing DCM core principles. The proposed regulations additionally implement five new core principles, specifically Core Principle 13 (Disciplinary Procedures), Core Principle 20 (System Safeguards), Core Principle 21 (Financial Resources), Core Principle 22 (Diversity of Boards of Directors), and Core Principle 23 (Securities and Exchange Commission). The proposed rules also modify existing core principles. For example, newly amended Core Principle 9 (Execution of Transactions) requires the board of trade to provide a competitive, open and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market. These changes will benefit the public by further enhancing the transparency and integrity of futures and options markets as well as swap markets on DCMs.

Further, the Commission proposes to replace guidance and acceptable practices associated with certain core principles with regulations. This will have the benefit to DCMs and the public of providing greater regulatory certainty. Finally the changes to the procedures for applying for contract market designation will benefit new applicants by improving the workability and efficiency of the application process.

Public Comment

The Commission invites public comment on its cost-benefit considerations. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the Proposal with their comment letters.

[163] *See* section 723 of Dodd-Frank Act.

IV. Text of Proposed Rules

List of Subjects

17 CFR Part 1

Commodity futures, Designated contract markets, Minimum financial requirements for intermediaries, Reporting and recordkeeping requirements.

17 CFR Part 16

Commodity futures, Reporting and Recordkeeping requirements.

17 CFR Part 38

Block transaction, Commodity futures, Designated contract markets, Reporting and Recordkeeping requirements, Transactions off the centralized market.

For the reasons stated in the preamble, and under the authority of 7 U.S.C. 1, *et seq.,* the Commodity Futures Trading Commission proposes to amend 17 CFR parts 1, 16 and 38 as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

1. Revise the authority citation for part 1 to read as follows:

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f,, 6g, 6h, 6i, 6j, 6k, 6l, 6m, 6n, 6o, 6p, 7, 7a–2, 7b, 8, 9, 12, 12a, 12c, 13a, 13a–1, 16, 19, 21, 23 and 24, as amended by Pub. L. No. 111–203, 124 Stat 1376.

§ 1.38 [Removed and Reserved]

2. Remove and reserve § 1.38.

3. Revise § 1.52 to read as follows:

§ 1.52 Self-regulatory organization adoption and surveillance of minimum financial requirements.

(a) Each self-regulatory organization must adopt rules prescribing minimum financial and related reporting requirements for members who are registered futures commission merchants, registered retail foreign exchange dealers, or registered introducing brokers. The self-regulatory minimum financial and related reporting requirements must be the same as, or more stringent than, the requirements contained in §§ 1.10 and 1.17 of this chapter, for futures commission merchants and introducing brokers, and §§ 5.7 and 5.12 of this chapter for retail foreign exchange dealers; Provided, however, a self-regulatory organization may permit its member registrants that are registered with the Securities and Exchange Commission as securities brokers or dealers to file (in accordance with § 1.10(h) of this chapter) a copy of their Financial and Operational Combined Uniform Single Report under the Securities Exchange Act of 1934, Part II, Part IIA, or Part II CSE, in lieu of Form 1–FR. The definition of adjusted net capital must be the same as that prescribed in § 1.17(c) of this chapter for futures commission merchants and introducing brokers, and § 5.7(b)(2) of this chapter for futures commission merchants offering or engaging in retail forex transactions and for retail foreign exchange dealers.

(b) Each self-regulatory organization must establish and operate a supervisory program for the purpose of assessing whether each member registrant is in compliance with the applicable self-regulatory organization and Commission rules and regulations governing minimum net capital and related financial requirements, the obligation to segregate customer funds, financial reporting requirements, recordkeeping requirements, and sales practice and other compliance requirements. The supervisory program also must address the following elements:

(1) *Adequate levels and independence of audit staff.* A self-regulatory organization must maintain staff of an adequate size, training, and experience to effectively implement a supervisory program. Staff of the self-regulatory organization, including officers, directors and supervising committee members, must maintain independent judgment and its actions must not impair its independence nor appear to impair its independence in matters related to the supervisory program. The self-regulatory organization must provide annual ethics training to all staff with responsibilities for the supervisory program.

(2) *Ongoing surveillance.* A self-regulatory organization's ongoing surveillance of member registrants must include the review and analysis of financial reports and regulatory notices filed by member registrants with the designated self-regulatory organization.

(3) *High-risk firms.* A self-regulatory organization's supervisory program must include procedures for identifying member registrants that are determined to pose a high degree of potential financial risk, including the potential risk of loss of customer funds. High-risk member registrants must include firms experiencing financial or operational difficulties, failing to meet segregation or net capital requirements, failing to maintain current books and records, or experiencing material inadequacies in internal controls. Enhanced monitoring for high risk firms should include, as appropriate, daily review of net capital, segregation, and secured calculations, to assess compliance with self-regulatory and Commission requirements.

(4) *On-site examinations.* (i) A self-regulatory organization must conduct routine periodic on-site examinations of member registrants. Member futures commission merchants and retail foreign exchange dealers must be subject to on-site examinations no less frequently than once every eighteen months. A self-regulatory organization may establish a risk-based method of establishing the scope of each on-site examination, *provided however,* that the scope of each on-site examination of a futures commission merchant or retail foreign exchange dealer must include an assessment of whether the registrant is in compliance with applicable Commission and self-regulatory organization minimum capital and customer fund protection requirements, recordkeeping, and reporting requirements.

(ii) A self-regulatory organization must establish the frequency of on-site examinations of member introducing brokers that do not operate pursuant to guarantee agreements with futures commission merchants or retail foreign exchange dealers using a risk-based approach, *provided however,* that each introducing broker is subject to an on-site examination no less frequently than once every three years.

(iii) A self-regulatory organization must conduct on-site examinations of member registrants in accordance with uniform audit programs and procedures that have been submitted to the Commission.

(5) *Adequate documentation.* A self-regulatory organization must adequately document all aspects of the operation of the supervisory program, including the conduct of risk-based scope setting and the risk-based surveillance of high-risk member registrants, and the imposition of remedial and punitive action(s) for material violations.

(c) Any two or more self-regulatory organizations may file with the Commission a plan for delegating to a designated self-regulatory organization, for any registered futures commission merchant, retail foreign exchange dealer, or introducing broker that is a member of more than one such self-regulatory organization, the responsibility of:

(1) Monitoring and auditing for compliance with the minimum financial and related reporting requirements adopted by such self-regulatory organizations and the Commission in accordance with paragraphs (a) and (b) of this section; and

(2) Receiving the financial reports necessitated by such minimum financial and related reporting requirements.

(d) Any plan filed under this section may contain provisions for the allocation of expenses reasonably incurred by the designated self-regulatory organization among the self-regulatory organizations participating in such a plan.

(e) A plan's designated self-regulatory organization must report to:

(1) That plan's other self-regulatory organizations any violation of such other self-regulatory organizations' rules and regulations for which the responsibility to monitor, audit or examine has been delegated to such designated self-regulatory organization under this section; and

(2) The Commission any violation of a self-regulatory organization's rules and regulations or any violation of the Commission's regulations for which the responsibility to monitor, audit or examine has been delegated to such designated self-regulatory organization under this section.

(f) The self-regulatory organizations may, among themselves, establish programs to provide access to any necessary financial or related information.

(g) After appropriate notice and opportunity for comment, the Commission may, by written notice, approve such a plan, or any part of the plan, if it finds that the plan, or any part of it:

(1) Is necessary or appropriate to serve the public interest;

(2) Is for the protection and in the interest of customers or option customers;

(3) Reduces multiple monitoring and multiple auditing for compliance with the minimum financial rules of the self-regulatory organizations submitting the plan of any futures commission merchant, retail foreign exchange dealer, or introducing broker that is a member of more than one self-regulatory organization;

(4) Reduces multiple reporting of the financial information necessitated by such minimum financial and related reporting requirements by any futures commission merchant, retail foreign exchange dealer, or introducing broker that is a member of more than one self-regulatory organization;

(5) Fosters cooperation and coordination among the self-regulatory organizations; and

(6) Does not hinder the development of a registered futures association under Section 17 of the Act.

(h) After the Commission has approved a plan, or part thereof, under § 1.52(g), a self-regulatory organization relieved of responsibility must notify each of its members that are subject to such a plan:

(1) Of the limited nature of its responsibility for such a member's compliance with its minimum financial and related reporting requirements; and

(2) Of the identity of the designated self-regulatory organization that has been delegated responsibility for such a member.

(i) The Commission may at any time, after appropriate notice and opportunity for hearing, withdraw its approval of any plan, or part thereof, established under this section, if such plan, or part thereof, ceases to adequately effectuate the purposes of Section 4f(b) of the Act or of this section.

(j) Whenever a registered futures commission merchant, a registered retail foreign exchange dealer, or a registered introducing broker holding membership in a self-regulatory organization ceases to be a member in good standing of that self-regulatory organization, such self-regulatory organization must, on the same day that event takes place, give electronic notice of that event to the Commission at its Washington, DC, headquarters and send a copy of that notification to such futures commission merchant, retail foreign exchange dealer, or introducing broker.

(k) Nothing in this section shall preclude the Commission from examining any futures commission merchant, retail foreign exchange dealer, or introducing broker for compliance with the minimum financial and related reporting requirements to which such futures commission merchant, retail foreign exchange dealer, or introducing broker is subject.

(l) In the event a plan is not filed and/or approved for each registered futures commission merchant, retail foreign exchange dealer, or introducing broker that is a member of more than one self-regulatory organization, the Commission may design and, after notice and opportunity for comment, approve a plan for those futures commission merchants, retail foreign exchange dealers, or introducing brokers that are not the subject of an approved plan (under paragraph (g) of this section), delegating to a designated self-regulatory organization the responsibilities described in paragraph (c) of this section.

PART 16—REPORTS BY CONTRACT MARKETS AND SWAP EXECUTION FACILITIES

4. The authority citation for part 16 is revised to read as follows:

Authority: 7 U.S.C. 2, 6a, 6c, 6g, 6i, and 7, and 7b–3, as amended by Pub. L. 111–203, 124 Stat. 1376.

5. The heading for part 16 is revised to read as set forth above.

6. Revise § 16.01 to read as follows:

§ 16.01 Publication of market data on futures, swaps and options thereon: Trading volume, open contracts, prices, and critical dates.

(a) *Trading volume and open contracts.* (1) Each reporting market, as defined in part 15 of this chapter, must record for each business day the following information separately:

(i) For futures, by commodity and by futures expiration date;

(ii) For options by underlying futures contracts for options on futures contracts or by underlying physical for options on physicals, and by put, by call, by expiration date and by strike price;

(iii) For swaps or class of swaps, by product type and by term life of the swap; and

(iv) For swaptions or class of swaptions, by underlying swap contracts for options on swap contracts or by underlying physical for swaptions on physicals, and by put, by call, by expiration date and by strike price.

(2) Volume for swaps and swaptions shall be reported in terms of contracts for standard-sized contracts (i.e., contracts with a set contract size for all contracts) or in terms of notional value for non-standard-sized contracts (i.e., contracts whose contract size is not set and can vary for each transaction):

(i) The option delta, where a delta system is used;

(ii) The total gross open contracts for futures, excluding those contracts against which delivery notices have been stopped;

(iii) For futures products that specify delivery, open contracts against which delivery notices have been issued on that business day;

(iv) The total volume of trading, excluding transfer trades or office trades;

(v) The total volume of futures/options/swaps/swaptions exchanged for commodities or for derivatives positions that are included in the total volume of trading; and

(vi) The total volume of block trades included in the total volume of trading.

(b) *Prices.* (1) Each reporting market must record the following information separately:

(i) For futures, by commodity and by futures expiration,

(ii) For options, by underlying futures contracts for options on futures contracts or by underlying physical for

options on physicals, and by put, by call, by expiration date and by strike price,

(iii) For swaps, by product type and contract month or term life of the swap, and

(iv) For swaptions or class of swaptions, by underlying swap contracts for options on swap contracts or by underlying physical for swaptions on physicals, and by put, by call, by expiration date and by strike price.

(2) Each reporting market must record for the trading session and for the opening and closing periods of trading as determined by each reporting market:

(i) The opening and closing prices of each futures, option, swap or swaption.

(ii) The price that is used for settlement purposes, if different from the closing price.

(iii) The lowest price of a sale or offer, whichever is lower, and the highest price of a sale or bid, whichever is higher, that the reporting market reasonably determines accurately reflects market conditions. Bids and offers vacated or withdrawn shall not be used in making this determination. A bid is vacated if followed by a higher bid or price and an offer is vacated if followed by a lower offer or price.

(3) If there are no transactions, bids, or offers during the opening or closing periods, the reporting market may record as appropriate:

(i) The first price (in lieu of opening price data) or the last price (in lieu of closing price data) occurring during the trading session, clearly indicating that such prices are the first and last prices; or

(ii) Nominal opening or nominal closing prices that the reporting market reasonably determines to accurately reflect market conditions, clearly indicating that such prices are nominal.

(4) Additional information. Each reporting market must record the following information with respect to transactions in commodity futures, commodity options, swaps or swaptions on that reporting market:

(i) The method used by the reporting market in determining nominal prices and settlement prices; and

(ii) If discretion is used by the reporting market in determining the opening and/or closing ranges or the settlement prices, an explanation that certain discretion may be employed by the reporting market and a description of the manner in which that discretion may be employed. Discretionary authority must be noted explicitly in each case in which it is applied (for example, by use of an asterisk or footnote).

(c) *Critical dates.* Each reporting market must report to the Commission, for each futures contract, the first notice date and the last trading date, and for each option contract, the expiration date in accordance with paragraph (d) of this section.

(d) *Form, manner and time of filing reports.* Unless otherwise approved by the Commission or its designee, reporting markets must submit to the Commission the information specified in paragraphs (a)(2), (b), and (c) of this section as follows:

(1) Using the format, coding structure and electronic data transmission procedures approved in writing by the Commission or its designee; *provided however,* that the information must be made available to the Commission or its designee in hard copy upon request;

(2) When each such form of the data is first available, but not later than 7 a.m. on the business day following the day to which the information pertains for the delta factor and settlement price and not later than 12 p.m. for the remainder of the information. Unless otherwise specified by the Commission or its designee, the stated time is U.S. eastern standard time for information concerning markets located in that time zone, and U.S. central time for information concerning all other markets; and

(3) For information on reports to the Commission for swap or swaption contracts, refer to part 20 of this chapter.

(e) *Publication of recorded information.* (1) Reporting markets must make the information in paragraph (a) of this section readily available to the news media and the general public without charge, in a format that readily enables the consideration of such data, no later than the business day following the day to which the information pertains. The information in paragraphs (a)(2)(iv) through (vi) of this section shall be made readily available in a format that presents the information together.

(2) Reporting markets must make the information in paragraphs (b)(2) and (3) of this section readily available to the news media and the general public, and the information in paragraph (b)(4)(ii) of this section readily available to the general public, in a format that readily enables the consideration of such data, no later than the business day following the day to which the information pertains. Information in paragraph (b)(4)(i) of this section must be made available in the registered entity's rulebook, which is publicly accessible on its Web site.

PART 38—DESIGNATED CONTRACT MARKETS

7. Revise the authority citation for part 38 to read as follows:

Authority: 7 U.S.C. 2, 4c,. 6, 6a, 6d, 6e, 6f, 6g, 6i, 6j, 6k, 6l, 6m, 6n, 7, 7a–2, 7b, 7b–1, 7b–3, 8, 9, 15, and 21 as amended by Pub. L. 111–203, 124 Stat. 1376.

8. Designate existing §§ 38.1 through 38.6 as subpart A under the following subpart heading:

Subpart A—General Provisions

* * * * *

§ 38.1 [Amended]

9. Amend § 38.1 by removing the reference "Parts 36 or 37 of this chapter" and adding in its place the reference "parts 37 or 49 of this chapter".

10. Revise § 38.2 to read as follows:

§ 38.2 Applicable provisions.

A designated contract market, the contract market's operator and transactions traded on or through a designated contract market under Section 5 of the Act shall comply with the requirements of this part 38, §§ 1.3, 1.12(e), 1.31, 1.37(c)–(d), 1.52, 1.59(d), 1.60, 1.63(c), 1.67, 33.10, part 9, parts 15 through 21, part 40, part 41, part 43, part 45, part 46, part 49, part 151, and part 190 of this chapter, including any related definitions and cross-referenced sections.

11. Revise § 38.3 to read as follows:

§ 38.3 Procedures for designation.

(a) *Application procedures.* (1) A board of trade seeking designation as a contract market must file electronically Application Form DCM provided in Appendix A of this part, with the Secretary of the Commission at its Washington, DC headquarters at *submissions@cftc.gov* and the Division of Market Oversight at *DMOSubmissions@cftc.gov.* The Commission will review the application for designation as a contract market pursuant to the 180-day timeframe and procedures specified in Section 6(a) of the Act. The Commission shall approve or deny the application or, if deemed appropriate, designate the applicant as a contract market subject to conditions.

(2) The application must include information sufficient to demonstrate compliance with the core principles specified in Section 5(d) of the Act. Application Form DCM consists of instructions, general questions and a list of Exhibits (documents, information and evidence) required by the Commission in order to determine whether an applicant is able to comply with the core principles. An application will not

be considered to be materially complete unless the applicant has submitted, at a minimum, the Exhibits as required in Application Form DCM. If the application is not materially complete, the Commission shall notify the applicant that the application will not be deemed to have been submitted for purposes of the 180-day review period set forth in paragraph (a)(1) of this section.

(3) The applicant must identify with particularity any information in the application that will be subject to a request for confidential treatment pursuant to § 145.9 of this chapter.

(4) Section 40.8 of this chapter sets forth those sections of the application that will be made publicly available, notwithstanding a request for confidential treatment pursuant to § 145.9 of this chapter.

(5) If any information contained in the application or in any Exhibit is or becomes inaccurate for any reason, an amendment to the application or a submission filed under part 40 of this chapter must be filed promptly correcting such information.

(b) *Reinstatement of dormant designation.* Before listing or relisting products for trading, a dormant designated contract market as defined in § 40.1 of this chapter must reinstate its designation under the procedures of paragraphs (a)(1) and (a)(2) of this section; provided, however, that an application for reinstatement may rely upon previously submitted materials that still pertain to, and accurately describe, current conditions.

(c) *Delegation of authority.* (1) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, upon consultation with the General Counsel or the General Counsel's delegate, authority to notify the applicant seeking designation under Section 6(a) of the Act that the application is materially incomplete and the running of the 180-day period is stayed.

(2) The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph.

(3) Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in paragraph (c)(1) of this section.

(d) *Request for transfer of designation.* (1) *Request for transfer of designation, listed contracts and open interest.* A designated contract market that wants to request the transfer of its designation from its current legal entity to a new legal entity, as a result of a corporate reorganization or otherwise, must file a request with the Commission for approval to transfer the designation, listed contracts and positions comprising all associated open interest. Such request must be filed electronically with the Secretary of the Commission at its Washington, DC headquarters at *submissions@cftc.gov* and the Division of Market Oversight at *DMOSubmissions@cftc.gov.*

(2) *Timing of submission.* The request must be filed no later than three months prior to the anticipated corporate change; provided that the designated contract market may file a request with the Commission later than three months prior to the anticipated change if the designated contract market does not know and reasonably could not have known of the anticipated change three months prior to the anticipated change. In such event, the designated contract market shall be required to immediately file the request with the Commission as soon as it knows of such change with an explanation as to the timing of the request.

(3) *Required information.* The request shall include the following:

(i) The underlying agreement that governs the corporate change.

(ii) A narrative description of the corporate change, including the reason for the change and its impact on the designated contract market, including its governance, and operations, and its impact on the rights and obligations of market participants holding the open interest positions.

(iii) A discussion of the transferee's ability to comply with the Act, including the core principles applicable to designated contract markets, and the Commission's regulations thereunder.

(iv) The governing documents of the transferee including, but not limited to, articles of incorporation and bylaws.

(v) The transferee's rules marked to show changes from the current rules of the designated contract market.

(vi) A list of contracts, agreements, transactions or swaps for which the designated contract market requests transfer of open interest.

(vii) A representation by the transferee that it:

(A) Will be the surviving corporation and successor-in-interest to the transferor designated contract market and will retain and assume, without limitation, all the assets and liabilities of the transferor;

(B) Will assume responsibility for complying with all applicable provisions of the Act and the Commission's regulations thereunder, including part 38 and Appendices thereto;

(C) Will assume, maintain and enforce all rules implementing and complying with these core principles, including the adoption of the transferor's rulebook, as amended in the request, and that any such amendments will be submitted to the Commission pursuant to Section 5c(c) of the Act and part 40 of the Commission's regulations; and

(D) Will comply with all self-regulatory responsibilities except if otherwise indicated in the request, and will maintain and enforce all self-regulatory programs.

(viii) A representation by the transferee that upon the transfer:

(A) All open interest in all contracts listed on the transferor will be transferred to and represent equivalent open interest in all such contracts listed on the transferee;

(B) It will assume responsibility for and maintain compliance with product core principles for all contracts previously listed for trading through the transferor, whether by certification or approval; and

(C) That none of the proposed rule changes will affect the rights and obligations of any participant with open positions transferred to it and that the proposed rule changes do not modify the manner in which such contracts are settled or cleared.

(ix) A representation by the transferee that market participants will be notified of all changes to the transferor's rulebook prior to the transfer and will be further notified of the concurrent transfer of the contract market designation and the related transfer of all listed contracts and all associated open interest, to the transferee upon Commission approval and issuance of an order permitting this transfer.

(4) Commission determination. The Commission will review a request as soon as practicable and such request will be approved or denied pursuant to a Commission order and based on the Commission's determination as to the transferee's ability to continue to operate the designated contract market in compliance with the Act and the Commission's regulations thereunder.

(e) *Request for withdrawal of application for designation.* An applicant for designation may withdraw its application submitted pursuant to paragraphs (a)(1) and (a)(2) of this section by filing such a request with the Commission at its Washington, DC headquarters. Withdrawal of an application for designation shall not affect any action taken or to be taken by the Commission based upon actions, activities or events occurring during the

time that the application for designation was pending with the Commission.

(f) *Request for vacation of designation.* A designated contract market may vacate its designation under Section 7 of the Act by filing electronically such a request with the Commission at its Washington, DC headquarters. Vacation of designation shall not affect any action taken or to be taken by the Commission based upon actions, activities or events occurring during the time that the facility was designated by the Commission.

(g) *Requirements for existing designated contract markets.* A board of trade that is designated as a contract market as of [EFFECTIVE DATE OF FINAL RULE], will be considered to be a designated contract market under this section, provided that such existing designated contract market certifies to the Commission in writing that it is in compliance with each of the designated contract market core principles and associated regulations in this part, within 60 days of [EFFECTIVE DATE OF FINAL RULE].

12. In § 38.4, revise paragraphs (a) and (b) to read as follows:

§ 38.4 Procedures for listing products and implementing designated contract market rules.

(a) *Request for Commission approval of rules and products.* (1) An applicant for designation, or a designated contract market, may request that the Commission approve under Section 5c(c) of the Act, any or all of its rules and contract terms and conditions, and subsequent amendments thereto, prior to their implementation or, notwithstanding the provisions of Section 5c(c)(2) of the Act, at anytime thereafter, under the procedures of §§ 40.3 or 40.5 of this chapter, as applicable. A designated contract market may label a future, swap or options product in its rules as "Listed for trading pursuant to Commission approval," if the future, swap or options product and its terms or conditions have been approved by the Commission, and it may label as "Approved by the Commission" only those rules that have been so approved.

(2) Notwithstanding the timeline under §§ 40.3(c) and 40.5(c) of this chapter, the operating rules and terms and conditions of futures, swaps and option products that have been submitted for Commission approval at the same time as an application for contract market designation or an application under § 38.3(b) of this part to reinstate the designation of a dormant designated contract market, as defined in § 40.1 of this chapter, or while one of the foregoing is pending, will be deemed approved by the Commission no earlier than when the facility is deemed to be designated or reinstated.

(b) *Self-certification of rules and products.* Rules of a designated contract market and subsequent amendments thereto, including both operational rules and the terms or conditions of futures, swaps and option products listed for trading on the facility, not voluntarily submitted for prior Commission approval pursuant to paragraph (a) of this section must be submitted to the Commission with a certification that the rule, rule amendment or futures, swap or options product complies with the Act or rules thereunder pursuant to the procedures of § 40.6 of this chapter, as applicable. *Provided, however,* any rule or rule amendment that would, for a delivery month having open interest, materially change a term or condition of a swap or a contract for future delivery in an agricultural commodity enumerated in Section 1a(9) of the Act, or of an option on such contract or commodity, must be submitted to the Commission prior to its implementation for review and approval under § 40.4 of this chapter.

* * * * *

13. Revise § 38.5 to read as follows:

§ 38.5 Information relating to contract market compliance.

(a) *Requests for information.* Upon request by the Commission, a designated contract market must file with the Commission such information related to its business as a designated contract market, including information relating to data entry and trade details, in the form and manner, and within the time specified by the Commission in its request.

(b) *Demonstration of compliance.* Upon request by the Commission, a designated contract market must file with the Commission a written demonstration, containing such supporting data, information and documents, in the form and manner and within such time as the Commission may specify, that the designated contract market is in compliance with one or more core principles as specified in the request, or that is requested by the Commission to satisfy its obligations under the Act.

(c) *Equity interest transfers.* (1) *Equity transfer notification.* Upon entering into any agreement(s) that could result in an equity interest transfer of ten percent or more in the contract market, the designated contract market must file a notification of the equity interest transfer with the Secretary of the Commission at its Washington, DC headquarters at *submissions@cftc.gov* and the Division of Market Oversight at *DMOSubmissions@cftc.gov,* no later than the business day, as defined in § 40.1 of this chapter, following the date on which the designated contract market enters into a firm obligation to transfer the equity interest.

(2) *Required information.* (i) The notification must include and be accompanied by:

(A) Any relevant agreement(s), including any preliminary agreements;

(B) Any associated changes to relevant corporate documents;

(C) A chart outlining any new ownership or corporate or organizational structure;

(D) A brief description of the purpose and any impact of the equity interest transfer; and

(E) A representation from the designated contract market that it meets all of the requirements of Section 5(d) of the Act and Commission regulations adopted thereunder.

(ii) The designated contract market must keep the Commission apprised of the projected date that the transaction resulting in the equity interest transfer will be consummated, and must provide to the Commission any new agreements or modifications to the original agreement(s) filed pursuant to this section. The designated contract market must notify the Commission of the consummation of the transaction on the day in which it occurs.

(3) *Certification.* (i) Upon a transfer of an equity interest of ten percent or more in a designated contract market, the designated contract market must file with the Secretary of the Commission at its Washington, DC headquarters, at *submissions@cftc.gov,* and the Division of Market Oversight, at *DMOSubmissions@cftc.gov,* a certification that the designated contract market meets all of the requirements of Section 5(d) of the Act and Commission regulations adopted thereunder, no later than two business days, as defined in § 40.1 of this chapter, following the date on which the equity interest transfer of ten percent or more was consummated. Such certification must state whether changes to any aspects of the designated contract market's operations were made as a result of such change in ownership, and include a description of any such change(s).

(ii) The certification required under this paragraph may rely on and be supported by reference to an application for designation or prior filings made pursuant to a product or rule submission requirement, along with any necessary new filings, including new filings that provide any and all material

updates of prior submissions. The DCM shall also amend any information that is no longer accurate on Form DCM consistent with the procedures set forth in § 38.3 of this part.

(d) *Delegation of authority.* The Commission hereby delegates, until it orders otherwise, the authority set forth in paragraph (b) of this section to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time. The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

14. Add § 38.7 to subpart A to read as follows:

§ 38.7 Prohibited use of data collected for regulatory purposes.

A designated contract market may not use for business or marketing purposes any proprietary data or personal information it collects or receives, from or on behalf of any person, for the purpose of fulfilling its regulatory obligations; *provided however,* that a designated contract market, where necessary, may share such information with one or more designated contract markets, or swap execution facilities registered with the Commission, for regulatory purposes.

15. Add § 38.8 to subpart A to read as follows:

§ 38.8 Listing of swaps on a designated contract market.

(a) A designated contract market that lists for the first time a swap contract for trading on its contract market must, either prior to or at the time of such listing, file with the Commission a written demonstration detailing how the designated contract market is addressing its self-regulatory obligations and is fulfilling its statutory and regulatory obligations with respect to swap transactions.

(b) Prior to listing swaps for trading on or through a designated contract market, each designated contract market must request from the Commission a unique, extensible, alphanumeric code for the purpose of identifying the designated contract market pursuant to part 45 of this chapter.

16. Add § 38.9 to subpart A to read as follows:

§ 38.9 Boards of trade operating both a designated contract market and a swap execution facility.

(a) A board of trade that operates a designated contract market and that intends to also operate a swap execution facility must separately register, pursuant to the swap execution facility registration requirements set forth in part 37 of this chapter, and on an ongoing basis, comply with the core principles under Section 5h of the Act, and the swap execution facility rules under part 37 of this chapter.

(b) A board of trade that operates both a designated contract market and a swap execution facility, and that uses the same electronic trade execution system for executing and trading swaps that it uses in its capacity as a designated contract market must clearly identify to market participants for each swap whether the execution or trading of such swap is taking place on the designated contract market or on the swap execution facility.

17. Add § 38.10 to subpart A to read as follows:

§ 38.10 Reporting of swaps traded on a designated contract market.

With respect to swaps traded on or through a designated contract market, each designated contract market must report specified swap data as provided under parts 43 and 45 of this chapter.

18. Add subparts B through X to read as follows:

Subpart B—Designation as Contract Market

Sec.
38.100 Core Principle 1.

Subpart C—Compliance With Rules

38.150 Core Principle 2.
38.151 Access requirements.
38.152 Abusive trading practices prohibited.
38.153 Capacity to detect and investigate rule violations.
38.154 Regulatory services provided by a third party.
38.155 Compliance staff and resources.
38.156 Automated trade surveillance system.
38.157 Real-time market monitoring.
38.158 Investigations and investigation reports.
38.159 Ability to obtain information.
38.160 Additional rules required.

Subpart D—Contracts Not Readily Susceptible to Manipulation

38.200 Core Principle 3.
38.201 Additional sources for compliance.

Subpart E—Prevention of Market Disruption

38.250 Core Principle 4.
38.251 General requirements.
38.252 Additional requirements for physical delivery markets.
38.253 Additional requirements for cash-settled markets.
38.254 Ability to obtain information.
38.255 Risk controls for trading.
38.256 Trade reconstruction.
38.257 Regulatory service provider.
38.258 Additional rules required.

Subpart F—Position Limitations or Accountability

38.300 Core Principle 5.
38.301 Position limitations and accountability.

Subpart G—Emergency Authority

38.350 Core Principle 6.
38.351 Additional sources for compliance.

Subpart H—Availability of General Information

38.400 Core Principle 7.
38.401 General requirements.

Subpart I—Daily Publication of Trading Information

38.450 Core Principle 8.
38.451 Reporting of trade information.

Subpart J—Execution of Transactions

38.500 Core Principle 9.
38.501 General requirements.
38.502 Minimum centralized trading requirement.
38.503 Blocks trades on futures contracts.
38.504 Block trades on swap contracts.
38.505 Exchange of derivatives for related position.
38.506 Office trades and transfer trades.

Subpart K—Trade Information

38.550 Core Principle 10.
38.551 Audit trail required.
38.552 Elements of an acceptable audit trail program.
38.553 Enforcement of audit trail requirements.

Subpart L—Financial Integrity of Transactions

38.600 Core Principle 11.
38.601 Mandatory clearing.
38.602 General financial integrity.
38.603 Protection of customer funds.
38.604 Financial surveillance.
38.605 Requirements for financial surveillance program.
38.606 Financial regulatory services provided by a third party.
38.607 Direct access.

Subpart M—Protection of Markets and Market Participants

38.650 Core Principle 12.
38.651 Additional sources for compliance.

Subpart N—Disciplinary Procedures

38.700 Core Principle 13.
38.701 Enforcement staff.
38.702 Disciplinary panels.
38.703 Review of investigation report.
38.704 Notice of charges.
38.705 Right to representation.
38.706 Answer to charges.
38.707 Admission or failure to deny charges.
38.708 Denial of charges and right to hearing.
38.709 Settlement offers.
38.710 Hearings.
38.711 Decisions.
38.712 Right to appeal.
38.713 Final decisions.
38.714 Disciplinary sanctions.
38.715 Summary fines for violations of rules regarding timely submission of

records, decorum, or other similar activities.
38.716 Emergency disciplinary actions.

Subpart O—Dispute Resolution

38.750 Core Principle 14.
38.751 Additional sources for compliance.

Subpart P—Governance Fitness Standards

38.800 Core Principle 15.

Subpart Q—Conflicts of Interest

38.850 Core Principle 16.

Subpart R—Composition of Governing Boards of Contract Markets

38.900 Core Principle 17.

Subpart S—Recordkeeping

38.950 Core Principle 18.
38.951 Additional sources for compliance.

Subpart T—Antitrust Considerations

38.1000 Core Principle 19.
38.1001 Additional sources for compliance.

Subpart U—System Safeguards

38.1050 Core Principle 20.
38.1051 General requirements.

Subpart V—Financial Resources

38.1100 Core Principle 21.
38.1101 General requirements.

Subpart W—Diversity of Boards of Directors

38.1150 Core Principle 22.

Subpart X—Securities and Exchange Commission

38.1200 Core Principle 23.
38.1201 Additional sources for compliance.

Subpart B—Designation as Contract Market

§ 38.100 Core Principle 1.

(a) *In general.* To be designated, and maintain a designation, as a contract market, a board of trade shall comply with:

(1) Any core principle described in Section 5(d) of the Act, and

(2) Any requirement that the Commission may impose by rule or regulation pursuant to Section 8a(5) of the Act.

(b) *Reasonable discretion of the contract market.* Unless otherwise determined by the Commission by rule or regulation, a board of trade described in paragraph (a) of this section shall have reasonable discretion in establishing the manner in which the board of trade complies with the core principles described in this subsection.

Subpart C—Compliance With Rules

§ 38.150 Core Principle 2.

(a) *In general.* The board of trade shall establish, monitor, and enforce compliance with the rules of the contract market, including:

(1) Access requirements;

(2) The terms and conditions of any contracts to be traded on the contract market; and

(3) Rules prohibiting abusive trade practices on the contract market.

(b) *Capacity of contract market.* The board of trade shall have the capacity to detect, investigate, and apply appropriate sanctions to any person that violates any rule of the contract market.

(c) *Requirement of rules.* The rules of the contract market shall provide the board of trade with the ability and authority to obtain any necessary information to perform any function described in this section, including the capacity to carry out such international information-sharing agreements, as the Commission may require.

§ 38.151 Access requirements.

(a) *Jurisdiction.* Prior to granting any member or market participant access to its markets, a designated contract market must require that the member or market participant consent to its jurisdiction.

(b) *Impartial access by members, market participants and independent software vendors.* A designated contract market must provide its members, market participants and independent software vendors with impartial access to its markets and services, including:

(1) Access criteria that are impartial, transparent, and applied in a non-discriminatory manner; and

(2) Comparable fee structures for members, market participants and independent software vendors receiving equal access to, or services from, the designated contract market.

(c) *Limitations on access.* A designated contract market must establish and impartially enforce rules governing denials, suspensions, and revocations of a member's and market participant's access privileges to the designated contract market, including when such actions are part of a disciplinary or emergency action by the designated contract market.

§ 38.152 Abusive trading practices prohibited.

A designated contract market must prohibit abusive trading practices on its markets by members and market participants. Designated contract markets that permit intermediation must prohibit customer-related abuses including, but not limited to, trading ahead of customer orders, trading against customer orders, accommodation trading, and improper cross trading. Specific trading practices that must be prohibited by all designated contract markets include front-running, wash trading, pre-arranged trading, fraudulent trading, money passes, and any other trading practices that a designated contract market deems to be abusive. In addition, a designated contract market also must prohibit any other manipulative or disruptive trading practices prohibited by the Act or by the Commission pursuant to Commission regulation.

§ 38.153 Capacity to detect and investigate rule violations.

A designated contract market must have arrangements and resources for effective enforcement of its rules. Such arrangements must include the authority to collect information and documents on both a routine and non-routine basis, including the authority to examine books and records kept by the designated contract market's members and by market participants. A designated contract market's arrangements and resources must also facilitate the direct supervision of the market and the analysis of data collected to determine whether a rule violation occurred.

§ 38.154 Regulatory services provided by a third party.

(a) *Use of third-party provider permitted.* A designated contract market may choose to contract with a registered futures association or another registered entity, as such terms are defined under the CEA, (collectively, "regulatory service provider"), for the provision of services to assist in complying with the core principles, as approved by the Commission. Any designated contract market that chooses to contract with a regulatory service provider must ensure that its regulatory service provider has the capacity and resources necessary to provide timely and effective regulatory services, including adequate staff and automated surveillance systems. A designated contract market will at all times remain responsible for the performance of any regulatory services received, for compliance with the designated contract market's obligations under the CEA and Commission regulations, and for the regulatory service provider's performance on its behalf.

(b) *Duty to supervise third party.* A designated contract market that elects to utilize a regulatory service provider must retain sufficient compliance staff to supervise the quality and effectiveness of the services provided on its behalf. Compliance staff of the designated contract market must hold regular meetings with the regulatory service provider to discuss ongoing investigations, trading patterns, market participants, and any other matters of

regulatory concern. A designated contract market also must conduct periodic reviews of the adequacy and effectiveness of services provided on its behalf. Such reviews must be documented carefully and made available to the Commission upon request.

(c) *Regulatory decisions required from the designated contract market.* A designated contract market that elects to utilize a regulatory service provider must retain exclusive authority in decisions involving the cancellation of trades, the issuance of disciplinary charges against members or market participants, and denials of access to the trading platform for disciplinary reasons. A designated contract market may also retain exclusive authority in other areas of its choosing; *provided however,* that the decision to open an investigation into a possible rule violation must always reside exclusively with the regulatory service provider. A designated contract market must document any instances where its actions differ from those recommended by its regulatory service provider, including the reasons for the course of action recommended by the regulatory service provider and the reasons why the designated contract market chose a different course of action.

§ 38.155 Compliance staff and resources.

(a) *Sufficient compliance staff.* A designated contract market must establish and maintain sufficient compliance department resources and staff to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring. The designated contract market's compliance staff must also be sufficient to address unusual market or trading events as they arise, and to conduct and complete investigations in a timely manner, as set forth in § 38.158(b) of this part.

(b) *Ongoing monitoring of compliance staff resources.* A designated contract market must monitor the size and workload of its compliance staff annually, and ensure that its compliance resources and staff are at appropriate levels. In determining the appropriate level of compliance resources and staff, the designated contract market should consider projected trading volume increases, the number of new products or contracts projected to be listed for trading, any new responsibilities expected to be assigned to compliance staff, the results of any internal review demonstrating that work is not completed in an effective or timely manner, and any other factors suggesting the need for increased resources and staff.

§ 38.156 Automated trade surveillance system.

A designated contract market must maintain an automated trade surveillance system capable of detecting and investigating potential trade practice violations. Such system must maintain all data reflecting the details of each order entered into the trading system, including all order modifications and cancellations and maintain all data reflecting transactions executed on the designated contract market. The automated system must load and process daily orders and trades no later than 24 hours after the completion of the trading day. In addition, the automated trade surveillance system must have the capability to detect and flag specific trade execution patterns and trade anomalies; compute, retain, and compare trading statistics; compute trade gains, losses, and futures-equivalent positions; reconstruct the sequence of market activity; perform market analyses; and support system users to perform in-depth analyses and ad hoc queries of trade-related data.

§ 38.157 Real-time market monitoring.

A designated contract market must conduct real-time market monitoring of all trading activity on its electronic trading platform(s) to ensure orderly trading and identify any market or system anomalies. A designated contract market must have the authority to adjust trade prices or cancel trades when necessary to mitigate market disrupting events caused by malfunctions in its electronic trading platform(s) or errors in orders submitted by members and market participants. Any trade price adjustments or trade cancellations must be transparent to the market and subject to standards that are clear, fair, and publicly available.

§ 38.158 Investigations and investigation reports.

(a) *Procedures.* A designated contract market must establish and maintain procedures that require its compliance staff to conduct investigations of possible rule violations. An investigation must be commenced upon the receipt of a request from Commission staff or upon the discovery or receipt of information by the designated contract market that, in the judgment of its compliance staff, indicates a possible basis for finding that a violation has occurred or will occur.

(b) *Timeliness.* Each compliance staff investigation must be completed in a timely manner. Absent mitigating factors, a timely manner is no later than 12 months after the date that an investigation is opened. Mitigating factors that may reasonably justify an investigation taking longer than 12 months to complete include the complexity of the investigation, the number of firms or individuals involved as potential wrongdoers, the number of potential violations to be investigated, and the volume of documents and data to be examined and analyzed by compliance staff.

(c) *Investigation reports when a reasonable basis exists for finding a violation.* Compliance staff must submit a written investigation report for disciplinary action in every instance in which compliance staff determines from surveillance or from an investigation that a reasonable basis exists for finding a rule violation. The investigation report must include the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; compliance staff's analysis and conclusions; and a recommendation as to whether disciplinary action should be pursued. The report must also include the member or market participant's disciplinary history at the designated contract market.

(d) *Investigation reports when no reasonable basis exists for finding a violation.* If after conducting an investigation, compliance staff determines that no reasonable basis exists for finding a violation, it must prepare a written report including the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; compliance staff's analysis and conclusions; and if applicable, any recommendation that a disciplinary committee issue a warning letter in accordance with paragraph (e) of this section. If compliance staff recommends that a warning letter be issued to a member or market participant pursuant to paragraph (e) of this section, the investigation report must include a copy of the letter as well as the member or market participant's disciplinary history at the designated contract market.

(e) *Warning letters.* In addition to the action required to be taken under paragraphs (c) and (d) of this section, the rules of a designated contract market may authorize compliance staff to issue a warning letter to a person or entity under investigation or to recommend that a disciplinary committee take such an action. A warning letter issued in accordance with this section is not a penalty or an indication that a finding

of a violation has been made. A copy of a warning letter issued by compliance staff must be included in the investigation report required by paragraphs (c) and (d) of this section. No more than one warning letter for the same potential violation may be issued to the same person or entity during a rolling 12-month period.

§ 38.159 Ability to obtain information.

A designated contract market must have the ability and authority to obtain any necessary information to perform any function required under this subpart C of the Commission's regulations, including the capacity to carry out international information-sharing agreements as the Commission may require. Appropriate information-sharing agreements can be established with other designated contract markets and swap execution facilities, or the Commission can act in conjunction with the designated contract market to carry out such information sharing.

§ 38.160 Additional rules required.

A designated contract market must adopt and enforce any additional rules that it believes are necessary to comply with the requirements of this subpart C.

Subpart D—Contracts Not Readily Subject to Manipulation

§ 38.200 Core Principle 3.

The board of trade shall list on the contract market only contracts that are not readily susceptible to manipulation.

§ 38.201 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance in appendix C of this part to demonstrate to the Commission compliance with the requirements of § 38.200 of this part.

Subpart E—Prevention of Market Disruption

§ 38.250 Core Principle 4.

The board of trade shall have the capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures, including:

(a) Methods for conducting real-time monitoring of trading; and

(b) Comprehensive and accurate trade reconstructions.

§ 38.251 General requirements.

A designated contract market must:

(a) Collect and evaluate data on individual traders' market activity on an ongoing basis in order to detect and prevent manipulation, price distortions and, where possible, disruptions of the delivery or cash-settlement process;

(b) Monitor and evaluate general market data in order to detect and prevent manipulative activity that would result in the failure of the market price to reflect the normal forces of supply and demand;

(c) Have the capacity to conduct real-time monitoring of trading and comprehensive and accurate trade reconstructions. The monitoring of intraday trading must include the capacity to detect abnormal price movements, unusual trading volumes, impairments to market liquidity, and position-limit violations; and

(d) Have either manual processes or automated alerts that are effective in detecting and preventing trading abuses.

§ 38.252 Additional requirements for physical delivery contracts.

(a) For physical delivery contracts, the designated contract market must:

(1) Monitor a contract's terms and conditions as to whether there is convergence between the contract price and the price of the underlying commodity;

(2) Monitor that the deliverable supply is adequate so that the contract will not be susceptible to price manipulation or distortion;

(3) Assess whether the deliverable commodity reasonably can be expected to be available to short traders and salable by long traders at its market value in normal cash marketing channels; and

(4) When available, monitor data related to the size and ownership of deliverable supplies.

(b) The designated contract market must continually monitor the appropriateness of the contract's terms and conditions, including the delivery instrument, the delivery locations and location differentials, and the commodity characteristics and related differentials. The designated contract market must address conditions that are interfering with convergence or causing price distortions or market disruptions, including, when appropriate, changes to contract terms.

§ 38.253 Additional requirements for cash-settled contracts.

(a) For cash-settled contracts, the designated contract market must monitor:

(1) The availability and pricing of the commodity making up the index to which the contract will be settled; and

(2) The continued appropriateness of the methodology for deriving the index. Designated contract markets must promptly amend any methodologies that result, or are likely to result, in manipulation, price distortions, or market disruptions, or must impose new methodologies to resolve the threat of disruptions or distortions.

(b) If a contract listed on a designated contract market is settled by reference to the price of a contract or commodity traded in another venue, including a price or index derived from prices on another designated contract market, the designated contract market must have rules that require traders on the DCM market to provide the DCM with their positions in the reference markets as the traders' contracts approach settlement. In the alternative, the DCM may have an information sharing agreement with the other venue or designated contract market.

§ 38.254 Ability to obtain information.

(a) The designated contract market must have rules that require traders in its contracts to keep records of their trading, including records of their activity in the underlying commodity and related derivatives markets and make such records available, upon request, to the designated contract market.

(b) A designated contract market with customers trading through intermediaries must either use a comprehensive large-trader reporting system (LTRS) or be able to demonstrate that it can obtain position data from other sources in order to conduct an effective surveillance program.

§ 38.255 Risk controls for trading.

The designated contract market must establish and maintain risk control mechanisms to reduce the potential risk of market disruptions, including but not limited to market restrictions that pause or halt trading in market conditions prescribed by the designated contract market. If a contract is linked to, or a substitute for, other contracts on the designated contract market or on other trading venues, such risk controls must, to the extent practicable, be coordinated with any similar controls placed on those other contracts. If a contract is based on the price of an equity security or the level of an equity index, such risk controls must, to the extent practicable, be coordinated with any similar controls placed on national security exchanges.

§ 38.256 Trade reconstruction.

The designated contract market must have the ability to comprehensively and accurately reconstruct all trading on its trading facility. All audit-trail data and reconstructions must be made available

to the Commission in a form, manner, and time as determined by the Commission.

§ 38.257 Regulatory service provider.

A designated contract market must comply with the regulations in this subpart through a dedicated regulatory department, or by delegation of that function to a registered futures association or a registered entity (collectively, "regulatory service provider"), as such terms are defined under the Act and over which the designated contract market has supervisory authority.

§ 38.258 Additional rules required.

A designated contract market must adopt and enforce any additional rules that it believes are necessary to comply with the requirements of subpart E of this part.

Subpart F—Position Limitations or Accountability

§ 38.300 Core Principle 5.

To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators. For any contract that is subject to a position limitation established by the Commission pursuant to Section 4a(a), the board of trade shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission.

§ 38.301 Position limitations and accountability.

A designated contract market must meet the requirements of part 151 of this chapter.

Subpart G—Emergency Authority

§ 38.350 Core Principle 6.

The board of trade, in consultation or cooperation with the Commission, shall adopt rules to provide for the exercise of emergency authority, as is necessary and appropriate, including the authority:

(a) To liquidate or transfer open positions in any contract;

(b) To suspend or curtail trading in any contract; and

(c) To require market participants in any contract to meet special margin requirements.

§ 38.351 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and/or acceptable practices in Appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.350.

Subpart H—Availability of General Information

§ 38.400 Core Principle 7.

The board of trade shall make available to market authorities, market participants, and the public accurate information concerning:

(a) The terms and conditions of the contracts of the contract market; and

(b)(1) The rules, regulations and mechanisms for executing transactions on or through the facilities of the contract market, and

(2) The rules and specifications describing the operation of the contract market's:

(i) Electronic matching platform, or

(ii) Trade execution facility.

§ 38.401 General requirements.

(a) *General.* (1) A designated contract market must have procedures, arrangements and resources for disclosing to the Commission, market participants and the public accurate information pertaining to:

(i) Contract terms and conditions;

(ii) Rules and regulations pertaining to the trading mechanisms; and

(iii) Rules and specifications pertaining to operation of the electronic matching platform or trade execution facility.

(2) Through such procedures, arrangements and resources, the designated contract market must ensure public dissemination of information pertaining to new product listings, new rules, rule amendments or other changes to previously disclosed information, in accordance with the timeline provided in paragraph (c) of this section.

(3) A designated contract market shall meet the requirements of this paragraph (a), by placing the information on the designated contract market's Web site within the time prescribed in paragraph (c) of this section.

(b) *Accuracy Requirement.* A designated contract market must provide accurate and complete information and not omit material information with respect to any communication with the Commission, and any information required to be transmitted or made available to market participants and the public, including on its Web site or otherwise.

(c) *Notice of Regulatory Submissions.* (1) A designated contract market, in making available on its Web site information pertaining to new product listings, new rules, rule amendments or other changes to previously-disclosed information, must place such information on its Web site simultaneous with the filing of such information with the Secretary of the Commission. Satisfaction of the requirements of this paragraph (c) shall be in addition to the requirements of paragraph (d) of this section.

(2) To the extent that a designated contract market requests confidential treatment of any information filed with the Secretary of the Commission, the designated contract market must post on its Web site the public version of such filing or submission.

(d) *Rulebook.* A designated contract market must ensure that the rulebook posted on its Web site is accurate, complete, current and readily accessible to the public. A designated contract market must publish or post in its rulebook all new or amended rules, both substantive and non-substantive, on the date of implementation of such new or amended rule, the day a new product is listed, or the day any changes to previously disclosed information take effect. Satisfaction of the requirements of this paragraph (d) is in addition to the requirements of paragraph (c) of this section.

Subpart I—Daily Publication of Trading Information

§ 38.450 Core Principle 8.

The board of trade shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market.

§ 38.451 Reporting of trade information.

A designated contract market must meet the reporting requirements set forth in part 16 of this chapter.

Subpart J—Execution of Transactions

§ 38.500 Core Principle 9.

The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade. The rules of the board of trade may authorize, for bona fide business purposes:

(a) Transfer trades or office trades;

(b) An exchange of:

(1) Futures in connection with a cash commodity transaction;

(2) Futures for cash commodities; or

(3) Futures for swaps; or

(c) A futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity

for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the contract market or a derivatives clearing organization.

§ 38.501 General requirements.

(a) *Transactions on the centralized market; requirements.* All purchases and sales of any commodity for future delivery, and any commodity option or swap, on or subject to the rules of a designated contract market, must be executed openly and competitively by open outcry, posting of bids and offers, or other equally open and competitive methods, in a place or through an electronic system provided by the designated contract market, during the hours prescribed by the designated contract market for trading in such commodity, commodity option or swap.

(b) *Transactions off the centralized market; requirements.* Notwithstanding paragraph (a) of this section, transactions may be executed off of a designated contract market's centralized market, including transfer trades, office trades, block trades, or trades involving the exchange of derivatives for related positions, if transacted in accordance with the written rules of the designated contract market that provide for execution of transactions off the centralized market and that have been certified to or approved by the Commission. Every person handling, executing, clearing, or carrying the trades, transactions or positions described in this paragraph shall comply with the rules of the appropriate designated contract market, including to identify and mark by appropriate symbol or designation all such transactions or contracts and all orders, records and memoranda pertaining thereto.

§ 38.502 Minimum centralized market trading requirement.

(a) *Minimum centralized market trading percentage requirement.* No designated contract market may continue to list a contract for trading unless an average of 85% or greater of the total volume of such contract is traded on the designated contract market's centralized market, as calculated over a 12 month period as specified in paragraph (b) of this section.

(b) *Centralized market trading percentage calculation.* (1) *Contracts listed after the effective date of this section.* For each new contract listed after the effective date of § 38.502, the designated contract market must determine the percentage of the total volume, in all contract months combined, that is attributable to centralized market trading for a 12 month period commencing one year following the date of the contract's initial listing on the designated contract market, and on each 12 month anniversary of the contract's listing thereafter. The designated contract market must calculate the centralized market trading percentage for each listed contract within thirty days following the conclusion of the 12 month anniversary of each contract's listing.

(2) *Contracts listed as of the effective date of this section.* For contracts and contract months listed as of the effective date of § 38.502, the designated contract market initially must complete the centralized market trading percentage calculation in each such contract within thirty days of the effective date of this § 38.502 ("Initial Calculation").

(3) *Initial Calculation.* The Initial Calculation for each such existing contract must be based on:

(i) The trading volume in such contract during the 12 month period immediately preceding the effective date of this section; or

(ii) If contract has been listed less than 12 months, the trading volume in such contract during the time period in which the contract was initially listed on the designated contract market.

(4) *Anniversary Calculation.* Thereafter, the designated contract market must calculate and file with the Commission the centralized market trading percentage in each such contract within thirty days of the 12 month anniversary of the Initial Calculation.

(c) *Mandatory delisting.* Except as otherwise provided in paragraph (d) of this section, as to any contract that does not meet the minimum centralized market trading percentage requirement of paragraph (a) of this section, within ninety days of the centralized market trading percentage calculation, the designated contract market must:

(1) Delist the contract from the designated contract market and transfer open positions in the contract to a SEF that it operates;

(2) Delist the contract from the designated contract market and transfer all open positions in the contract to another SEF that will accept the contract; or

(3) Liquidate the contract.

(d) *Treatment of contracts listed as of the effective date of this section.* Contracts and contract months that are listed on a designated contract market as of the effective date of § 38.502 and that do not meet the requirements of paragraph (a) of this section, as calculated in accordance with paragraph (b) of this section, may continue to be listed on the designated contract market until all open positions in such contracts and contract months are liquidated. Trading in such contracts is allowed for liquidation purposes only.

(e) *Exemptions upon petition.* (1) A designated contract market may petition the Commission to exempt a contract from the requirements of paragraphs (c) or (d) of this section, for a maximum period of 12 months, or such other time as determined by the Commission.

(2) The designated contract market must demonstrate in its petition that:

(i) (A) Such contract achieved an average of at least 50% trading volume on the centralized market over the preceding 12 month period, and

(B) The contract is likely to attain the minimum centralized market trading percentage requirement within the following 12 month period; or

(ii) As of the effective date of this section, such contract has been listed for less than 12 months.

(3) Petitions seeking an exemption from the mandatory delisting requirement must be submitted to the Commission within thirty-five days of the 12 month anniversary of the listing of such contract, or for contracts listed less than 12 months, thirty-five days after the effective date of this section, as applicable.

(4) The filing of a petition for a mandatory delisting exemption shall toll the mandatory delisting requirement set forth in paragraph (c) of this section until such time that a decision is made on the petition.

§ 38.503 Block trades on futures contracts.

(a) *Block trade rules.* A designated contract market that permits block trade transactions on futures contracts must have rules that limit such block trades to large transactions, and impose minimum size requirements on such transactions that are appropriate for each listed contract subject to a block trading provision. The block trade size for each listed contract must be certified to or approved by the Commission.

(b) *Block size review.* A designated contract market must review the minimum size thresholds for all block trades on futures contracts on an annual basis to ensure that the minimum size remains appropriate for each contract, and in accordance with the provisions of this section 38.503.

(c) *Eligible block trade participants.* Block trading must be limited to Eligible Contract Participants, as that term is defined in Section 1a(18) of the Act, except that the designated contract market may allow a commodity trading advisor acting in an asset managerial

capacity and registered pursuant to Section 4n of the Act, or a principal thereof, including any investment advisor who satisfies the criteria of § 4.7(a)(2)(v) of this chapter, or a foreign person performing a similar role or function and subject as such to foreign regulation, to transact block trades for customers who are not Eligible Contract Participants, if such commodity trading advisor, investment advisor or foreign person has more than $25,000,000 in total assets under management. A person may transact a block trade on behalf of a customer only when such person has received an instruction or prior consent to do so from the customer.

(d) *Affiliated parties.* (1) Block trades between affiliated parties are permitted under the circumstances provided in paragraph (d)(3) of this section.

(2) For purposes of block trades, an affiliated party is a party that directly or indirectly through one or more persons, controls, is controlled by, or is under common control with another party.

(3) Block trades between affiliated parties are permitted if:

(i) Priced on a competitive market price, either by falling within the contemporaneous bid-ask spread on the centralized market or calculated based on a contemporaneous market price in a related cash market;

(ii) Each party has a separate and independent legal bona fide business purpose for engaging in the trades; and

(iii) Each party's decision to enter into the block trade is made by a separate and independent decision-maker.

(e) *Aggregation.* Except as otherwise stated in this paragraph (e), the aggregation of orders for different accounts in order to satisfy the minimum block size requirement is prohibited. Aggregation is permissible if done by a commodity trading advisor acting in an asset managerial capacity and registered pursuant to Section 4n of the Act, or a principal thereof, including any investment advisor who satisfies the criteria of § 4.7(a)(2)(v) of this chapter, or a foreign person performing a similar role or function and subject as such to foreign regulation, if such commodity trading advisor, investment advisor or foreign person has more than $25,000,000 in total assets under management.

(f) *Recordkeeping.* Parties to, and members facilitating, a block trade must keep accurate block trade records that comply with Sections 5(d)(10) and 5(d)(18) of the Act and the associated Commission regulations in subparts K and S of this part. Block trade orders must be recorded by the member and time-stamped with both the time the order was received and the time the order was reported to the designated contract market, and must indicate if the block trades are between affiliated parties. When requested by the designated contract market, the Commission or the Department of Justice, parties to, and members facilitating, a block trade must provide records to document that the block trade is executed in conformance with the board of trade's rules.

(g) *Reporting.* (1) Each block trade must be reported to the designated contract market within five minutes after its execution.

(2) The designated contract market must publicize the details of each block trade immediately upon receipt of the transaction report, and must publicize daily the total quantity of block trades that are included in the total volume of trading under the procedures set forth in § 16.01 of this chapter.

(h) *Block size determinations; pricing of block trades.* Applicants and designated contract markets may refer to the guidance and acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements for block size determinations and pricing of block trades.

§ 38.504 Block trades on swap contracts.

A designated contract market must have rules requiring that block trades involving swaps comply with the requirements set forth in part 43 of this chapter.

§ 38.505 Exchange of derivatives for related position.

(a) (1) A designated contract market may permit bona fide exchange of derivatives for related positions transactions.

(2) (i) A bona fide exchange of derivatives for related positions transaction must include:

(A) Separate but integrally related transactions involving the same or a related commodity;

(B) Price correlation and quantitative equivalence of the derivative and related position legs; and

(C) A buyer of a derivative who is the seller of the corresponding related position, and a seller of a derivative who is the buyer of the corresponding related position.

(ii) The transaction must result in an actual transfer of ownership of the related position and occur between parties with different beneficial owners or under separate control.

(iii) The price differential between the futures leg and the commodities leg or derivatives position should reflect commercial realities, and at least one leg of the transaction should be priced at the prevailing market price.

(b) A designated contract market may permit parties to an exchange of derivatives for related position transaction to engage in a separate transaction that offsets a leg of the exchange of derivatives for a related position if:

(1) The offsetting transaction results in an actual transfer of ownership and demonstrates other indicia of being a bona fide transaction as set forth in paragraph (a) of this section; and

(2) The offsetting transaction must be able to stand on its own as a commercially appropriate transaction, with no obligation on either party that the offsetting transaction be dependent upon the execution of the exchange of derivatives for related position transaction, or that the exchange of derivatives for a related position transaction be dependent upon the execution of the offsetting transaction.

(c) An exchange of derivatives for a related position transaction must be bona fide such that the exchange of derivatives for the related position is not contingent upon an offsetting transaction.

(d) An exchange of derivatives for a related position transaction must be reported to the designated contract market within five minutes after its execution.

(e) A designated contract market must make public, on a daily basis, the total quantity of exchanges of derivatives for a related position transactions that are included in the total volume of trading under the procedures set forth in § 16.01 of this chapter.

§ 38.506 Office trades and transfer trades.

A designated contract market must keep records of office trades and transfer trades under the procedures set forth in § 1.31 of this chapter.

Subpart K—Trade Information

§ 38.550 Core Principle 10.

The board of trade shall maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables the contract market to use the information:

(a) To assist in the prevention of customer and market abuses; and

(b) To provide evidence of any violations of the rules of the contract market.

§ 38.551 Audit trail required.

A designated contract market must capture and retain all audit trail data

necessary to detect, investigate, and prevent customer and market abuses. Such data must be sufficient to reconstruct all transactions within a reasonable period of time and to provide evidence of any violations of the rules of the designated contract market. An acceptable audit trail must also permit the designated contract market to track a customer order from the time of receipt through fill, allocation, or other disposition, and must include both order and trade data.

§ 38.552 Elements of an acceptable audit trail program.

(a) *Original source documents.* A designated contract market's audit trail must include original source documents. Original source documents include unalterable, sequentially identified records on which trade execution information is originally recorded, whether recorded manually or electronically. Records for customer orders (whether filled, unfilled or cancelled, each of which shall be retained or electronically captured) must reflect the terms of the order, an account identifier that relates back to the account(s) owner(s), and the time of order entry. For open-outcry trades, the time of report of execution of the order shall also be captured.

(b) *Transaction history database.* A designated contract market's audit trail program must include an electronic transaction history database. An adequate transaction history database includes a history of all orders and trades, and also includes:

(1) All data that are input into the trade entry or matching system for the transaction to match and clear;

(2) The categories of participants for which such trades are executed, including whether the person executing a trade was executing it for his/her own account or an account for which he/she has discretion, his/her clearing member's house account, the account of another member, including market participants present on the floor, or the account of any other customer;

(3) Timing and sequencing data adequate to reconstruct trading; and

(4) Identification of each account to which fills are allocated.

(c) *Electronic analysis capability.* A designated contract market's audit trail program must include electronic analysis capability with respect to all audit trail data in the transaction history database. An adequate electronic analysis capability must permit the sorting and presentation of data in the transaction history database so as to reconstruct trading and identify possible trading violations with respect to both customer and market abuse.

(d) *Safe storage capability.* A designated contract market's audit trail program must include the capability to safely store all audit trail data retained in its transaction history database. Such safe storage capability must include the capability to store all data in the database in a manner that protects it from unauthorized alteration, as well as from accidental erasure or other loss. Data must be retained in accordance with the recordkeeping requirements of Core Principle 18 and the associated regulations in subpart S of this part.

§ 38.553 Enforcement of audit trail requirements.

(a) *Annual audit trail and recordkeeping reviews.* A designated contract market must enforce its audit trail and recordkeeping requirements through at least annual reviews of all members and market participants to verify their compliance with the contract market's audit trail and recordkeeping requirements. Such reviews must include, but are not limited to, the following:

(1) For electronic trading, audit trail and recordkeeping reviews must include reviews of randomly selected samples of front-end audit trail data for order routing systems; a review of the process by which user identifications are assigned and user identification records are maintained; a review of usage patterns associated with user identifications to monitor for violations of user identification rules; and reviews of account numbers and customer type indicator codes in trade records to test for accuracy and improper use.

(2) For open outcry trading, audit trail and recordkeeping reviews must include reviews of members' and market participants' compliance with the designated contract market's trade timing, order ticket, and trading card requirements.

(b) *Enforcement program required.* A designated contract market must establish a program for effective enforcement of its audit trail and recordkeeping requirements for both electronic and open-outcry trading, as applicable. An effective program must identify members and market participants that have failed to maintain high levels of compliance with such requirements, and levy meaningful sanctions when deficiencies are found. Sanctions must be sufficient to deter recidivist behavior, and may not include more than one warning letter for the same violation within a rolling twelve month period.

Subpart L—Financial Integrity of Transactions

§ 38.600 Core Principle 11.

The board of trade shall establish and enforce:

(a) Rules and procedures for ensuring the financial integrity of transactions entered into on or through the facilities of the contract market (including the clearance and settlement of the transactions with a derivatives clearing organization); and

(b) Rules to ensure:

(1) The financial integrity of any:

(i) Futures commission merchant, and

(ii) Introducing broker; and

(2) The protection of customer funds.

§ 38.601 Mandatory clearing.

Transactions executed on or through the designated contract market, other than transactions in security futures products, must be cleared through a Commission-registered derivatives clearing organization, in accordance with the provisions of part 39 of this chapter.

§ 38.602 General financial integrity.

A designated contract market must provide for the financial integrity of its transactions by establishing and maintaining appropriate minimum financial standards for its members and non-intermediated market participants.

§ 38.603 Protection of customer funds.

A designated contract market must have rules concerning the protection of customer funds. These rules shall address appropriate minimum financial standards for intermediaries, the segregation of customer and proprietary funds, the custody of customer funds, the investment standards for customer funds, intermediary default procedures and related recordkeeping. A designated contract market must review the default rules and procedures of the derivatives clearing organization that clears for such designated contract market to wind down operations, transfer customers, or otherwise protect customers in the event of a default of a clearing member or the derivatives clearing organization.

§ 38.604 Financial surveillance.

A designated contract market must monitor members' compliance with the designated contract market's minimum financial standards and, therefore, must routinely receive and promptly review financial and related information from its members, as well as continuously monitor the positions of members and their customers. A designated contract market must have rules that prescribe minimum capital requirements for member futures commission merchants

and introducing brokers. A designated contract market must:

(a) Continually survey the obligations of each futures commission merchant created by the positions of its customers;

(b) As appropriate, compare those obligations to the financial resources of the futures commission merchant; and

(c) Take appropriate steps to use this information to protect customer funds.

§ 38.605 Requirements for financial surveillance program.

A designated contract market's financial surveillance program for futures commission merchants, retail foreign exchange dealers, and introducing brokers must comply with the requirements of § 1.52 of this chapter to assess the compliance of such entities with applicable contract market rules and Commission regulations.

§ 38.606 Financial regulatory services provided by a third party.

A designated contract market may comply with the requirements of § 38.604 (Financial Surveillance) and § 38.605 (Requirements for Financial Surveillance Program) of this part through the regulatory services of a registered futures association or a registered entity (collectively, "regulatory service provider"), as such terms are defined under the Act. A designated contract market must ensure that its regulatory service provider has the capacity and resources necessary to provide timely and effective regulatory services, including adequate staff and appropriate surveillance systems. A designated contract market will at all times remain responsible for compliance with its obligations under the Act and Commission regulations, and for the regulatory service provider's performance on its behalf. Regulatory services must be provided under a written agreement with a regulatory services provider that shall specifically document the services to be performed as well as the capacity and resources of the regulatory service provider with respect to the services to be performed.

§ 38.607 Direct access.

A designated contract market that permits direct electronic access by customers (i.e., allowing customers of futures commission merchants to enter orders directly into a designated contract market's trade matching system for execution) must have in place effective systems and controls reasonably designed to enable the FCM's management of financial risk, such as automated pre-trade controls that enable member futures commission merchants to implement appropriate financial risk limits. A designated contract market must implement and enforce rules requiring the member futures commission merchants to use the provided systems and controls.

Subpart M—Protection of Markets and Market Participants

§ 38.650 Core Principle 12.

The board of trade shall establish and enforce rules:

(a) To protect markets and market participants from abusive practices committed by any party, including abusive practices committed by a party acting as an agent for a participant; and

(b) To promote fair and equitable trading on the contract market.

§ 38.651 Additional sources for compliance.

A designated contract market must have and enforce rules that are designed to promote fair and equitable trading and to protect the market and market participants from abusive practices including fraudulent, noncompetitive or unfair actions, committed by any party. The designated contract market must have methods and resources appropriate to the nature of the trading system and the structure of the market to detect trade practice and market abuses and to discipline such behavior, in accordance with Core Principles 2 and 4, and the associated regulations in subparts C and E of this part, respectively. The designated contract market also must provide a competitive, open and efficient market and mechanism for executing transactions in accordance with Core Principle 9 and the associated regulations under subpart J of this part.

Subpart N—Disciplinary Procedures

§ 38.700 Core Principle 13.

The board of trade shall establish and enforce disciplinary procedures that authorize the board of trade to discipline, suspend, or expel members or market participants that violate the rules of the board of trade, or similar methods for performing the same functions, including delegation of the functions to third parties.

§ 38.701 Enforcement staff.

A designated contract market must establish and maintain sufficient enforcement staff and resources to effectively and promptly prosecute possible rule violations within the disciplinary jurisdiction of the contract market. A designated contract market must also monitor the size and workload of its enforcement staff annually, and ensure that its enforcement resources and staff are at appropriate levels. The enforcement staff may not include either members of the designated contract market or persons whose interests conflict with their enforcement duties. A member of the enforcement staff may not operate under the direction or control of any person or persons with trading privileges at the contract market. A designated contract market's enforcement staff may operate as part of the designated contract market's compliance department.

§ 38.702 Disciplinary panels.

(a) *Disciplinary panels required.* A designated contract market must establish one or more Review Panels and one or more Hearing Panels (collectively, "disciplinary panels") that are authorized to fulfill their obligations under the rules of this subpart. Disciplinary panels must meet the composition requirements of § 40.9(c)(3)(ii) of this chapter, and must not include any members of the designated contract market's compliance staff, or any person involved in adjudicating any other stage of the same proceeding.

(b) *Review panels.* A designated contract market's Review Panel(s) must be responsible for determining whether a reasonable basis exists for finding a violation of contract market rules, and for authorizing the issuance of notices of charges against persons alleged to have committed violations if the Review Panel believes that the matter should be adjudicated.

(c) *Hearing Panels.* A designated contract market's Hearing Panel(s) must be responsible for adjudicating disciplinary cases pursuant to a notice of charges authorized by a Review Panel, and must also be responsible for such other duties as are specified in this subpart.

§ 38.703 Review of investigation report.

Promptly after receiving a completed investigation report pursuant to § 38.158(c) of this part, a Review Panel must promptly review the report and, within 30 days of such receipt, must take one of the following actions:

(a) If the Review Panel determines that additional investigation or evidence is needed, it must promptly direct the compliance staff to conduct further investigation.

(b) If the Review Panel determines that no reasonable basis exists for finding a violation or that prosecution is otherwise unwarranted, it may direct that no further action be taken. Such determination must be in writing, and must include a written statement setting

forth the facts and analysis supporting the decision.

(c) If the Review Panel determines that a reasonable basis exists for finding a violation and adjudication is warranted, it must direct that the person or entity alleged to have committed the violation be served with a notice of charges and must proceed in accordance with the rules of this section.

§ 38.704 Notice of charges.

A notice of charges must adequately state the acts, conduct, or practices in which the respondent is alleged to have engaged; state the rule, or rules, alleged to have been violated (or about to be violated); and prescribe the period within which a hearing on the charges may be requested. The notice must also advise the respondent charged that he is entitled, upon request, to a hearing on the charges; and if the rules of the designated contract market so provide:

(a) That failure to request a hearing within the period prescribed in the notice, except for good cause, may be deemed a waiver of the right to a hearing; and

(b) That failure to answer or to deny expressly a charge may be deemed to be an admission of such charge.

§ 38.705 Right to representation.

Upon being served with a notice of charges, a respondent must have the right to be represented by legal counsel or any other representative of its choosing in all succeeding stages of the disciplinary process.

§ 38.706 Answer to charges.

A respondent must be given a reasonable period of time to file an answer to a notice of charges. The rules of a designated contract market may require that:

(a) The answer must be in writing and include a statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation. A statement of a lack of sufficient information shall have the effect of a denial of an allegation;

(b) Failure to file an answer on a timely basis shall be deemed an admission of all allegations contained in the notice of charges; and

(c) Failure in an answer to deny expressly a charge shall be deemed to be an admission of such charge.

§ 38.707 Admission or failure to deny charges.

The rules of a designated contract market may provide that if a respondent admits or fails to deny any of the charges a Hearing Panel may find that the violations alleged in the notice of charges for which the respondent admitted or failed to deny any of the charges have been committed. If the designated contract market's rules so provide, then:

(a) The Hearing Panel must impose a sanction for each violation found to have been committed;

(b) The Hearing Panel must promptly notify the respondent in writing of any sanction to be imposed pursuant to paragraph (a) of this section and shall advise the respondent that it may request a hearing on such sanction within the period of time, which shall be stated in the notice;

(c) The rules of a designated contract market may provide that if a respondent fails to request a hearing within the period of time stated in the notice, the respondent will be deemed to have accepted the sanction.

§ 38.708 Denial of charges and right to hearing.

In every instance where a respondent has requested a hearing on a charge that is denied, or on a sanction set by the Hearing Panel pursuant to § 38.707 of this part, the respondent must be given an opportunity for a hearing in accordance with the requirements of § 38.710 of this part. The designated contract market's rules may provide that, except for good cause, the hearing must be concerned only with those charges denied and/or sanctions set by the Hearing Panel under § 38.707 of this part for which a hearing has been requested.

§ 38.709 Settlement offers.

(a) The rules of a designated contract market may permit a respondent to submit a written offer of settlement at any time after the investigation report is completed. The disciplinary panel presiding over the matter may accept the offer of settlement, but may not alter the terms of a settlement offer unless the respondent agrees.

(b) The rules of a designated contract market may provide that, in its discretion, a disciplinary panel may permit the respondent to accept a sanction without either admitting or denying the rule violations upon which the sanction is based.

(c) If an offer of settlement is accepted, the panel accepting the offer must issue a written decision specifying the rule violations it has reason to believe were committed, including the basis or reasons for the panel's conclusions, and any sanction to be imposed, which must include full customer restitution where customer harm is demonstrated. If an offer of settlement is accepted without the agreement of the enforcement staff, the decision must adequately support the Hearing Panel's acceptance of the settlement. Where applicable, the decision must also include a statement that the respondent has accepted the sanctions imposed without either admitting or denying the rule violations.

(d) The respondent may withdraw his or her offer of settlement at any time before final acceptance by a panel. If an offer is withdrawn after submission, or is rejected by a disciplinary panel, the respondent must not be deemed to have made any admissions by reason of the offer of settlement and must not be otherwise prejudiced by having submitted the offer of settlement.

§ 38.710 Hearings.

(a) A designated contract market must adopt rules that provide for the following minimum requirements for any hearing conducted pursuant to a notice of charges:

(1) The hearing must be fair, must be conducted before members of the Hearing Panel, and must be promptly convened after reasonable notice to the respondent. The formal rules of evidence need not apply; nevertheless, the procedures for the hearing may not be so informal as to deny a fair hearing. No member of the Hearing Panel for the matter may have a financial, personal, or other direct interest in the matter under consideration.

(2) In advance of the hearing, the respondent must be entitled to examine all books, documents, or other evidence in the possession or under the control of the designated contract market that are to be relied upon by the enforcement staff in presenting the charges contained in the notice of charges or which are relevant to those charges.

(3) The designated contract market's enforcement and compliance staffs must be parties to the hearing, and the enforcement staff must present their case on those charges and sanctions that are the subject of the hearing.

(4) The respondent must be entitled to appear personally at the hearing, must be entitled to cross-examine any persons appearing as witnesses at the hearing, and must be entitled to call witnesses and to present such evidence as may be relevant to the charges.

(5) The designated contract market must require persons within its jurisdiction who are called as witnesses to participate in the hearing and to produce evidence. It must make reasonable efforts to secure the presence of all other persons called as witnesses whose testimony would be relevant.

(6) If the respondent has requested a hearing, a copy of the hearing must be

made and must become a part of the record of the proceeding. The record must be one that is capable of being accurately transcribed; however, it need not be transcribed unless the transcript is requested by Commission staff or the respondent, the decision is appealed pursuant to § 38.712 of this part, or is reviewed by the Commission pursuant to Section 8c of the Act or part 9 of this chapter. In all other instances a summary record of a hearing is permitted.

(7) The rules of a designated contract market may provide that the cost of transcribing the record of the hearing must be borne by a respondent who requests the transcript, appeals the decision pursuant to § 38.712 of this part, or whose application for Commission review of the disciplinary action has been granted. In all other instances, the cost of transcribing the record must be borne by the designated contract market.

(b) The rules of a designated contract market may provide that a sanction may be summarily imposed upon any person within its jurisdiction whose actions impede the progress of a hearing.

§ 38.711 Decisions.

Promptly following a hearing conducted in accordance with § 38.710 of this part, the Hearing Panel must render a written decision based upon the weight of the evidence contained in the record of the proceeding and must provide a copy to the respondent.

The decision must include:

(a) The notice of charges or a summary of the charges;

(b) The answer, if any, or a summary of the answer;

(c) A summary of the evidence produced at the hearing or, where appropriate, incorporation by reference of the investigation report;

(d) A statement of findings and conclusions with respect to each charge, and a complete explanation of the evidentiary and other basis for such findings and conclusions with respect to each charge;

(e) An indication of each specific rule that the respondent was found to have violated; and

(f) A declaration of all sanctions imposed against the respondent, including the basis for such sanctions and the effective date of such sanctions.

§ 38.712 Right to appeal.

The rules of a designated contract market may permit the parties to a proceeding to appeal promptly an adverse decision of the Hearing Panel in all or in certain classes of cases. Such rules may require a party's notice of appeal to be in writing and to specify the findings, conclusions, or sanctions to which objection are taken. If the rules of a designated contract market permit appeals, then both the respondent and the enforcement staff must have the opportunity to appeal and the designated contract must provide for the following:

(a) The designated contract market must establish an appellate panel that must be authorized to hear appeals of respondents. In addition, the rules of a designated contract market may provide that the appellate panel may, on its own initiative, order review of a decision by the Hearing Panel within a reasonable period of time after the decision has been rendered.

(b) The composition of the appellate panel must be consistent with § 40.9(c)(iv) of this chapter, and must not include any members of the designated contract market's compliance staff, or any person involved in adjudicating any other stage of the same proceeding. The rules of a designated contract market must provide for the appeal proceeding to be conducted before all of the members of the board of appeals or a panel thereof.

(c) Except for good cause shown, the appeal or review must be conducted solely on the record before the Hearing Panel, the written exceptions filed by the parties, and the oral or written arguments of the parties.

(d) Promptly following the appeal or review proceeding, the board of appeals must issue a written decision and must provide a copy to the respondent. The decision issued by the board of appeal must adhere to all the requirements of § 38.711 of this part, to the extent that a different conclusion is reached from that issued by the Hearing Panel.

§ 38.713 Final decisions.

Each designated contract market must establish rules setting forth when a decision rendered pursuant to this section will become the final decision of such designated contract market.

§ 38.714 Disciplinary sanctions.

All disciplinary sanctions imposed by a designated contract market or its disciplinary panels must be commensurate with the violations committed and must be clearly sufficient to deter recidivism or similar violations by other market participants. All disciplinary sanctions must take into account the respondent's disciplinary history. In the event of demonstrated customer harm, any disciplinary sanction must also include full customer restitution.

§ 38.715 Summary fines for violations of rules regarding timely submission of records, decorum, or other similar activities.

A designated contract market may adopt a summary fine schedule for violations of rules relating to the timely submission of accurate records required for clearing or verifying each day's transactions, decorum, attire, or other similar activities. A designated contract market may permit its compliance staff, or a designated panel of contract market officials, to summarily impose minor sanctions against persons within the designated contract market's jurisdiction for violating such rules. A designated contract market's summary fine schedule may allow for warning letters to be issued for first-time violations or violators, provided that no more than one warning letter may be issued per rolling 12-month period for the same violation. If adopted, a summary fine schedule must provide for progressively larger fines for recurring violations.

§ 38.716 Emergency disciplinary actions.

(a) A designated contract market may impose a sanction, including suspension, or take other summary action against a person or entity subject to its jurisdiction upon a reasonable belief that such immediate action is necessary to protect the best interest of the marketplace.

(b) Any emergency disciplinary action must be taken in accordance with a designated contract market's procedures that provide for the following:

(1) If practicable, a respondent must be served with a notice before the action is taken, or otherwise at the earliest possible opportunity. The notice must state the action, briefly state the reasons for the action, and state the effective time and date, and the duration of the action.

(2) The respondent must have the right to be represented by legal counsel or any other representative of its choosing in all proceedings subsequent to the emergency action taken. The respondent must be given the opportunity for a hearing as soon as reasonably practicable and the hearing must be conducted before the Hearing Panel pursuant to the requirements of § 38.710 of this part.

(3) Promptly following the hearing provided for in this rule, the designated contract market must render a written decision based upon the weight of the evidence contained in the record of the proceeding and must provide a copy to the respondent. The decision must include a description of the summary action taken; the reasons for the

summary action; a summary of the evidence produced at the hearing; a statement of findings and conclusions; a determination that the summary action should be affirmed, modified, or reversed; and a declaration of any action to be taken pursuant to the determination, and the effective date and duration of such action.

Subpart O—Dispute Resolution

§ 38.750 Core Principle 14.

The board of trade shall establish and enforce rules regarding, and provide facilities for alternative dispute resolution as appropriate for, market participants and any market intermediaries.

§ 38.751 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and acceptable practices in Appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.750 of this part.

Subpart P—Governance Fitness Standards

§ 38.800 Core Principle 15.

The board of trade shall establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market, and any other person with direct access to the facility (including any party affiliated with any person described in this paragraph).

Subpart Q—Conflicts of Interest

§ 38.850 Core Principle 16.

The board of trade shall establish and enforce rules:

(a) To minimize conflicts of interest in the decision-making process of the contract market; and

(b) To establish a process for resolving conflicts of interest described in paragraph (a) of this section.

Subpart R—Composition of Governing Boards of Contract Markets

§ 38.900 Core Principle 17.

The governance arrangements of the board of trade shall be designed to permit consideration of the views of market participants.

Subpart S—Recordkeeping

§ 38.950 Core Principle 18.

The board of trade shall maintain records of all activities relating to the business of the contract market:

(a) In a form and manner that is acceptable to the Commission; and

(b) For a period of at least 5 years.

§ 38.951 Additional sources for compliance.

A designated contract market must maintain such records, including trade records and investigatory and disciplinary files, in accordance with the requirements of § 1.31 of this chapter, and in accordance with § 45.1 of this chapter, if applicable.

Subpart T—Antitrust Considerations

§ 38.1000 Core Principle 19.

Unless necessary or appropriate to achieve the purposes of this Act, the board of trade shall not:

(a) Adopt any rule or taking any action that results in any unreasonable restraint of trade; or

(b) Impose any material anticompetitive burden on trading on the contract market.

§ 38.1001 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and acceptable practices in appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.1000 of this part.

Subpart U—System Safeguards

§ 38.1050 Core Principle 20.

Each designated contract market shall:

(a) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and the development of automated systems, that are reliable, secure, and have adequate scalable capacity;

(b) Establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the board of trade; and

(c) Periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, transmission of matched orders to a designated clearing organization for clearing, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail.

§ 38.1051 General requirements.

(a) A designated contract market's program of risk analysis and oversight with respect to its operations and automated systems must address each of the following categories of risk analysis and oversight:

(1) Information security;

(2) Business continuity-disaster recovery planning and resources;

(3) Capacity and performance planning;

(4) Systems operations;

(5) Systems development and quality assurance; and

(6) Physical security and environmental controls.

(b) In addressing the categories of risk analysis and oversight required under paragraph (a) of this section, a designated contract market should follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(c) A designated contract market must maintain a business continuity-disaster recovery plan and business continuity-disaster recovery resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a designated contract market following any disruption of its operations. Such responsibilities and obligations include, without limitation, order processing and trade matching; transmission of matched orders to a designated clearing organization for clearing; price reporting; market surveillance; and maintenance of a comprehensive audit trail. The designated contract market's business continuity-disaster recovery plan and resources generally should enable resumption of trading and clearing of the designated contract market's products during the next business day following the disruption. Designated contract markets determined by the Commission to be critical financial markets are subject to more stringent requirements in this regard, set forth in § 40.9 of this chapter. Electronic trading is an acceptable backup for open outcry trading in the event of a disruption.

(d) A designated contract market that is not determined by the Commission to be a critical financial market satisfies the requirement to be able to resume trading and clearing during the next business day following a disruption by maintaining either:

(1) Infrastructure and personnel resources of its own that are sufficient to ensure timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a designated contract market following any disruption of its operations; or

(2) Contractual arrangements with other designated contract markets or

disaster recovery service providers, as appropriate, that are sufficient to ensure continued trading and clearing of the designated contract market's products, and ongoing fulfillment of all of the designated contract market's responsibilities and obligations with respect to those products, in the event that a disruption renders the designated contract market temporarily or permanently unable to satisfy this requirement on its own behalf.

(e) A designated contract market must notify Commission staff promptly of all:

(1) Electronic trading halts and systems malfunctions;

(2) Cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security, or capacity; and

(3) Any activation of the designated contract market's business continuity-disaster recovery plan.

(f) A designated contract market must give Commission staff timely advance notice of all:

(1) Planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and

(2) Planned changes to the designated contract market's program of risk analysis and oversight.

(g) A designated contract market must provide to the Commission upon request current copies of its business continuity-disaster recovery plan and other emergency procedures, its assessments of its operational risks, and other documents requested by Commission staff for the purpose of maintaining a current profile of the designated contract market's automated systems.

(h) A designated contract market must conduct regular, periodic, objective testing and review of its automated systems to ensure that they are reliable, secure, and have adequate scalable capacity. It must also conduct regular, periodic testing and review of its business continuity-disaster recovery capabilities. Both types of testing should be conducted by qualified, independent professionals. Such qualified independent professionals may be independent contractors or employees of the designated contract market, but should not be persons responsible for development or operation of the systems or capabilities being tested. Pursuant to Core Principle 18 (Recordkeeping) and §§ 38.950 and 38.951 of this part, the designated contract market must keep records of all such tests, and make all test results available to the Commission upon request.

(i) To the extent practicable, a designated contract market should:

(1) Coordinate its business continuity-disaster recovery plan with those of the members and other market participants upon whom it depends to provide liquidity, in a manner adequate to enable effective resumption of activity in its markets following a disruption causing activation of the designated contract market's business continuity-disaster recovery plan;

(2) Initiate and coordinate periodic, synchronized testing of its business continuity-disaster recovery plan and the business continuity-disaster recovery plans of the members and other market participants upon whom it depends to provide liquidity; and

(3) Ensure that its business continuity-disaster recovery plan takes into account the business continuity-disaster recovery plans of its telecommunications, power, water, and other essential service providers.

(j) Part 46 of this chapter governs the obligations of those registered entities that the Commission has determined to be critical financial markets, with respect to maintenance and geographic dispersal of disaster recovery resources sufficient to meet a same-day recovery time objective in the event of a wide-scale disruption. Section 40.9 of this chapter establishes the requirements for core principle compliance in that respect.

Subpart V—Financial Resources

§ 38.1100 Core Principle 21.

(a) *In General.* The board of trade shall have adequate financial, operational, and managerial resources to discharge each responsibility of the board of trade.

(b) *Determination of Adequacy.* The financial resources of the board of trade shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the contract market to cover the operating costs of the contract market for a 1-year period, as calculated on a rolling basis.

§ 38.1101 General requirements.

(a) *General rule.* (1) A designated contract market must maintain financial resources sufficient to enable it to perform its functions in compliance with the core principles set forth in Section 5 of the Act and regulations thereunder.

(2) An entity that operates as both a designated contract market and a derivatives clearing organization also shall comply with the financial resource requirements of § 39.11 of this chapter.

(3) Financial resources shall be considered sufficient if their value is at least equal to a total amount that would enable the designated contract market, or applicant for designation as such, to cover its operating costs for a period of at least one year, calculated on a rolling basis.

(b) *Types of financial resources.* Financial resources available to satisfy the requirements of paragraph (a) of this section may include:

(1) The designated contract market's own capital; and

(2) Any other financial resource deemed acceptable by the Commission.

(c) *Computation of financial resource requirement.* A designated contract market must, on a quarterly basis, based upon its fiscal year, make a reasonable calculation of its projected operating costs over a 12-month period in order to determine the amount needed to meet the requirements of paragraph (a) of this section. The designated contract market shall have reasonable discretion in determining the methodology used to compute such projected operating costs. The Commission may review the methodology and require changes as appropriate.

(d) *Valuation of financial resources.* At appropriate intervals, but not less than quarterly, a designated contract market must compute the current market value of each financial resource used to meet its obligations under paragraph (a) of this section. Reductions in value to reflect market and credit risk ("haircuts") must be applied as appropriate.

(e) *Liquidity of financial resources.* The financial resources allocated by the designated contract market to meet the requirements of paragraph (a) of this section must include unencumbered, liquid financial assets (*i.e.,* cash and/or highly liquid securities) equal to at least six months' operating costs. If any portion of such financial resources is not sufficiently liquid, the designated contract market may take into account a committed line of credit or similar facility for the purpose of meeting this requirement.

(f) *Reporting requirements.* (1) Each fiscal quarter, or at any time upon Commission request, a designated contract market must:

(i) Report to the Commission:

(A) The amount of financial resources necessary to meet the requirements of paragraph (a) of this section; and

(B) The value of each financial resource available, computed in accordance with the requirements of paragraph (d) of this section; and

(ii) Provide the Commission with a financial statement, including the balance sheet, income statement, and statement of cash flows of the

designated contract market or of its parent company.

(2) The calculations required by this paragraph shall be made as of the last business day of the designated contract market's fiscal quarter.

(3) The designated contract market must provide the Commission with:

(i) Sufficient documentation explaining the methodology used to compute its financial requirements under paragraph (a) of this section,

(ii) Sufficient documentation explaining the basis for its determinations regarding the valuation and liquidity requirements set forth in paragraphs (d) and (e) of this section, and

(iii) Copies of any agreements establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the designated contract market's conclusions.

(4) The report shall be filed not later than 17 business days after the end of the designated contract market's fiscal quarter, or at such later time as the Commission may permit, in its discretion, upon request by the designated contract market.

Subpart W—Diversity of Board of Directors

§ 38.1150 Core Principle 22.

The board of trade, if a publicly traded company, shall endeavor to recruit individuals to serve on the board of directors and the other decision-making bodies (as determined by the Commission) of the board of trade from among, and to have the composition of the bodies reflect, a broad and culturally diverse pool of qualified candidates.

Subpart X—Securities and Exchange Commission

§ 38.1200 Core Principle 23.

The board of trade shall keep any such records relating to swaps defined in Section 1a(47)(A)(v) of the Act open to inspection and examination by the Securities and Exchange Commission.

§ 38.1201 Additional sources for compliance.

Applicants and designated contract markets may refer to the guidance and/or acceptable practices in Appendix B of this part to demonstrate to the Commission compliance with the requirements of § 38.1200 of this part.

19. Revise appendix A to part 38 to read as follows:

Appendix A—Form DCM lit]

COMMODITY FUTURES TRADING COMMISSION

FORM DCM

CONTRACT MARKET

APPLICATION OR AMENDMENT TO APPLICATION FOR DESIGNATION

DESIGNATION INSTRUCTIONS

Intentional misstatements or material omissions of fact may constitute Federal criminal violations (7 U.S.C. 13 and 18 U.S.C. 1001) or grounds for disqualification from designation.

DEFINITIONS

Unless the context requires otherwise, all terms used in the Form DCM have the same meaning as in the Commodity Exchange Act, as amended ("CEA" or "Act"), and in the General Rules and Regulations of the Commodity Futures Trading Commission ("Commission") thereunder.

GENERAL INSTRUCTIONS

1. Application Form DCM and Exhibits thereto are to be filed with the Commission by applicants for designation as a contract market, or by a designated contract market amending such designation, pursuant to Section 5 of the CEA and the Commission's regulations thereunder. Applicants may prepare their own Form DCM but must follow the format prescribed herein. Upon the filing of an application for designation in accordance with the instructions provided herein, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views and arguments concerning such application. No application for designation shall be effective unless the Commission, by order, grants such designation.

2. Individuals' names, except the executing signature in Item 10, shall be given in full (Last Name, First Name, and Middle Name).

3. Signatures on all copies of the Form DCM filed with the Commission can be executed electronically. If the Form DCM is filed by a limited liability company, it must be signed in the name of the limited liability company by a member duly authorized to sign on the limited liability company's behalf; if filed by a partnership, it shall be signed in the name of the partnership by a general partner duly authorized; if filed by an unincorporated organization or association which is not a partnership, it shall be signed in the name of such organization or association by the managing agent—i.e., a duly authorized person who directs or manages or who participates in the directing or managing of its affairs; if filed by a corporation, it shall be signed in the name of the corporation by a principal officer duly authorized.

4. If Form DCM is being filed as an application for designation, all applicable items must be answered in full. If any item is not applicable, indicate by "none," "not applicable," or "N/A" as appropriate.

5. For the purposes of this Form DCM, the term "Applicant" shall include any applicant for designation as a contract market or any designated contract market that is amending Form DCM.

6. Under Section 5 of the CEA and the Commission's regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this Form DCM from Applicants seeking designation as a contract market and from a designated contract market. Disclosure of the information specified on this Form DCM is mandatory prior to the start of processing of an application for designation as a contract market. The information provided with this Form DCM will be used for the principal purpose of determining whether the Commission should grant or deny designation to an Applicant. The Commission further may determine that other and additional information is required from the Applicant in order to process its application. Except in cases where confidential treatment is requested by the Applicant and granted by the Commission, pursuant to the Freedom of Information Act and the rules of the Commission thereunder, information supplied on this Form DCM will be included routinely in the public files of the Commission and will be available for inspection by any interested person. A Form DCM which is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form DCM, however, shall not constitute a finding that the Form DCM has been filed as required or that the information submitted is true, current or complete.

UPDATING INFORMATION ON THE FORM DCM

1. Part 38 of the Commission's regulations requires that if any information contained in this application, or any supplement or amendment thereto, is or becomes inaccurate for any reason, an amendment to Form DCM, or a submission under part 40 of the Commission's regulations, in either case correcting such information must be filed promptly with the Commission.

2. Designated Contract Markets filing Form DCM as an amendment need file only the facing page, the signature page (Item 10), and any pages on which an answer is being amended, together with any exhibits that are being amended. The submission of an amendment represents that the remaining items and exhibits remain true, current and complete as previously filed.

WHERE TO FILE

The Application Form DCM and appropriate exhibits must be filed electronically with the Secretary of the Commission at its Washington DC headquarters at submissions@cftc.gov and the Division of Market Oversight at *DMOSubmissions@cftc.gov*.

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

FORM DCM

DESIGNATED CONTRACT MARKET
APPLICATION OR AMENDMENT TO APPLICATION FOR DESIGNATION

_____

Exact name of Applicant as specified in charter

_____

Address of principal executive offices

☐ If this is an **APPLICATION** for designation, complete in full and check here.

☐ If this is an **AMENDMENT** to an application, or to an existing designation, list all items that are amended and check here.

_____ _____

_____ _____

_____ _____

GENERAL INFORMATION

1. Name under which the business of the designated contract market will be conducted, if different than name specified on facing sheet:

_____

2. If name of designated contract market is hereby amended, state previous designated contract market name:

_____

3. Mailing address, if different than address specified on facing sheet:

_____

Number and Street

_____

City **State** **Zip Code**

3(a). Additional contact information:

_____

Fax

_____

Phone

_____

Website

4. List of principal office(s) and address(es) where designated contract market activities are/will be conducted:

Office	**Address**
_____	_____
_____	_____

BUSINESS ORGANIZATION

5. Applicant is a:

☐ Corporation
☐ Partnership
☐ Limited Liability Company
☐ Other form of organization (specify)

_____

6. If Applicant is a corporation:

a. Date of incorporation:

_____

b. State of incorporation:

_____

7. If Applicant is a partnership:

a. Date of filing of partnership articles:

_____

b. State in which filed:

_____

8. If Applicant is a limited liability company:

a. Date of filing of Articles of Organization/Certificate of Formation:

_____

b. State in which filed:

_____

9. Applicant agrees and consents that the notice of any proceeding before the Commission in connection with its application for designation as a contract market may be given by sending such notice by certified mail or confirmed telegram to the officer specified or person named below at the address given.

_____

Name of person (if Applicant is a corporation, limited liability company or partnership, title of officer)

_____

Name of Applicant

_____

Number and Street

_____

City **State** **Zip Code**

SIGNATURES

10. The Applicant has duly caused this application or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this _____ day of _____, 20_____. The Applicant and the undersigned represent that all information contained herein is true, current and complete. It is understood that all required items and Exhibits are considered integral parts of this Form DCM and that the submission of any amendment represents that all unamended items and Exhibits remain true, current, and complete as previously filed.

_____

Name of Applicant

_____

Manual signature of Member, General Partner, Managing Agent, or Principal Agent

_____

Title

BILLING CODE 6351–01–C

EXHIBITS INSTRUCTIONS

The following exhibits must be filed with the Commission by Applicants seeking designation as a contract market, or by a designated contract market amending its designation, pursuant to Section 5 of the CEA and the Commission's regulations thereunder. The exhibits should be labeled according to the items specified in this Form DCM. If any exhibit is not applicable, please specify the exhibit letter and indicate by "none," "not applicable," or "N/A" as appropriate.

EXHIBITS—BUSINESS ORGANIZATION

1. Attach as **Exhibit A**, the name of any person(s) who owns ten percent (10%) or more of the Applicant's stock or who, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of Applicant.

Provide as part of Exhibit A the full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

2. Attach as **Exhibit B**, a list of the present officers, directors, governors (and, in the case of an Applicant that is not a corporation, the members of all standing committees grouped by committee), or persons performing functions similar to any of the foregoing, of the designated contract market or of any entity that performs the regulatory activities of the Applicant, indicating for each:

a. Name

b. Title

c. Dates of commencement and termination of present term of office or position

d. Length of time each present officer, director, or governor has held the same office or position

e. Brief account of the business experience of each officer and director over the last five (5) years

f. Any other business affiliations in the derivatives and securities industry

g. For directors, list any committees on which they serve and any compensation received by virtue of their directorship

h. A description of:

(1) Any order of the Commission with respect to such person pursuant to Section 5e of the CEA;

(2) Any conviction or injunction against such person within the past ten (10) years;

(3) Any disciplinary actions with respect to such person within the last five (5) years;

(4) Any disqualification under Sections 8b and 8d of the CEA;

(5) Any disciplinary action under Section 8c of the CEA; and

(6) Any violation pursuant to Section 9 of the CEA.

3. Attach as **Exhibit C**, a narrative that sets forth the fitness standards for the Board of Directors and its composition including the number and percentage of public directors.

4. Attach as Exhibit D, a narrative or graphic description of the organizational structure of the Applicant. Include a list of all affiliates of the Applicant and indicate the general nature of the affiliation. Note: If the designated contract market activities of the Applicant are or will be conducted primarily by a division, subdivision, or other separate entity within the Applicant, corporation or organization, describe the relationship of such entity within the overall organizational structure and attach as Exhibit D a description only as it applies to the division, subdivision or separate entity, as applicable. Additionally, provide any relevant jurisdictional information, including any and all jurisdictions in which you or any affiliated entity are doing business, and registration status, including pending applications (e.g., country, regulator, registration category, date of registration). Provide the address for legal service of process for each jurisdiction, which cannot be a post office box.

5. Attach as **Exhibit E**, a description of the personnel qualifications for each category of professional employees employed by the Applicant or the division, subdivision, or other separate entity within the Applicant as described in Item 4.

6. Attach as **Exhibit F**, an analysis of staffing requirements necessary to carry out operations of the Applicant as a designated contract market and the name and qualifications of each key staff person.

7. Attach as **Exhibit G**, a copy of the constitution, articles of incorporation, formation or association with all amendments thereto, partnership or limited liability agreements, and existing by-laws, operating agreement, rules or instruments corresponding thereto, of the Applicant. Include any additional governance fitness information not included in Exhibit C. Provide a certificate of good standing dated

within one week of the date of the Form DCM.

8. Attach as **Exhibit H**, a brief description of any pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the Applicant or any of its affiliates is a party or to which any of its or their property is the subject. Include the name of the court or agency where the proceeding(s) are pending, the date(s) instituted, the principal parties involved, a description of the factual basis alleged to underlie the proceeding(s), and the relief sought. Include similar information as to any proceeding(s) known to be contemplated by the governmental agencies.

EXHIBITS—FINANCIAL INFORMATION

9. Attach as **Exhibit I**:

a. (i) Balance sheet, (ii) Statement of income and expenses, (iii) Statement of cash flows, and (iv) Statement of sources and application of revenues and all notes or schedules thereto, as of the most recent fiscal year of the Applicant, or of its parent company, if applicable. If a balance sheet and any statements certified by an independent public accountant are available, such balance sheet and statement(s) should be submitted as Exhibit I.

b. Provide a narrative of how the value of the financial resources of the Applicant is at least equal to a total amount that would enable the Applicant to cover its operating costs for a period of at least one year, calculated on a rolling basis, and whether such financial resources include unencumbered, liquid financial assets (i.e. cash and/or highly liquid securities) equal to at least six months' operating costs.

c. Attach copies of any agreements establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the Applicant's conclusions regarding the liquidity of its financial assets.

d. Representations regarding sources and estimates for future ongoing operational resources.

10. Attach as **Exhibit J,** a balance sheet and an income and expense statement for each affiliate of the designated contract market that also engages in designated contract market activities as of the end of the most recent fiscal year of each such affiliate, and each affiliate of the designated contract market that engages in swap execution facility activities.

11. Attach as **Exhibit K,** the following:

a. A complete list of all dues, fees and other charges imposed, or to be imposed, by or on behalf of Applicant for its designated contract market services that are provided on an exclusive basis and identify the service or services provided for each such due, fee, or other charge.

b. A description of the basis and methods used in determining the level and structure of the dues, fees and other charges listed in paragraph (a.) of this item.

c. If the Applicant differentiates, or proposes to differentiate, among its customers, or classes of customers in the amount of any dues, fees, or other charges imposed for the same or similar exclusive services, so state and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services, and any other factors, that account for such differentiations.

EXHIBITS—COMPLIANCE

12. Attach as **Exhibit L,** a narrative and supporting documents that may be provided under other Exhibits herein, that describe the manner in which the Applicant is able to comply with each core principle. The Applicant should include an explanation, and any other forms of documentation the Applicant thinks will be helpful to its explanation, demonstrating how the designated contract market will be able to comply with each core principle. To the extent that the application raises issues that are novel, or for which compliance with a core principle is not self-evident, include an explanation of how that item and the application satisfy the core principles.

13. Attach as **Exhibit M,** a copy of the Applicant's rules (as defined in § 40.1 of the Commission's regulations) and any technical manuals, other guides or instructions for users of, or participants in, the market, including minimum financial standards for members or market participants. Include rules citing applicable Federal position limits and aggregation standards in part 151 of the Commission's regulations and any exchange set position limit rules. Include rules on publication of daily trading information with regards to the requirements of part 16 of the Commission's regulations. The Applicant should include an explanation, and other forms of documentation the Applicant thinks will be helpful to its explanation, demonstrating how the designated contract market will be able to comply with each core principle and how its rules, technical manuals, other guides or instructions for users of, or participants in, the market, or minimum financial standards for members of market participants as provided in this Exhibit M help support the designated contract market's compliance with the core principles.

14. Attach as **Exhibit N,** executed or executable copies of any agreements or contracts entered into or to be entered into by the Applicant, including third party regulatory service provider or member or user agreements that enable or empower the Applicant to comply with applicable core principles. Identify: (1) The services that will be provided; and (2) The core principles addressed by such agreement.

15. Attach as **Exhibit O,** a copy of any compliance manual and any other documents that describe with specificity, the manner in which the Applicant will conduct trade practice, market and financial surveillance.

16. Attach as **Exhibit P,** a description of the Applicant's disciplinary and enforcement protocols, tools, and procedures and the arrangements for alternative dispute resolution.

17. Attach as **Exhibit Q,** a description of the Applicant's trade matching algorithm and examples of how that algorithm works in various trading scenarios involving various types of orders.

18. Attach as **Exhibit R,** a list of rules prohibiting specific trade practice violations.

19. Attach as **Exhibit S,** a discussion of how trading data will be maintained by the designated contract market.

20. Attach as **Exhibit T,** a list of the name of the clearing organization(s) that will be clearing the Applicant's trades, and a representation that clearing members of that organization will be guaranteeing such trades.

21. Attach as **Exhibit U,** any information (described with particularity) included in the application that will be subject to a request for confidential treatment pursuant to § 145.9 of the Commission's regulations.

EXHIBITS—OPERATIONAL CAPABILITY

22. Attach as **Exhibit V,** information responsive to the Technology Questionnaire (hyperlink to Web site). This questionnaire focuses on information pertaining to the Applicant's program of risk analysis and oversight. Main topic areas include: information security; business continuity-disaster recovery ("BC–DR") planning and resources; capacity and performance planning; systems operations; systems development and quality assurance; and physical security and environmental controls.

20. Revise Appendix B to part 38 to read as follows:

Appendix B to Part 38—Guidance on, and Acceptable Practices in, Compliance With Core Principles

1. This appendix provides guidance on complying with core principles, both initially and on an ongoing basis, to obtain and maintain designation under Section 5(d) of the Act and this part 38. Where provided, guidance is set forth in paragraph (a) following the relevant heading and can be used to demonstrate to the Commission compliance with the selected requirements of a core principle, under §§ 38.3 and 38.5 of this part. The guidance for the core principle is illustrative only of the types of matters a designated contract market may address, as applicable, and is not intended to be used as a mandatory checklist. Addressing the issues set forth in this appendix would help the Commission in its consideration of whether the designated contract market is in compliance with the selected requirements of a core principle; *provided however,* that the guidance is not intended to diminish or replace, in any event, the obligations and requirements of applicants and designated contract markets to comply with the regulations provided under this part.

2. Where provided, acceptable practices meeting selected requirements of core principles are set forth in paragraph (b) following guidance. Designated contract markets that follow specific practices outlined in the acceptable practices for a core principle in this appendix will meet the selected requirements of the applicable core principle; *provided however,* that the acceptable practice is not intended to diminish or replace, in any event, the obligations and requirements of applicants and designated contract markets to comply with the regulations provided under this part 38. The acceptable practices are for

illustrative purposes only and do not state the exclusive means for satisfying a core principle.

Core Principle 1 of section 5(d) of the Act: DESIGNATION AS CONTRACT MARKET.—(A) IN GENERAL—To be designated, and maintain a designation, as a contract market, a board of trade shall comply with—

(i) any core principle described in this subsection; and

(ii) any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5).

(B) REASONABLE DISCRETION OF CONTRACT MARKET—Unless otherwise determined by the Commission by rule or regulation, a board of trade described in subparagraph (A) shall have reasonable discretion in establishing the manner in which the board of trade complies with the core principles described in this subsection.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 2 of section 5(d) of the Act: COMPLIANCE WITH RULES—(A) IN GENERAL.—The board of trade shall establish, monitor, and enforce compliance with the rules of the contract market, including—

(i) access requirements;

(ii) the terms and conditions of any contracts to be traded on the contract market; and

(iii) rules prohibiting abusive trade practices on the contract market.

(B) CAPACITY OF CONTRACT MARKET.—The board of trade shall have the capacity to detect, investigate, and apply appropriate sanctions to any person that violates any rule of the contract market.

(C) REQUIREMENT OF RULES.—The rules of the contract market shall provide the board of trade with the ability and authority to obtain any necessary information to perform any function described in this subsection, including the capacity to carry out such international information-sharing agreements as the Commission may require.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 3 of section 5(d) of the Act: CONTRACTS NOT READILY SUBJECT TO MANIPULATION—The board of trade shall list on the contract market only contracts that are not readily susceptible to manipulation.

(a) *Guidance.* (1) Designated contract markets may list new products for trading by self-certification under § 40.2 of this chapter or may submit products for Commission approval under § 40.3 of this chapter.

(2) Guidance in appendix C to this part may be used as guidance in meeting this core principle for both new products listings and existing listed contracts.

(b) *Acceptable Practices.* [Reserved.]

Core Principle 4 of section 5(d) of the Act: PREVENTION OF MARKET DISRUPTION.—The board of trade shall have the capacity and responsibility to prevent manipulation, price distortion, and disruptions of the delivery or cash-settlement process through market surveillance, compliance, and enforcement practices and procedures, including—

(A) methods for conducting real-time monitoring of trading; and

(B) comprehensive and accurate trade reconstructions.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 5 of section 5(d) of the Act: POSITION LIMITATIONS OR ACCOUNTABILITY—(A) IN GENERAL.—To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators.

(B) MAXIMUM ALLOWABLE POSITION LIMITATION.—For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a), the board of trade shall set the position limitation of the board of trade at a level not higher than the position limitation established by the Commission.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 6 of section 5(d) of the Act: EMERGENCY AUTHORITY—The board of trade, in consultation or cooperation with the Commission, shall adopt rules to provide for the exercise of emergency authority, as is necessary and appropriate, including the authority—

(A) to liquidate or transfer open positions in any contract;

(B) to suspend or curtail trading in any contract; and

(C) to require market participants in any contract to meet special margin requirements.

(a) *Guidance.* In consultation and cooperation with the Commission, a designated contract market should have the authority to intervene as necessary to maintain markets with fair and orderly trading and to prevent or address manipulation or disruptive trading practices, whether the need for intervention arises exclusively from the DCM's market or as part of a coordinated, cross-market intervention. DCM rules should include procedures and guidelines to avoid conflicts of interest in accordance with the provisions of § 40.9 of this chapter, and include alternate lines of communication and approval procedures to address emergencies associated with real time events. To address perceived market threats, the designated contract market should have rules that allow it to take certain actions in the event of an emergency, as defined in § 40.1(h) of this chapter, including: imposing or modifying position limits, price limits, and intraday market restrictions; imposing special margin requirements; ordering the liquidation or transfer of open positions in any contract; ordering the fixing of a settlement price; extending or shortening the expiration date or the trading hours; suspending or curtailing trading in any contract; transferring customer contracts and the margin or altering any contract's settlement terms or conditions; and, where applicable, providing for the carrying out of such actions through its agreements with its third-party provider of clearing or regulatory services. In situations where a swap is traded on more than one platform, emergency action to liquidate or transfer open interest must be as directed, or agreed to, by the Commission or the Commission's staff. The Commission should be notified promptly of the DCM's exercise of emergency action, explaining how conflicts of interest were minimized, including the extent to which the DCM considered the effect of its emergency action on the underlying markets and on markets that are linked or referenced to the contract market and similar markets on other trading venues. Information on all regulatory actions carried out pursuant to a DCM's emergency authority should be included in a timely submission of a certified rule pursuant to part 40 of this chapter.

(b) *Acceptable Practices.* A designated contract market must have procedures and guidelines for decision-making and implementation of emergency intervention in the market. At a minimum, the DCM must have the authority to liquidate or transfer open positions in the market, suspend or curtail trading in any contract, and require market participants in any contract to meet special margin requirements. In situations where a swap is traded on more than one platform, emergency action to liquidate or transfer open interest must be directed, or agreed to, by the Commission or the Commission's staff. The DCM must promptly notify the Commission of the exercise of its emergency authority, documenting its decision-making process, including how conflicts of interest were minimized, and the reasons for using its emergency authority. The DCM must also have rules that allow it to take such market actions as may be directed by the Commission.

Core Principle 7 of section 5(d) of the Act: AVAILABILITY OF GENERAL INFORMATION.—The board of trade shall make available to market authorities, market participants, and the public accurate information concerning—

(A) the terms and conditions of the contracts of the contract market; and

(B)(i) the rules, regulations, and mechanisms for executing transactions on or through the facilities of the contract market; and

(ii) the rules and specifications describing the operation of the contract market's—

(I) electronic matching platform; or

(II) trade execution facility.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 8 of section 5(d) of the Act: DAILY PUBLICATION OF TRADING INFORMATION.—The board of trade shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 9 of section 5(d) of the Act: EXECUTION OF TRANSACTIONS.—"(A) IN GENERAL.—The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade.

(B) RULES.—The rules of the board of trade may authorize, for bona fide business purposes—

(i) transfer trades or office trades;

(ii) an exchange of—

(I) futures in connection with a cash commodity transaction;

(II) futures for cash commodities; or

(III) futures for swaps; or

(iii) a futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the contract market or a derivatives clearing organization.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* (1) *Block size determination for existing contracts.* For any futures contract that has been trading for one calendar quarter or longer, the acceptable minimum block trade size should be a number larger than the size at which a single buy or sell order is customarily able to be filled in its entirety in that product's centralized market without incurring a substantial price concession. In specifying the minimum block, the designated contract market should consider, and the Commission will review, data related to factors including: the trading volume, open interest, liquidity and depth of the order book, typical trade and order sizes in the market, any input the designated contract market receives from brokers, floor traders and/or market users related to these factors, and the block sizes on comparable swap products.

(2) *Block size determination for new contracts.* For any futures contract that has been listed for trading for less than one calendar quarter, an acceptable minimum block trade size should be a number equal to the size of a trade that the exchange reasonably anticipates will not be able to be filled in its entirety in that product's centralized market without incurring a substantial price concession. In reviewing the block size for these products, the designated contract market should consider, and the Commission will review: centralized market data in a related futures contract, the same contract traded on another exchange, trading activity in the underlying cash market, and the block sizes on comparable swap products. For both existing and new contracts, the designated contract market may consider other relevant factors, but must present those factors to the Commission when it certifies or seeks approval of the block trade size.

(3) *Pricing of block trades.* (i) Block trades must be at a price that is fair and reasonable. In determining whether a block trade price is fair and reasonable, the DCM should consider: (A) the size of the block; (B) the price and size of other block trades in any relevant markets at the applicable time; and/or (C) the circumstance of the market or the parties to the block trade. Relevant markets include the designated contract market itself, the underlying cash markets, and/or related futures or options markets. (ii) Block trades between affiliated parties are subject to the pricing requirements set forth in § 38.503(d) of this part.

(4) *Recordkeeping for block trades.* Records kept in accordance with the requirements of FASB Statement No. 133 ("Accounting for Derivative Instruments and Hedging Activities"), as amended by FASB Statement No. 161 ("Disclosures about Derivative Instruments and Hedging Activities—an amendment of FASB Statement No. 133") are acceptable records.

Core Principle 10 of section 5(d) of the Act: TRADE INFORMATION.—The board of trade shall maintain rules and procedures to provide for the recording and safe storage of all identifying trade information in a manner that enables the contract market to use the information—

(A) to assist in the prevention of customer and market abuses; and

(B) to provide evidence of any violations of the rules of the contract market.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 11 of section 5(d) of the Act: FINANCIAL INTEGRITY OF TRANSACTIONS.—The board of trade shall establish and enforce—

(A) rules and procedures for ensuring the financial integrity of transactions entered into on or through the facilities of the contract market (including the clearance and settlement of the transactions with a derivatives clearing organization); and

(B) rules to ensure—

(i) the financial integrity of any—

(I) futures commission merchant; and

(II) introducing broker; and

(ii) the protection of customer funds.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 12 of section 5(d) of the Act: PROTECTION OF MARKETS AND MARKET PARTICIPANTS— The board of trade shall establish and enforce rules—

(A) to protect markets and market participants from abusive practices committed by any party, including abusive practices committed by a party acting as an agent for a participant; and

(B) to promote fair and equitable trading on the contract market.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 13 of section 5(d) of the Act: DISCIPLINARY PROCEDURES.—The board of trade shall establish and enforce disciplinary procedures that authorize the board of trade to discipline, suspend, or expel members or market participants that violate the rules of the board of trade, or similar methods for performing the same functions, including delegation of the functions to third parties.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 14 of section 5(d) of the Act: DISPUTE RESOLUTION.—The board of trade shall establish and enforce rules regarding, and provide facilities for alternative dispute resolution as appropriate for, market participants and any market intermediaries.

(a) *Guidance.* A designated contract market should provide customer dispute resolution procedures that are: appropriate to the nature of the market; fair and equitable; and available on a voluntary basis, either directly or through another self-regulatory organization, to customers that are non-eligible contract participants.

(b) *Acceptable Practices.*

(1) *Fair and equitable procedure.* Every contract market shall provide customer dispute resolution procedures that are fair and equitable. An acceptable customer dispute resolution mechanism would:

(i) Provide the customer with an opportunity to have his or her claim decided by an objective and impartial decision-maker;

(ii) Provide each party with the right to be represented by counsel at the commencement of the procedure, at the party's own expense;

(iii) Provide each party with adequate notice of the claims presented against such party, an opportunity to be heard on all claims, defenses and permitted counterclaims, and an opportunity for a prompt hearing;

(iv) Authorize prompt, written, final settlement awards that are not subject to appeal within the designated contract market; and

(v) Notify the parties of the fees and costs that may be assessed.

(2) *Voluntary Procedures.* The use of dispute settlement procedures shall be voluntary for customers other than eligible contract participants as defined in section 1a(18) of the Act, and may permit counterclaims as provided in § 166.5 of this chapter.

(3) *Member-to-Member Procedures.* If the designated contract market also provides procedures for the resolution of disputes that do not involve customers (i.e., member-to-member disputes), the procedures for resolving such disputes must be independent of and shall not interfere with or delay the resolution of customers' claims or grievances.

(4) *Delegation.* A designated contract market may delegate to another self-regulatory organization or to a registered futures association its responsibility to provide for customer dispute resolution mechanisms, provided, however, that in the event of such delegation, the designated contract market shall in all respects treat any decision issued by such other organization or association with respect to such dispute as if the decision were its own, including providing for the appropriate enforcement of any award issued against a delinquent member.

Core Principle 15 of section 5(d) of the Act: GOVERNANCE FITNESS STANDARDS.—The board of trade shall establish and enforce appropriate fitness standards for directors, members of any disciplinary committee, members of the contract market, and any other person with direct access to the facility (including any party affiliated with any person described in this paragraph).

(a) *Guidance.* [Reserved.]

(b) *Applicable Practices.* [Reserved.]

Core Principle 16 of section 5(d) of the Act: CONFLICTS OF INTEREST.—The board of trade shall establish and enforce rules—

(A) to minimize conflicts of interest in the decision making process of the contract market; and

(B) to establish a process for resolving conflicts of interest described in subparagraph (A).

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 17 of section 5(d) of the Act: COMPOSITION OF GOVERNING BOARDS OF CONTRACT MARKETS.—The governance arrangements of the board of

trade shall be designed to permit consideration of the views of market participants.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 18 of section 5(d) of the Act: RECORDKEEPING.—The board of trade shall maintain records of all activities relating to the business of the contract market—

(A) in a form and manner that is acceptable to the Commission; and

(B) for a period of at least 5 years.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 19 of section 5(d) of the Act: ANTITRUST CONSIDERATIONS.—Unless necessary or appropriate to achieve the purposes of this Act, the board of trade shall not—

(A) adopt any rule or taking any action that results in any unreasonable restraint of trade; or

(B) impose any material anticompetitive burden on trading on the contract market.

(a) *Guidance.* An entity seeking designation as a contract market may request that the Commission consider under the provisions of section 15(b) of the Act, any of the entity's rules, including trading protocols or policies, and including both operational rules and the terms or conditions of products listed for trading, at the time of designation or thereafter. The Commission intends to apply section 15(b) of the Act to its consideration of issues under this core principle in a manner consistent with that previously applied to contract markets.

(b) *Acceptable Practices.* [Reserved.]

Core Principle 20 of section 5(d) of the Act: SYSTEM SAFEGUARDS.—The board of trade shall—

(A) establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and the development of automated systems, that are reliable, secure, and have adequate scalable capacity;

(B) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the board of trade; and

(C) periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 21 of section 5(d) of the Act: FINANCIAL RESOURCES.—

(A) IN GENERAL.—The board of trade shall have adequate financial, operational, and managerial resources to discharge each responsibility of the board of trade.

(B) DETERMINATION OF ADEQUACY.—The financial resources of the board of trade shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the contract market to cover the operating costs of the contract market for a 1-year period, as calculated on a rolling basis.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 22 of section 5(d) of the Act: DIVERSITY OF BOARD OF DIRECTORS.—The board of trade, if a publicly traded company, shall endeavor to recruit individuals to serve on the board of directors and the other decision-making bodies (as determined by the Commission) of the board of trade from among, and to have the composition of the bodies reflect, a broad and culturally diverse pool of qualified candidates.

(a) *Guidance.* [Reserved.]

(b) *Acceptable Practices.* [Reserved.]

Core Principle 23 of section 5(d) of the Act: SECURITIES AND EXCHANGE COMMISSION.—The board of trade shall keep any such records relating to swaps defined in section 1a(47)(A)(v) open to inspection and examination by the Securities and Exchange Commission.

(a) *Guidance.* A designated contract market should have arrangements and resources for collecting and maintaining accurate records pertaining to any swaps agreements defined in section 1a(47)(A)(v) of the Act.

(b) *Acceptable Practices.* [Reserved.]

21. Add appendix C to part 38 to read as follows:

Appendix C—Demonstration of Compliance That a Contract is not Readily Susceptible to Manipulation

(a) *Futures Contracts—General Information.* When a designated contract market certifies or submits for approval contract terms and conditions for a new futures contract, that submission must include the following information:

(1) A narrative describing the contract, including data and information to support the contract's terms and conditions, as set by the designated contract market. When designing a futures contract, the designated contract market should conduct market research so that the contract design meets the risk management needs of prospective users and promotes price discovery of the underlying commodity. The designated contract market should consult with market users to obtain their views and opinions during the contract design process to ensure the contract's term and conditions reflect the underlying cash market and that the futures contract will perform the intended risk management and/or price discovery functions. A designated contract market should provide a statement indicating that it took such steps to ensure the usefulness of the submitted contract.

(2) A detailed cash market description for physical and cash-settled contracts should be included. Such descriptions must be based on government and/or other publically-available data whenever possible and be formulated for both the national and regional/local market relevant to the underlying commodity. For tangible commodities, the cash market descriptions for the relevant market (i.e., national and regional/local) must incorporate at least five full years of data that may include, among other factors, production, consumption, stocks, imports, exports, and prices. Each of those cash market variables must be fully defined and the data sources must be fully specified and documented to permit Commission staff to replicate the estimates of deliverable supply (defined in paragraph (b)(1)(A) of this appendix C). Whenever possible, the Commission requests that monthly or daily prices (depending on the contract) underlying the cash settlement index be submitted for the most recent five full calendar years and for as many of the current year's months for which data are available. For contracts that are cash settled to an index, the index's methodology must be provided along with supporting information showing how the index is reflective of the underlying cash market, is not readily subject to manipulation or distortion, and is based on a cash price series that is reliable, acceptable, publicly available and timely (defined in paragraphs (c)(2) and (c)(3) of this appendix C). The Commission recognizes that the data necessary for accurate and cogent cash market analyses for an underlying commodity vary with the nature of the underlying commodity. The Commission may require that the designated contract market submit a detailed report on commodity definitions and uses.

(b) *Futures Contracts Settled by Physical Delivery.* (1) For listed contracts that are settled by physical delivery, the terms and conditions of the contract should conform to the most common commercial practices and conditions in the cash market for the commodity underlying the futures contract. The terms and conditions should be designed to avoid any impediments to the delivery of the commodity so as to promote convergence between the price of the futures contract and the cash market value of the commodity at the expiration of a futures contract.

(i) Estimating Deliverable Supplies.

(A) *General definition.* The specified terms and conditions, considered as a whole, must result in a "deliverable supply" that is sufficient to ensure that the contract is not susceptible to price manipulation or distortion. In general, the term "deliverable supply" means the quantity of the commodity meeting the contract's delivery specifications that reasonably can be expected to be readily available to short traders and salable by long traders at its market value in normal cash marketing channels at the contract's delivery points during the specified delivery period, barring abnormal movement in interstate commerce. Typically, deliverable supply reflects the quantity of the commodity that potentially could be made available for sale on a spot basis at current prices at the contract's delivery points. For a non-financial physical-delivery commodity contract, this estimate might represent product which is in storage at the delivery point(s) specified in the futures contract or can be moved economically into or through such points consistent with the delivery procedures set forth in the contract and which is available for sale on a spot basis within the marketing channels that normally are tributary to the delivery point(s). Furthermore, an appropriate estimate of deliverable supply excludes commodity supplies that are committed to some commercial use. The size of commodity supplies that are committed to

some commercial use may be estimated by consulting with market participants. An adequate measure of deliverable supply would be an amount of the commodity that would meet the normal or expected range of delivery demand without causing futures prices to become distorted relative to cash market prices. Given the availability of acceptable data, deliverable supply should be estimated on a monthly basis for at least the most recent five years for which data are available. To the extent possible and that data resources permit, deliverable supply estimates should be constructed such that the data reflect, as close as possible, the market defined by the contract's terms and conditions, and should be formulated, whenever possible, with government or publically available data. All deliverable supply estimates must be fully defined, have all underlying assumptions explicitly stated, and have documentation of all data/information sources in order to permit estimate replication by Commission staff.

(B) *Accounting for variations in deliverable supplies.* To assure the availability of adequate deliverable supplies and acceptable levels of commercial risk management utility, contract terms and conditions should account for variations in the patterns of production, consumption and supply over a period of years of sufficient length to assess adequately the potential range of deliverable supplies. This assessment also should consider seasonality, growth, and market concentration in the production/consumption of the underlying cash commodity. Deliverable supply implications of seasonal effects are more straightforwardly delineated when deliverable supply estimates are calculated on a monthly basis and when such monthly estimates are provided for at least the most recent five years for which data resources permit. In addition, consideration should be given to the relative roles of producers, merchants, and consumers in the production, distribution, and consumption of the cash commodity and whether the underlying commodity exhibits a domestic or international export focus. Careful consideration also should be given to the quality of the cash commodity and to the movement or flow of the cash commodity in normal commercial channels and whether there exist external factors or regulatory controls that could affect the price or supply of the cash commodity.

(C) *Calculation of deliverable supplies.* Designated contract markets should derive a quantitative estimate of the deliverable supplies for the delivery period specified in the proposed contract. For commodities with seasonal supply or demand characteristics, the deliverable supply analysis should include that period when potential supplies typically are at their lowest levels. The estimate should be based on statistical data, when reasonably available, covering a period of time that is representative of the underlying commodity's actual patterns of production, patterns of consumption, and patterns of seasonal effects (if relevant). Often, such a relevant time period should include at least five years of monthly deliverable supply estimates permitted by available data resources. Deliverable supply estimates should also exclude the amount of the commodity that would not be otherwise deliverable on the futures contract. For example, deliverable supplies should exclude quantities that at current price levels are not economically obtainable or deliverable or were previously dedicated under contract for commercial use.

(2) Contract Terms and Conditions Requirements for Futures Contracts Settled by Physical Delivery.

(i) For physical delivery contracts, an acceptable specification of terms and conditions would include, but may not be limited to, rules that address, as appropriate, the following criteria and comply with the associated standards:

(A) *Quality Standards:* The terms and conditions of a commodity contract should describe or define all of the economically significant characteristics or attributes of the commodity underlying the contract. In particular, the quality standards should be described or defined so that such standards reflect those used in transactions in the commodity in normal cash marketing channels. Documentation establishing that the quality standards of the contract's underlying commodity comply with those accepted/established by the industry, by Government regulations, and/or by relevant laws should also be submitted. For any particular commodity contract, the specific attributes that must be enumerated depend upon the individual characteristics of the underlying commodity. These may include, for example, the following items: grade, quality, purity, weight, class, origin, growth, issuer, originator, maturity window, coupon rate, source, hours of trading, etc. If the terms of the contract provide for the delivery of multiple qualities of a specific attribute of the commodity having different cash market values, then a "par" quality should be specified with price differentials applicable to the "non-par" qualities that reflect discounts or premiums commonly observed or expected to occur in the cash market for that commodity.

(B) *Delivery Points and Facilities:* Delivery point/area specifications should provide for futures delivery at a single location or at multiple locations where the underlying cash commodity is normally transacted or stored and where there exists a viable cash market(s). If multiple delivery points are specified and the value of the commodity differs between these locations, contract terms should include price differentials that reflect usual differences in value between the different delivery locations. If the price relationships among the delivery points are unstable and a designated contract market chooses to adopt fixed locational price differentials, such differentials should fall within the range of commonly observed or expected commercial price differences. In this regard, any price differentials must be supported with cash price data for the delivery location(s). The terms and conditions of the contracts also should specify, as appropriate, any conditions the delivery facilities and/or delivery facility operators must meet in order to be eligible for delivery. Specification of any requirements for delivery facilities also should consider the extent to which ownership of such facilities is concentrated and whether the level of concentration would be susceptible to manipulation of the futures contract's prices. Commodity contracts also should specify appropriately detailed delivery procedures that describe the responsibilities of deliverers, receivers and any required third parties in carrying out the delivery process. Such responsibilities could include allocation between buyer and seller of all associated costs such as load-out, document preparation, sampling, grading, weighing, storage, taxes, duties, fees, drayage, stevedoring, demurrage, dispatch, etc. Required accreditation for third-parties also should be detailed. These procedures should seek to minimize or eliminate any impediments to making or taking delivery by both deliverers and takers of delivery to help ensure convergence of cash and futures at the expiration of a futures delivery month.

(C) *Delivery Period and Last Trading Day:* An acceptable specification of the delivery period would allow for sufficient time for deliverers to acquire the deliverable commodity and make it available for delivery, considering any restrictions or requirements imposed by the designated contract market. Specification of the last trading day for expiring contracts should consider whether adequate time remains after the last trading day to allow for delivery on the contract.

(D) *Contract Size and Trading Unit:* An acceptable specification of the delivery unit and/or trading unit would be a contract size that is consistent with customary transactions, transportation or storage amounts in the cash market (e.g., the contract size may be reflective of the amount of the commodity that represents a pipeline, truckload or railcar shipment). For purposes of increasing market liquidity, a designated contract market may elect to specify a contract size that is smaller than the typical commercial transaction size, storage unit or transportation size. In such cases, the commodity contract should include procedures that allow futures traders to easily take or make delivery on such a contract with a smaller size, or, alternatively, the designated contract market may adopt special provisions requiring that delivery be made only in multiple contracts to accommodate reselling the commodity in the cash market. If the latter provision is adopted, contract terms should be adopted to minimize the potential for default in the delivery process by ensuring that all contracts remaining open at the close of trading in expiring delivery months can be combined to meet the required delivery unit size. Generally, contract sizes and trading units must be determined after a careful analysis of relevant cash market trading practices, conditions and deliverable supply estimates, so as to ensure that the underlying market commodity market and available supply sources are able to support the contract sizes and trading units at all times.

(E) *Delivery Pack:* The term "delivery pack" refers to the packaging standards (e.g., product may be delivered in burlap or polyethylene bags stacked on wooden

pallets) or non-quality related standards regarding the composition of commodity within a delivery unit (e.g., product must all be imported from the same country or origin). An acceptable specification of the delivery pack or composition of a contract's delivery unit should reflect, to the extent possible, specifications commonly applied to the commodity traded or transacted in the cash market.

(F) *Delivery Instrument:* An acceptable specification of the delivery instrument (*e.g.,* warehouse receipt, depository certificate or receipt, shipping certificate, bill of lading, in-line transfer, book transfer of securities, etc.) would provide for its conversion into the cash commodity at a commercially-reasonable cost. Transportation terms (*e.g.,* FOB, CIF, freight prepaid to destination) as well as any limits on storage or certificate daily premium fees should be specified. These terms should reflect cash market practices and the customary provision for allocating delivery costs between buyer and seller.

(G) *Inspection Provisions:* Any inspection/certification procedures for verifying compliance with quality requirements or any other related delivery requirements (*e.g.,* discounts relating to the age of the commodity, etc.) should be specified in the contract rules. An acceptable specification of inspection procedures would include the establishment of formal procedures that are consistent with procedures used in the cash market. To the extent that formal inspection procedures are not used in the cash market, an acceptable specification would contain provisions that assure accuracy in assessing the commodity, that are available at a low cost, that do not pose an obstacle to delivery on the contract and that are performed by a reputable, disinterested third party or by qualified designated contract market employees. Inspection terms also should detail which party pays for the service, particularly in light of the possibility of varying inspection results.

(H) *Delivery (Trading) Months:* Delivery months should be established based on the risk management needs of commercial entities as well as the availability of deliverable supplies in the specified months.

(I) *Minimum Price Fluctuation (Minimum Tick):* The minimum price increment (tick) should be set at a level that is equal to, or less than, the minimum price increment commonly observed in cash market transactions for the underlying commodity. Specifying a futures' minimum tick that is greater than the minimum price increment in the cash market can undermine the risk management utility of the futures contract by preventing hedgers from efficiently establishing and liquidating futures positions that are used to hedge anticipated cash market transactions or cash market positions.

(J) *Maximum Price Fluctuation Limits:* Designated contract markets may adopt price limits to: (*1*) Reduce or constrain price movements in a trading day that may not be reflective of true market conditions but might be caused by traders overreacting to news; (*2*) Allow additional time for the collection of margins in times of large price movements; and (*3*) Provide a "cooling-off" period for futures market participants to respond to bona fide changes in market supply and demand fundamentals that would lead to large cash and futures price changes. If price limit provisions are adopted, the limits should be set at levels that are not overly restrictive in relation to price movements in the cash market for the commodity underlying the futures contract.

(K) *Speculative Limits:* Specific information regarding the establishment of speculative position limits are set forth in part 151 of the Commission's regulations.

(L) *Reportable Levels:* Refer to § 15.03 of the Commission's regulations.

(M) *Trading Hours:* Should be set by the designated contract market to delineate each trading day.

(c) *Futures Contracts Settled by Cash Settlement.* (1) Cash settlement is a method of settling certain futures or option contracts whereby, at contract expiration, the contract is settled by cash payment in lieu of physical delivery of the commodity or instrument underlying the contract. An acceptable specification of the cash settlement price for commodity futures and option contracts would include rules that fully describe the essential economic characteristics of the underlying commodity (e.g., grade, quality, weight, class, growth, issuer, maturity, source, rating, description of the underlying index and index's calculation methodology, etc.), as well as how the final settlement price is calculated. In addition, the rules should clearly specify the trading months and hours of trading, the last trading day, contract size, minimum price change (tick size) and any limitations on price movements (e.g., price limits or trading halts).

(2) Cash settled contracts may be susceptible to manipulation or price distortion. In evaluating the susceptibility of a cash-settled contract to manipulation, a designated contract market must consider the size and liquidity of the cash market that underlies the listed contract. In particular, situations susceptible to manipulation include those in which the volume of cash market transactions and/or the number of participants contacted in determining the cash-settlement price are very low. Cash-settled contracts may create an incentive to manipulate or artificially influence the data from which the cash-settlement price is derived or to exert undue influence on the cash-settlement price's computation in order to profit on a futures position in that commodity. The utility of a cash-settled contract for risk management and price discovery would be significantly impaired if the cash settlement price is not a reliable or robust indicator of the value of the underlying commodity or instrument. Accordingly, careful consideration should be given to the potential for manipulation or distortion of the cash settlement price, as well as the reliability of that price as an indicator of cash market values. Appropriate consideration also should be given to the commercial acceptability, public availability, and timeliness of the price series that is used to calculate the cash settlement price. Documentation demonstrating that the settlement price index is a reliable indicator of market values and conditions and is commonly used as a reference index by industry/market agents should be provided. Such documentation may take on various forms, including carefully documented interview results with knowledgeable agents.

(3) Where an independent, private-sector third party calculates the cash settlement price series, a designated contract market must consider the need for a licensing agreement that will ensure the designated contract market's rights to the use of the price series to settle the listed contract.

(i) Where an independent, private-sector third party calculates the cash settlement price series, the designated contract market should verify that the third party utilizes business practices that minimize the opportunity or incentive to manipulate the cash-settlement price series. Such safeguards may include lock-downs, prohibitions against derivatives trading by employees, or public dissemination of the names of sources and the price quotes they provide. Because a cash-settled contract may create an incentive to manipulate or artificially influence the underlying market from which the cash-settlement price is derived or to exert undue influence on the cash-settlement computation in order to profit on a futures position in that commodity, a designated contract market should, whenever practicable, enter into an information-sharing agreement with the third-party provider which would enable the designated contract market to better detect and prevent manipulative behavior.

(ii) Where a designated contract market itself generates the cash settlement price series, the designated contract market should establish calculation procedures that safeguard against potential attempts to artificially influence the price. For example, if the cash settlement price is derived by the designated contract market based on a survey of cash market sources, the designated contract market should maintain a list of such entities which all should be reputable sources with knowledge of the cash market. In addition, the sample of sources polled should be representative of the cash market, and the poll should be conducted at a time when trading in the cash market is active. The cash-settlement survey should include a minimum of four independent entities if such sources do not take positions in the commodity (e.g., if the survey list is comprised exclusively of brokers) or at least eight independent entities if such sources trade for their own accounts (e.g., if the survey list is comprised of dealers or merchants).

(iii) The cash-settlement calculation should involve computational procedures that eliminate or reduce the impact of potentially unrepresentative data.

(iv) The cash settlement price should be an accurate and reliable indicator of prices in the underlying cash market. The cash settlement price also should be acceptable to commercial users of the commodity contract. The registered entity should fully document that the settlement price is accurate, reliable, highly regarded by industry/market agents, and fully reflects the economic and commercial conditions of the relevant designated contract market.

(v) To the extent possible, the cash settlement price should be based on cash price series that are publicly available and available on a timely basis for purposes of calculating the cash settlement price at the expiration of a commodity contract. A designated contract market should make the final cash settlement price and any other supporting information that is appropriate for release to the public, available to the public when cash settlement is accomplished by the derivatives clearing organization. If the cash settlement price is based on cash prices that are obtained from non-public sources (e.g., cash market surveys conducted by the designated contract market or by third parties on behalf of the designated contract market), a designated contract market should make available to the public as soon as possible after a contract month's expiration the final cash settlement price as well as any other supporting information that is appropriate or feasible to make available to the public.

(4) Contract Terms and Conditions Requirements for Futures Contracts Settled by Cash Settlement

(i) An acceptable specification of the terms and conditions of a cash-settled commodity contract will also set forth the trading months, last trading day, contract size, minimum price change (tick size) and daily price limits, if any.

(A) *Commodity Characteristics:* The terms and conditions of a commodity contract should describe the commodity underlying the contract.

(B) *Contract Size and Trading Unit:* An acceptable specification of the trading unit would be a contract size that is consistent with customary transactions in the cash market. A designated contract market may opt to set the contract size smaller than that of standard cash market transactions.

(C) *Cash Settlement* Procedure: The cash settlement price should be reliable, acceptable, publicly available, and reported in a timely manner as described in paragraphs (c)(3)(iv) and (c)(3)(v) of this appendix C.

(D) *Pricing Basis and Minimum Price Fluctuation (Minimum Tick):* The minimum price increment (tick) should be set a level that is equal to, or less than, the minimum price increment commonly observed in cash market transactions for the underlying commodity. Specifying a futures' minimum tick that is greater than the minimum price increment in the cash *market* can undermine the risk management utility of the futures contract by preventing hedgers from efficiently establishing and liquidating futures positions that are used to hedge anticipated cash market transactions or cash market positions.

(E) *Maximum Price Fluctuation Limits:* Designated contract markets may adopt price limits to: (*1*) Reduce or constrain price movements in a trading day that may not be reflective of true market conditions but might be caused by traders overreacting to news; (*2*) Allow additional time for the collection of margins in times of large price movements; and (*3*) Provide a "cooling-off" period for futures market participants to respond to bona fide changes in market supply and demand fundamentals that would lead to large cash and futures price changes. If price-limit provisions are adopted, the limits should be set at levels that are not overly restrictive in relation to price movements in the cash market for the commodity underlying the futures contract. For broad-based stock index futures contracts, rules should be adopted that coordinate with New York Stock Exchange ("NYSE") declared Circuit Breaker Trading Halts and would recommence trading in the futures contract only after trading in the majority of the stocks underlying the index has recommenced.

(F) *Last Trading Day:* Specification of the last trading day for expiring contracts should be established such that it occurs before publication of the underlying third-party price index or determination of the final settlement price. If the designated contract market chooses to allow trading to occur through the determination of the final settlement price, then the designated contract market should show that futures trading would not distort the final settlement price calculation.

(G) *Trading Months:* Trading months should be established based on the risk management needs of commercial entities as well as the availability of price and other data needed to calculate the cash settlement price in the specified months. Specification of the last trading day should take into consideration whether the volume of transactions underlying the cash settlement price would be unduly limited by occurrence of holidays or traditional holiday periods in the cash market. Moreover, a contract should not be listed past the date for which the designated contract market has access to use a proprietary price index for cash settlement.

(H) *Speculative Limits:* Specific rules and policies for speculative position limits are set forth in the part 151 of the Commission's regulations.

(I) *Reportable Levels:* Refer to § 15.03 of the Commission's regulations.

(J) *Trading Hours:* Should be set by the designated contract market to delineate each trading day.

(d) *Options on a Futures Contract.* (1) The Commission's experience with the oversight of trading in futures option contracts indicates that most of the terms and conditions associated with such trading do not raise any regulatory concerns or issues. The Commission has found that the following terms do not affect an option contract's susceptible to manipulation or its utility for risk management. Thus, the Commission believes that, in most cases, any specification of the following terms would be acceptable; the only requirement is that such terms be specified in an automatic and objective manner in the option contract's rules:

- Exercise method;
- Exercise procedure (if positions in the underlying futures contract are established via book entry);
- Strike price listing provisions, including provisions for listing strike prices on a discretionary basis;
- Strike price intervals;
- Automatic exercise provisions;
- Contract size (unless not set equal to the size of the underlying futures contract); and
- Option minimum tick should be equal to or smaller than that of the underlying futures contract.

(2) Option Expiration & Last Trading Day. For options on futures contracts, specification of expiration dates should consider the relationship of the option expiration date to the delivery period for the underlying futures contract. In particular, an assessment should be made of liquidity in the underlying futures market to assure that any futures contracts acquired through exercise can be liquidated without adversely affecting the orderly liquidation of futures positions or increasing the underlying futures contract's susceptibility to manipulation. When the underlying futures contract exhibits a very low trading activity during an expiring delivery month's final trading days or has a greater risk of price manipulation than other contracts, the last trading day and expiration day of the option should occur prior to the delivery period or the settlement date of the underlying future. For example, the last trading day and option expiration day might appropriately be established prior to first delivery notice day for option contracts with underlying futures contracts that have very limited deliverable supplies. Similarly, if the futures contract underlying an option contract is cash settled using cash prices from a very limited number of underlying cash market transactions, the last trading and option expiration days for the option contract might appropriately be established prior to the last trading day for the futures contract.

(3) Speculative Limits. In cases where the terms of an underlying futures contract specify a spot-month speculative position limit and the option contract expires during, or at the close of, the futures contract's delivery period, the option contract should include a spot-month speculative position limit provision that requires traders to combine their futures and option position and be subject to the limit established for the futures contract. Specific rules and policies for speculative position limits are set forth in part 151 of the Commission's regulations.

(4) Options on Physicals Contracts.

(i) Under the Commission's regulations, the term "option on physicals" refers to option contracts that do *not* provide for exercise into an underlying futures contract. Upon exercise, options on physicals can be settled via physical delivery of the underlying commodity or by a cash payment. Thus, options on physicals raise many of the same issues associated with trading in futures contracts regarding adequacy of deliverable supplies or acceptability of the cash settlement price series. In this regard, an option that is cash settled based on the settlement price of a futures contract would be considered an "option on physicals" and the futures settlement price would be considered the cash price series.

(ii) In view of the above, acceptable practices for the terms and conditions of options on physicals contracts include, as appropriate, those practices set forth above for physical-delivery or cash-settled futures contracts plus the practices set forth for options on futures contracts.

(e) *Security Futures Products.* (1) The listing of security futures products are

governed by the special requirements of part 41 of the Commission's regulations. A designated contract market should follow the appropriate guidance regarding physically delivered security futures products that are settled through physical delivery or cash settlement.

(f) *Non-Price Based Futures Contracts.* (1) Non-price based contracts are typically construed as binary options, but also may be designed to function similar to traditional futures or option contracts.

(2) Where the contract is settled to a third party cash-settlement series, the designated contract market should consider the nature and sources of the data comprising the cash-settlement calculation, the computational procedures, and the mechanisms in place to ensure the accuracy and reliability of the index value. The evaluation also considers the extent to which the third party has, or will adopt, safeguards against unauthorized or premature release of the index value itself or any key data used in deriving the index value.

(3) The designated contract market should follow the guidance in paragraph (c)(4) (Contract Terms and Conditions Requirements for Futures Contracts Settled by Cash Settlement) of this appendix C to meet compliance.

(g) *Swap Contracts.* (1) In general, swap contracts are an agreement to exchange a series of cash flows over a period of time based on reference price indices. When listing a swap for trading, a swap execution facility or designated contract market must determine that the reference price indices used for its contracts are not readily susceptible to manipulation. Accordingly, careful consideration should be given to the potential for manipulation or distortion of the cash settlement price, as well as the reliability of that price as an indicator of cash market values. Appropriate consideration also should be given to the commercial acceptability, public availability, and timeliness of the price series that is used to calculate the cash settlement price. Documentation demonstrating that the settlement price index is a reliable indicator of market values and conditions and is highly regarded by industry/market agents should be provided. Such documentation may take on various forms, including carefully documented interviews with principal market trading agents, pricing experts, marketing agents, etc. Appropriate consideration also should be given to the commercial acceptability, public availability, and timeliness of the price series that is used to calculate the cash flows of the swap.

(i) Where an independent, private-sector third party calculates the referenced price index, the designated contract market should verify that the third party utilizes business practices that minimize the opportunity or incentive to manipulate the cash-settlement price series. Such safeguards may include lock-downs, prohibitions against derivatives trading by employees, or public dissemination of the names of sources and the price quotes they provide. Because a cash-settled contract may create an incentive to manipulate or artificially influence the underlying market from which the cash-settlement price is derived or to exert undue influence on the cash-settlement computation in order to profit on a futures position in that commodity, a designated contract market should, whenever practicable, enter into an information-sharing agreement with the third-party provider which would enable the designated contract market to better detect and prevent manipulative behavior.

(ii) Where a designated contract market itself generates the cash settlement price series, the designated contract market should establish calculation procedures that safeguard against potential attempts to artificially influence the price. For example, if the cash settlement price is derived by the designated contract market based on a survey of cash market sources, the designated contract market should maintain a list of such entities which all should be reputable sources with knowledge of the cash market. In addition, the sample of sources polled should be representative of the cash market, and the poll should be conducted at a time when trading in the cash market is active. The cash-settlement survey should include a minimum of four independent entities if such sources do not take positions in the commodity (e.g., if the survey list is comprised exclusively of brokers) or eight independent entities if such sources trade for their own accounts (e.g., if the survey list is comprised of dealers or merchants).

(iii) The cash-settlement calculation should involve appropriate computational procedures that eliminate or reduce the impact of potentially unrepresentative data.

(2) Speculative Limits: Specific rules and policies for speculative position limits are set forth in part 151 of the Commission's regulations.

(3) Intraday Market Restrictions*:* Designated contract markets or swap execution facilities must have in place intraday market restrictions that pause or halt trading in the event of extraordinary price moves that may result in distorted prices. Such restrictions need to be coordinated with other markets that may be a proxy or a substitute for the contracts traded on their facility. For example, coordination with NYSE rule 80.B Circuit Breaker Trading Halts. The designated contract market or swap execution facility must adopt rules to specifically address who is authorized to declare an emergency; how the designated contract market or swap execution facility will notify the Commission of its decision that an emergency exists; how it will address conflicts of interest in the exercise of emergency authority; and how it will coordinate trading halts with markets that trade the underlying price reference index or product.

(4) *Settlement Method.* The designated contract market or swap execution facility should follow the guidance in paragraph (c)(4) (Contract Terms and Conditions Requirements for Futures Contracts Settled by Cash Settlement) of this appendix C to meet compliance, or paragraph (b)(2) (Contract Terms and Conditions Requirements for Futures Contracts Settled by Physical Delivery) of this appendix C, as appropriate.

By the Commission.

Dated: December 1, 2010.

David A. Stawick,

Secretary.

Appendices to Core Principles and Other Requirements for Designated Contract Markets—Commission Voting Summary and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn and Chilton voted in the affirmative; Commissioners Sommers and O'Malia voted in the negative.

Appendix 2—Statements of Commissioners

Statement of Chairman Gary Gensler

I support the proposed rulemaking to update our rules and guidance with regard to designated contract markets (DCMs). The Dodd-Frank Act updated the statutory language for core principles for contract markets, increasing the number to 23 and modifying existing core principles. Thus, it is important to update our rules and guidance to reflect those changes. Further, the Dodd-Frank Act allows DCMs to—for the first time—offer swaps in addition to futures and commodity options, and this proposal addresses that broader scope. I believe it is also important to update the rules and guidance for DCMs in light of the fact that we will be promulgating rules and guidance for swap execution facilities, and many of the core principles are similar. This rule will help to promote transparency and market integrity.

Dissent of Commissioner Jill E. Sommers and Commissioner Scott D. O'Malia

We respectfully dissent from the action taken today by the Commission to issue proposed regulations relating to "Core Principle and Other Requirements for Designated Contract Markets" (DCMs). While we each dissent for a number of reasons, we join in writing to express our disagreement with the Commission's narrow interpretation of Core Principle 9—*Execution of Transactions,* and request comment on the implications of such a narrow interpretation of Core Principle 9 for markets and market participants.

In relevant part, Core Principle 9 states: "The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade." Core Principle 9 does not say that every contract listed for trading on the board of trade must trade in the centralized market. Nor does it require that every contract listed for trading serve a price discovery function. Rather, it requires a mechanism for protecting the price discovery function for those contracts that do trade in the centralized market. With these proposed regulations, the Commission is interpreting

Core Principle 9 in a way that does not comport with the plain language of the statute.

Over the past decade, a long list of non-standardized, illiquid contracts in the energy sphere have been executed off-exchange and cleared on-exchange through the exchange of futures for swaps (EFS) mechanism. The availability of clearing for these contracts added a level of safety, soundness and transparency to the marketplace that did not exist before. If the Commission had not permitted these contracts to be listed for clearing through the EFS process it is highly doubtful that the level of clearing that exists today for these contracts would have been achieved, and highly likely that this activity would have remained opaque to market participants and regulators. Congress was aware of this specialized marketplace when it amended Core Principle 9. If Congress had intended to outlaw this activity it could have done so by explicitly requiring all DCM contracts to trade in the centralized market. It did not do so. In fact, Core Principle 9 explicitly allows boards of trade to authorize certain types of contracts that have traditionally been traded off the centralized market, including EFS.

Finally, the full ramifications of the Commission's overly-restrictive reading of Core Principle 9 are not yet known, but are likely to be of great consequence to many market participants. Clearing helps mitigate risk, and the movement of illiquid contracts into a cleared environment was a positive development for our markets and market participants. Clearing contracts listed on a DCM also permits market participants to take advantage of certain efficiencies, like portfolio margining. Now, hundreds of contracts that are listed for trading on DCMs and cleared likely will no longer enjoy that status. The assumption appears to be that these contracts will simply be listed for trading on a swap execution facility (SEF) and cleared, without any disruption to markets or market participants. We are not willing to make such a bold assumption, especially when the Commission has not yet proposed regulations relating to listing and trading requirements for SEFs.

We would have preferred that the proposed regulations preserve the functioning of this specialized marketplace; a marketplace that has not adversely affected price discovery for any contract currently traded in the centralized market.

[FR Doc. 2010–31458 Filed 12–21–10; 8:45 am]

BILLING CODE 6351–01–P

Federal Register

Wednesday,
December 22, 2010

Part III

Commodity Futures Trading Commission

17 CFR Parts 23 and 155

Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties; Proposed Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 23 and 155

RIN 3038–AD25

Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rules.

SUMMARY: The Commodity Futures Trading Commission ("Commission" or "CFTC") is proposing for comment new rules under Section 4s(h) of the Commodity Exchange Act ("CEA") to implement provisions of Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") relating generally to external business conduct standards for swap dealers and major swap participants.

DATES: Written comments must be received on or before February 22, 2011.

ADDRESSES: You may submit comments, identified by RIN number 3038–AD25, by any of the following methods:

- *Agency Web site, via its Comments Online process: http://comments.cftc.gov/.* Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.
- *Hand Delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *http://www.cftc.gov.* You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's Regulations.[1]

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from *http://www.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

[1] 17 CFR 145.9.

FOR FURTHER INFORMATION CONTACT: Phyllis J. Cela, Deputy Director and Chief Counsel, Division of Enforcement, or Peter Sanchez, Special Counsel, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581. Telephone number: (202) 418–7642.

SUPPLEMENTARY INFORMATION: The Commission is proposing §§ 23.400–402, 23.410, 23.430–434, 23.440, 23.450–451, and 155.7 under Section 4s(h) of the CEA. The Commission is soliciting comments on all aspects of the proposed rules and will carefully consider any comments received.

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I. Introduction

On July 21, 2010, President Obama signed the Dodd-Frank Act.[3] Title VII of the Dodd-Frank Act amended the CEA [4] to establish a comprehensive new regulatory framework for swaps and certain security-based swaps. The legislation was enacted to reduce risk, increase transparency, and promote

[2] The proposed swap execution standards § 155.7 would apply to any Commission registrant, including a swap dealer or major swap participant, handling an order for a swap that is available for trading on a designated contract market or a swap execution facility.

[3] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010) ("Dodd-Frank Act"). The text of the Dodd-Frank Act may be accessed at *http://www.cftc.gov/LawRegulation/OTCDERIVATIVES/index.htm.*

[4] 7 U.S.C. 1 *et seq.,* as amended by the Dodd-Frank Act. All references to the CEA are to the CEA as amended by the Dodd-Frank Act.

market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight.

Section 731 of the Dodd-Frank Act amends the CEA by adding Section 4s(h). This section provides the Commission with both mandatory and discretionary rulemaking authority to impose business conduct requirements on swap dealers and major swap participants in their dealings with counterparties, including "Special Entities." [5] Such entities are generally defined to include Federal agencies, States and political subdivisions, employee benefit plans as defined under the Employee Retirement Income Security Act of 1974 ("ERISA"), governmental plans as defined under ERISA, and endowments. Congress granted the Commission broad discretionary authority to promulgate business conduct requirements, as appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the CEA.[6]

A. Business Conduct Standards—Dealing With Counterparties Generally

Section 4s(h)(1) grants the Commission authority to promulgate rules applicable to swap dealers and major swap participants related to, among other things: Fraud, manipulation and abusive practices involving swaps; diligent supervision; [7] and adherence to position limits.[8] The proposed rules incorporate the anti-fraud provision for swap dealers and major swap participants contained in Section 4s(h)(4), and also would prohibit swap dealers and major swap participants from disclosing confidential counterparty information, or front running or trading ahead of counterparty transactions. The Commission also proposes to adopt certain counterparty-specific supervisory and compliance duties including a "know your counterparty" requirement and policies and procedures to enforce these business conduct rules and to prevent evasion of the requirements of the CEA and Commission Regulations.[9]

Section 4s(h)(3) directs the Commission to promulgate rules that would require swap dealers and major swap participants to: Verify the eligibility of their counterparties; disclose to their counterparties material information about swaps, including material risks, characteristics, incentives and conflicts of interest; and provide counterparties with information concerning the daily mark for swaps. The Commission also is directed to establish a duty for swap dealers and major swap participants to communicate in a fair and balanced manner based on principles of fair dealing and good faith.

In addition, using its discretionary authority under 4s(h)(3)(D), the Commission is proposing to require that swap dealers and major swap participants comply with certain disclosure requirements based on certain clearing provisions of the Dodd-Frank Act and the CEA.[10]

The Commission proposes to use its rulemaking authority under Section 4s(h) to promulgate several requirements adapted from analogous standards and practices applicable to certain financial market professionals. In drafting the proposed rules, the Commission considered existing requirements for market intermediaries under the CEA, Commission Regulations and the Federal securities laws, as well as self-regulatory organization ("SRO") rules.[11] The Commission also considered standards adopted by prudential regulators, industry recommendations concerning "best practices" and requirements applicable under foreign regulatory regimes.[12] To the extent practicable, the Commission has modeled the proposed rules on these existing rules and standards. Among the proposed requirements that are based on these analogous rules and standards are: An institutional suitability requirement for swap dealers and major swap participants when making recommendations to counterparties; swap execution standards that would apply to all Commission registrants, including swap dealers, for swaps available for trading on a designated contract market ("DCM") or swap execution facility ("SEF"); and, as part of a swap dealer's or major swap participant's duty to disclose the material risks and characteristics of the swap, a duty to provide a scenario analysis of potential exposure for high-risk complex bilateral swaps, and on an "opt-in" basis scenario analysis for bilateral swaps not available for trading on a DCM or SEF.[13] The Commission also is proposing that both swap dealers and independent representatives of Special Entities, including those that are registered with the Commission as

[5] Congress enacted a virtually identical provision in Dodd-Frank Act Section 764 which adds Section 15F(h) to the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78a *et seq.*). All references to the Exchange Act are to the Exchange Act, as amended by the Dodd-Frank Act. Section 712(a)(1) of the Dodd-Frank Act requires that the Commission consult with the Securities and Exchange Commission and prudential regulators in promulgating rules pursuant to Section 4s(h).

[6] *See* Section 4s(h)(3)(D) ("Business conduct requirements adopted by the Commission shall establish such other standards and requirements as the Commission may determine are appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this Act"); *see also* Sections 4s(h)(1)(D), 4s(h)(5)(B) and 4s(h)(6).

[7] *See also* Regulations Establishing and Governing the Duties of Swap Dealers and Major Swap Participants, 75 FR 71397, Nov. 23, 2010 (proposed § 23.602 imposing additional diligent supervision requirements on swap dealers and major swap participants).

[8] *Id.* (proposed § 23.601 imposing requirements for swap dealers and major swap participants related to monitoring position limits).

[9] Dodd-Frank Act Sections 722(d) (amending CEA Section 2(i)), 723(a)(3) (amending CEA Sections 2(h)(4)(A) and 2(h)(7)(F)) and 741(b)(11) (amending CEA Section 6(e)) amend the CEA by prohibiting a swap dealer or major swap participant from "knowingly or recklessly" evading certain provisions of the CEA.

[10] *See* Sections 2(h)(7)(A) and (B) of the CEA.

[11] In this regard, the Commission has looked to the requirements imposed by the National Futures Association ("NFA"), CME Group, Inc. ("CME"), IntercontinentalExchange, Inc. ("ICE"), Financial Industry Regulatory Authority, Inc. ("FINRA") and the Municipal Securities Rulemaking Board ("MSRB"). SRO rules, in particular, provide a useful model because historically the Commission has relied on SROs to regulate conduct that is unethical or otherwise undesirable, but may not be fraudulent. *See, e.g.,* NFA Compliance Rule 2–4, Just and Equitable Principles of Trade.

[12] *See, e.g.,* International Organization of Securities Commissions, "Operational and Financial Risk Management Control Mechanisms for Over-the-Counter Derivatives Activities of Regulated Securities Firms" (Jul. 1994); Derivatives Policy Group, "Framework for Voluntary Oversight" (Mar. 1995) ("DPG Framework"), available at *http://www.riskinstitute.ch/137790.htm;* The Counterparty Risk Management Policy Group, "Improving Counterparty Risk Management Practices" (June 1999) (CRMPG is composed of OTC derivatives dealers including Bank of America, BNP Paribas, Citigroup, Goldman Sachs, HSBC, JP Morgan and Morgan Stanley); The Counterparty Risk Management Policy Group, "Toward Greater Financial Stability: A Private Sector Perspective—The Report of the Counterparty Risk Management Policy Group II" (Jul. 27, 2005); The Counterparty Risk Management Policy Group, "Containing Systemic Risk: The Road to Reform, The Report of the CRMPG III (Aug. 6, 2008) ("CRMPG III Report"), available at *http://www.crmpolicygroup.org/.*

[13] The CRMPG III Report identifies the characteristics of high-risk complex bilateral swaps to be: The degree and nature of leverage, the potential for periods of significantly reduced liquidity, and the lack of price transparency. The CRMPG III Report, at 54–57.

commodity trading advisors ("CTAs"), be subject to certain restrictions with respect to political contributions to certain governmental Special Entities ("pay-to-play").

B. Business Conduct Standards—Dealing With Counterparties That Are Special Entities

Section 4s(h)(4) requires that a swap dealer who "acts as an advisor to a Special Entity" must act in the "best interests" of the Special Entity and undertake "reasonable efforts" to obtain information necessary to determine that a recommended swap is in the best interests of the Special Entity. The Commission proposes to incorporate the statutory text in a proposed rule and to specify that certain swaps-related conduct would be included within the meaning of the term "act as an advisor to a Special Entity."

Section 4s(h)(5) authorizes the Commission to establish duties for swap dealers and major swap participants that offer swaps or enter into swaps with Special Entities, including requiring a swap dealer or major swap participant to have a reasonable basis to believe that the Special Entity has a representative, independent of the swap dealer or major swap participant, that meets certain criteria, including having sufficient knowledge to evaluate the transaction and risks, undertaking a duty to act in the "best interests" of the Special Entity, and being subject to pay-to-play restrictions. The statute requires swap dealers and major swap participants to disclose in writing the capacity in which they are acting before initiating a transaction with a Special Entity. The Commission is proposing to establish the duties described in Section 4s(h)(5) for swap dealers and major swap participants dealing with all categories of Special Entities.

The Dodd-Frank Act requires the Commission to promulgate the mandatory rules by July 15, 2011.[14] The Commission requests comment on all aspects of the proposed rules, as well as comment on the specific provisions and issues highlighted in the discussion below.

C. Consultations With Stakeholders

Commission staff held more than two dozen external consultations[15] with stakeholders representing a broad spectrum of views on business conduct standards.[16] Commission staff conducted many of these consultations jointly with Securities and Exchange Commission ("SEC") staff. The consultations included discussions of the general nature of counterparty relationships today, counterparty practices unique to different types of swaps and asset classes, and interpretive recommendations concerning certain provisions of Section 4s(h).

D. Consultation and Coordination With the SEC, Prudential Regulators and Other Domestic and Foreign Regulatory Authorities

In compliance with Sections 712(a)(1) and 752(a)[17] of the Dodd-Frank Act, Commission staff has consulted and coordinated with the SEC, prudential regulators and foreign authorities. Commission staff has worked closely with SEC staff in the development of the proposed rules. The Commission's objective was to establish consistent requirements for CFTC and SEC registrants to the extent practicable given the differences in existing regulatory regimes and approaches. With respect to the prudential regulators, Commission staff consulted and considered certain existing business conduct standards that apply to banks. Commission staff also consulted informally with staff from the Department of Labor ("DOL") and the Internal Revenue Service with respect to certain Special Entity definitions and the intersection of their regulatory requirements with the Dodd-Frank Act business conduct provisions.

In addition, Commission staff consulted with foreign authorities, specifically, European Commission and United Kingdom Financial Services Authority staff. Staff also considered the existing and ongoing work of the International Organization of Securities Commissions ("IOSCO"). Staff consultations with foreign authorities revealed many similarities in the proposed rules and foreign regulatory requirements.[18]

II. Proposed Rules for Swap Dealers and Major Swap Participants Dealing With Counterparties

The proposed business conduct rules dealing with counterparty relationships are contained in subpart H of new part 23 of the Commission's regulations.[19] While the CEA and other provisions of the Commission's rules will govern swap transactions and the business of swap dealers and major swap participants, subpart H will contain the principal regulations governing sales practices and counterparty relationships. A section-by-section description of the proposed rules follows.

A. Proposed §§ 23.400, 23.401 and 23.402—Scope, Definitions and General Provisions

These proposed rules set out the scope, definitions and general provisions that apply, as appropriate, to subpart H of new part 23 of the Commission's regulations. The "scope" provision, under proposed § 23.400, states that the rules in subpart H apply to swap dealers and major swap participants and that the rules do not limit the applicability of other provisions of the CEA, Commission Regulations or other laws.[20] So, for example, in addition to the anti-fraud provision that would apply only to swap dealers and major swap participants in proposed § 23.410, swap dealers and major swap participants will be subject to all other applicable anti-fraud provisions in the CEA and

[14] *See* Dodd-Frank Act Sections 712 and 754.

[15] A list of Commission staff consultations in connection with this proposed rulemaking is posted on the Commission's Web site, available at *http://www.cftc.gov/LawRegulation/DoddFrankAct/ExternalMeetings/index.htm.*

[16] The Commission received several written submissions from the public including: National Futures Association, Aug. 25, 2010 ("NFA Letter"); Swap Financial Group, Aug. 9, 2010 ("SFG Letter"); Swap Financial Group, "Briefing for SEC/CFTC Joint Working Group" Aug. 9, 2010 ("SFG Presentation"); Christopher Klem, Ropes & Gray LLP, Sept. 2, 2010 ("Ropes & Gray Letter"); American Benefits Council, Sept. 8, 2010 ("ABC Letter"); American Benefits Council and the Committee on Investment of Employee Benefit Assets, Oct. 19, 2010 ("ABC/CIEBA Letter"); and Securities Industry and Financial Markets Association and International Swaps and Derivatives Association, Oct. 22, 2010 ("SIFMA/ISDA Letter"), available at *http://www.cftc.gov/LawRegulation/DoddFrankAct/Rulemakings/OTC_3_BusConductStandardsCP.html.*

[17] Dodd-Frank Act Section 752(a) states in part, "the Commodity Futures Trading Commission, the Securities and Exchange Commission, and the prudential regulators (as that term is defined in section 1a(39) of the [CEA]), as appropriate, shall consult and coordinate with foreign regulatory authorities on the establishment of consistent international standards with respect to the regulation (including fees) of swaps * * *."

[18] *See generally* European Union Markets in Financial Instruments Directive ("MiFID"), Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, available at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004L0039:20070921:EN:PDF;* European Union Market Abuse Directive ("Market Abuse Directive"), Directive 2006/6/EC of the European Parliament and of the Council of 28 January 2003 on market abuse, available at *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:096:0016:0016:EN:PDF.*

[19] The proposed swap execution § 155.7 would be promulgated in part 155. All the other proposed rules would appear in subpart H of new part 23.

[20] In addition to its obligations under the proposed rules, to the extent a swap dealer or major swap participant is required to be a member of a registered futures association it would be required to comply as well with the business conduct and other requirements of NFA and any other applicable SROs.

Commission Regulations, as appropriate.[21] The scope section also provides that, where appropriate, the rules also apply to swaps offered but not entered into. For example, the fair and balanced communications and fair dealing requirements in proposed § 23.433 apply to swap dealers and major swap participants with respect to both counterparties and prospective counterparties.

The proposed rules under subpart H will have most applicability when swap dealers and major swap participants have a pre-trade relationship with their counterparty, where that relationship includes discussions and negotiations that would allow a swap dealer or major swap participant to make appropriate disclosures and conduct due diligence. Indeed, when a swap is initiated on a DCM or SEF and the swap dealer or major swap participant does not know the counterparty's identity prior to execution, disclosure and due diligence obligations, such as the duties to verify counterparty eligibility under proposed § 23.430, to disclose material information under proposed § 23.431, and the duty to verify that a Special Entity has a qualified representative under proposed § 23.450, would not apply because there would be no basis on which to make those disclosures or opportunity to engage in discussions. However, when a swap dealer or major swap participant does not know the counterparty's identity pre-execution, but does become aware of the counterparty's identity post-execution of a bilateral swap, the swap dealer or major swap participant would still have certain specific duties such as the one to provide a daily mark in proposed § 23.431(c)(2), (3).

The Commission also proposes to define several terms for purposes of subpart H in proposed § 23.401. The term "counterparty" would include "prospective counterparty" as appropriate in the rules. The terms swap dealer and major swap participant would include anyone acting for or on behalf of such persons, including associated persons as defined in Section 1a(4) of the CEA. Proposed § 23.401 adopts the definition of Special Entity in Section 4s(h)(2). Additional terms are defined in the proposed rules relating to Special Entities.

The "general provisions" for subpart H that are specified in proposed § 23.402 include a requirement that swap dealers and major swap participants have policies and procedures reasonably designed to ensure compliance with the business conduct rules in subpart H and, in particular, to prevent a swap dealer or major swap participant from evading any provision of the CEA or Commission Regulations. For example, for a swap that is subject to mandatory clearing, a swap dealer or major swap participant should only be offering to enter into such a swap on an uncleared basis with a counterparty who has qualified for a valid end-user exception to the mandatory clearing of swaps.[22] The Commission expects that these policies and procedures would be part of a swap dealer's or major swap participant's overall system of supervision, compliance and risk management.[23]

Section 4s(h)(1)(B) gives the Commission the authority to prescribe rules relating to diligent supervision by swap dealers and major swap participants. In a separate release containing internal business conduct rules, the Commission has proposed comprehensive supervision and risk management program duties on swap dealers and major swap participants contained in new subpart J of part 23 of the Commission's Regulations.[24] Proposed § 23.402(b) would require swap dealers and major swap participants to diligently supervise their dealings with counterparties as required under subpart H in accordance with the diligent supervision requirements of subpart J.

Proposed § 23.402(c) would establish a "know your counterparty" requirement on swap dealers and major swap participants.[25] The proposed requirement would include the use of reasonable due diligence to know and retain a record of the essential facts concerning the counterparty, including information necessary to comply with the law, to service the counterparty, to implement a counterparty's special instructions, and to evaluate the counterparty's swaps experience and objectives. The proposed rule also would assist swap dealers and major swap participants in avoiding violations of Section 4c(a)(7) of the CEA which makes it "unlawful for any person to enter into a swap knowing, or acting in reckless disregard of the fact, that its counterparty will use the swap as part of a device, scheme, or artifice to defraud any third party."

Proposed § 23.402(d) would require swap dealers and major swap participants to keep a record showing the true name and address of each counterparty, as well as a counterparty's address and the same information for any other person guaranteeing the counterparty's performance or controlling the counterparty's positions. This proposed rule is based on existing § 1.37(a)(1)[26] of the Commission's Regulations which applies to futures commission merchants, introducing brokers and members of a designated contract market.

Another general provision, under proposed § 23.402(e), states that swap dealers and major swap participants that seek to rely on the representations of their counterparties to satisfy any requirements in the proposed rules must have a reasonable basis to believe that the representations are reliable under the circumstances. In addition, the representations must be sufficiently detailed to enable the swap dealer or major swap participant to reasonably conclude that the particular requirement is satisfied. Proposed § 23.402(e) would allow the parties to a swap to agree that such representations can be included in a master agreement[27] or other written agreement between the parties and that the representations can be deemed applicable or renewed, as appropriate, to subsequent swaps between the parties. For example, particular counterparty representations about its sophistication or financial wherewithal relevant to the institutional suitability obligation imposed on swap dealers and major swap participants in proposed § 23.434 may be contained in a master agreement, if agreed by the parties, and may be applied to subsequent swaps between the parties if the representations continue to be accurate

[21] *See, e.g.,* Section 4b of the CEA.

[22] Separately, the Commission is proposing rules detailing when a counterparty may elect to use the exception to mandatory clearing under section 2(h)(7)(A)(iii) of the CEA.

[23] Separately, the Commission is proposing rules detailing the supervision, compliance and risk management obligations for swap dealers and major swap participants. *See* 75 FR 71397, Nov. 23, 2010.

[24] *See* proposed §§ 23.600 and 23.602, 75 FR 71397, Nov. 23, 2010.

[25] This rule is based in part on NFA Compliance Rule 2–30, Customer Information and Risk Disclosure, which NFA has interpreted to impose "know your customer" duties, and has been a key component of NFA's customer protection regime. *See* NFA Interpretive Notice 9013.

[26] 17 CFR 1.37(a)(1).

[27] The Commission understands that swaps are generally governed by a master agreement and confirmation setting forth the relationship of the counterparties and the particulars of the transaction. Master agreements, which have typically been standard form agreements prepared by industry associations like the International Swaps and Derivatives Association ("ISDA"), include basic representations and covenants that are subject to negotiation by the parties and are supplemented with modifications to account for their specific interests. Master agreements contain terms that govern all succeeding swaps between the counterparties, and generally include provisions applicable to all swaps including: Payment netting, events of default, cross-default provisions, early termination events and closeout netting.

and relevant with respect to the subsequent swaps.

Proposed § 23.402(f) would provide flexibility to swap dealers, major swap participants and their counterparties to agree to a reliable means for making disclosures of material information. Furthermore, proposed § 23.402(g) would also allow swap dealers and major swap participants to use, where appropriate, standardized formats to make certain required disclosures of material information to their counterparties, and to include such standardized disclosures in a master or other written agreement between the parties, if agreed to by the parties. While standardized disclosures may be appropriate to meet certain disclosure obligations relating to the risks, characteristics, incentives and conflicts of interest related to a particular swap, it is unlikely that they would be adequate to meet all such disclosure duties. Swap dealers and major swap participants are cautioned to consider their disclosure obligations under the CEA and proposed rules with respect to each swap that they offer or enter into with a counterparty.

Finally, proposed § 23.402(h) would require swap dealers and major swap participants to create and retain a written record of their compliance with the requirements in subpart H. Such requirements would be part of the overall recordkeeping obligations imposed on swap dealers and major swap participants in the CEA and part 23 supbart F of the Commission's Regulations, would be maintained in accordance with § 1.31 [28] of the Commission's Regulations, and would be accessible to applicable prudential regulators.

Request for Comment: The Commission requests comment generally on all of the proposed rules regarding scope, general provisions and definitions, and specifically on the following specific issues:

- Should the Commission adopt any of the guidance from SRO rules relating to know your customer requirements? Is other guidance necessary in this area?
- Are there additional terms that should be defined by the Commission? If so, how should such terms be defined and why?
- Do any proposed requirements conflict with any requirement imposed by an SRO such that it would be impracticable or impossible for a swap dealer or major swap participant that is a member of an SRO to meet both obligations? If so, which ones and why?
- Should the Commission specify any particular restrictions or prohibitions to further protect against evasion?

B. Proposed § 23.410—Prohibition on Fraud, Manipulation and Other Abusive Practices

Section 4s(h)(1) grants the Commission discretionary authority to promulgate rules applicable to swap dealers and major swap participants related to, among other things: Fraud, manipulation and abusive practices.[29] To implement this provision the Commission proposes to adopt the anti-fraud provision in Section 4s(h)(4)(A) as § 23.410, which prohibits fraudulent, deceptive and manipulative practices by swap dealers and major swap participants.[30] While the heading of Section 4s(h)(4) states "Special Requirements for Swap Dealers Acting as Advisors," the anti-fraud provision that follows in Section 4s(h)(4)(A) is not so limited. The proposed rule follows the statutory text and applies to swap dealers and major swap participants acting in any capacity, *e.g.,* as an advisor, counterparty or other market participant in relation to counterparties generally. The first two paragraphs of the rule focus on Special Entities and prohibit swap dealers and major swap participants from (1) employing any device, scheme or artifice to defraud any Special Entity; and (2) engaging in any transaction, practice, or course of business that operates as a fraud or deceit on any Special Entity. The third paragraph is not limited to Special Entities and prohibits swap dealers and major swap participants from engaging in any act, practice, or course of business that is fraudulent, deceptive or manipulative.[31]

The Commission also proposes §§ 23.410(b) and 23.410(c), which would prohibit swap dealers and major swap participants from disclosing confidential counterparty information and front running or trading ahead of counterparty swap transactions.[32] These rules are based on trading standards applicable to futures commission merchants and introducing brokers that prohibit trading ahead of a customer and protect the confidentiality of customer orders.[33] Such abuses are considered fraudulent practices.[34] Viewed together, proposed §§ 23. 410(b) and 23.410(c) build on the code of ethics requirements and informational barriers in proposed subpart J which add substantial protections for counterparties from abuse of their confidential information and business opportunities.

Request for Comment: The Commission requests comment generally on all of the proposed rules regarding fraud, manipulation, and abusive practices, and on the following specific issues:

- Should a swap dealer or major swap participant be required to disclose to a counterparty its pre-existing positions in a type of swap prior to entering into the same type of swap with the counterparty?
- Should the prohibitions on trading ahead of a counterparty transaction and disclosure of confidential counterparty information be limited in any way not already provided in the proposed rule? For example, if a counterparty discusses a potential swap but does not immediately enter into it with the swap

[28] 17 CFR 1.31.

[29] On October 26, 2010, the Commission proposed rules to implement new anti-manipulation authority in Section 753 of the Dodd-Frank Act. The proposed rules expand and codify the Commission's authority to prohibit manipulation. 75 FR 67657, Nov. 3, 2010. The same day, the Commission issued an advance notice of proposed rulemaking seeking comment on Section 747 of the Dodd-Frank Act, which amends Section 4c(a) of the CEA to expressly prohibit certain trading practices deemed disruptive of fair and equitable trading. 75 FR 67301, Nov. 2, 2010.

[30] In addition to the proposed anti-fraud rule, swap dealers and major swap participants will be subject to all other applicable provisions of the CEA and Commission Regulations, including those dealing with fraud and manipulation (*e.g.,* Sections 4b, 6(c)(1), (3) and 9(a)(2) of the CEA).

[31] This language mirrors the language in Section 206(4) of the Investment Advisers Act of 1940 ("Advisers Act") (15 U.S.C. 80b–1 *et seq.*), which does not require scienter to prove liability. *See SEC* v. *Steadman,* 967 F.2d 636, 647 (D.C. Cir. 1992) ("[S]ection 206(4) uses the more neutral 'act, practice, or course or business' language. This is similar to section 17(a)(3)'s 'transaction, practice, or course of business,' which 'quite plainly focuses upon the effect of particular conduct * * * rather than upon the culpability of the person responsible.' Accordingly, scienter is not required under section 206(4), and the SEC did not have to prove it in order to establish the appellants' liability * * *.") (citations omitted).

[32] Senator Lincoln noted in a colloquy that the Commission should adopt rules to ensure that swap dealers maintain the confidentiality of hedging and portfolio information provided by Special Entities, and prohibit swap dealers from using information received from a Special Entity to engage in trades that would take advantage of the Special Entity's positions or strategies. 156 Cong. Rec. S5923 (daily ed. Jul. 15, 2010) (statement of Sen. Lincoln). In consultations with stakeholders, Commission staff has learned that these concerns apply more generally to all counterparties, rather than exclusively to Special Entities. Thus, the Commission proposes that the business conduct rules include prohibitions on these types of activities in all transactions between swap dealers or major swap participants and their counterparties.

[33] *See, e.g.,* 17 CFR 155.3–4; *cf.* Market Abuse Directive, at Para. 19, Art. 1(1) (prohibiting the misuse of confidential customer information and front running). The proposed rule would make clear that the confidentiality requirements do not apply when disclosure is made upon request of the Commission, Department of Justice or an applicable prudential regulator.

[34] *See, e.g., United States* v. *Dial,* 757 F.2d 163, 168 (7th Cir. 1985).

dealer or major swap participant, should there be a limit on the time during which the swap dealer or major swap participant must refrain from trading on or otherwise disclosing the counterparty's information?

• Are there other specific fraudulent, manipulative or abusive practices by swap dealers and major swap participants that should be prohibited in these proposed rules? If so, how would they assist in protecting swap markets and counterparties? Are there gaps in the existing requirements that should be filled here?

C. Proposed § 23.430—Verification of Counterparty Eligibility

The Dodd-Frank Act makes it unlawful for any person, other than an eligible contract participant ("ECP"),[35] to enter into a swap unless it is executed on or subject to the rules of a designated contract market.[36] Section 4s(h)(3)(A) also requires the Commission to establish a duty for a swap dealer or major swap participant to verify that any counterparty meets the eligibility standards for an ECP. Proposed § 23.430 would require swap dealers and major swap participants to verify that a counterparty meets the definition of an ECP prior to offering or entering into a swap. The proposed rule also would require a swap dealer or major swap participant to determine whether the counterparty is a Special Entity as defined in Section 4s(h)(2) and proposed § 23.401.

The Commission contemplates that, in the absence of "red flags," and as provided in proposed § 23.402(e), a swap dealer or major swap participant would be permitted to rely on reasonable written representations of a potential counterparty to establish its eligibility as an ECP.[37] In addition, under proposed § 23.402(g), such written representations could be expressed in a master agreement or other written agreement and, if agreed by the parties, could be deemed to be renewed with each subsequent swap transaction, absent any facts or circumstances to the contrary.[38]

Finally, as set forth in proposed § 23.430(c), a swap dealer or major swap participant would not be required to verify the ECP or Special Entity status of the counterparty for any swap initiated on a SEF where the swap dealer or major swap participant does not know the identity of the counterparty.[39]

Request for Comment: The Commission requests comment generally on all of the proposed rules regarding verification of counterparties as ECPs and Special Entities, and on the following specific issues:

• Should there be an ongoing, affirmative duty to verify eligibility? If so, how would it be met? Would the swap dealer or major swap participant's duty change in any way if the ECP status of the counterparty changes after the swap has been entered into?

• Are there particular "red flags" that should indicate a need for a swap dealer or major swap participant to obtain additional information about the status of the counterparty as an ECP or Special Entity?

D. Proposed § 23.431—Disclosure of Material Risks, Characteristics, Material Incentives and Conflicts of Interest Regarding a Swap

Section 4(s)(h)(3)(B) requires swap dealers and major swap participants to disclose to their counterparties material information about the risks, characteristics, incentives and conflicts of interest regarding a swap. The requirements do not apply if both counterparties are any of the following: Swap dealer, major swap participant, security-based swap dealer or major security-based swap participant. Proposed § 23.431 would implement the statutory disclosure requirements and provide specificity with respect to certain material information that must be disclosed under the rule. Information is material if there is a substantial likelihood that a reasonable counterparty would consider it important in making a swap related decision.[40]

1. Timing and Manner of Disclosures

The Dodd-Frank Act does not address the timing and form of the required disclosures. Proposed § 23.431(a) would require that the disclosures be made before entering into a swap and in a manner reasonably designed to allow the counterparty to assess the disclosures. To satisfy its obligation, the swap dealer or major swap participant would also be required to make such disclosures at a time prior to entering into the swap that was reasonably sufficient to allow the counterparty to assess the disclosures. Swap dealers and major swap participants would have flexibility to make these disclosures using reliable means agreed to by the parties, as provided in proposed § 23.402(f).[41]

Standardized disclosure of some required information may be appropriate if the information is applicable to multiple swaps of a particular type and class.[42] As discussed below, the Commission believes that most bespoke transactions, however, will require some combination of standardized and particularized disclosures.

2. Disclosure of Material Risks

The proposed rule tracks the statutory obligations under Section 4s(h)(3)(B)(i) and would require the swap dealer or major swap participant to disclose information to enable a counterparty to assess the material risks of a particular swap. The Commission anticipates that swap dealers and major swap participants typically will rely on a combination of general and more particularized disclosures to satisfy this requirement. The Commission understands that there are certain types of risks that are associated with swaps generally, including market,[43] credit,[44] operational,[45] and liquidity risks.[46] Required risk disclosure would include sufficient information to enable a

[35] "Eligible contract participant" is a defined term in Section 1a(18) of the CEA.

[36] *See* Section 2(e) of the CEA.

[37] This position is consistent with industry comment. *See, e.g.,* NFA Letter, at 2 (recommending the Commission adopt a rule modeled after NFA Compliance Rule 2–23, which permits NFA members to rely on information provided by the customer to satisfy the member's know-your-customer obligations).

[38] Certain industry comments support this approach. *See, e.g.,* NFA Letter, at 2; SIFMA/ISDA Letter, at 12.

[39] This rule tracks the statutory language in Section 4s(h)(7).

[40] *Cf. CFTC* v. *R.J. Fitzgerald & Co.,* 310 F.3d 1321, 1328–29 (11th Cir. 2002) ("A representation or omission is "material" if a reasonable investor would consider it important in deciding whether to make an investment.") (citing *Affiliated Ute Citizens of Utah* v. *United States,* 406 U.S. 128, 153–54 (1972)).

[41] Additionally, under proposed § 23.402(h), swap dealers and major swap participants would be required to maintain a record of their compliance with the proposed rules.

[42] *Cf.* SIFMA/ISDA Letter, at 12 (recommending the use of standard disclosure templates that could be adopted on an industry-wide basis, with disclosure requirements satisfied by a registrant on a relationship (rather than a transaction-by-transaction) basis in cases where prior disclosures apply to and adequately address the relevant transaction).

[43] Market risk refers to the risk to a counterparty's financial condition resulting from adverse movements in the level or volatility of market prices.

[44] Credit risk refers to the risk that a party to a swap will fail to perform on an obligation under the swap.

[45] Operational risk refers to the risk that deficiencies in information systems or internal controls, including human error, will result in unexpected loss.

[46] Liquidity risk is the risk that a counterparty may not be able to, or cannot easily, unwind or offset a particular position at or near the previous market price because of inadequate market depth, unique trade terms or remaining party characteristics or because of disruptions in the marketplace.

counterparty to assess its potential exposure during the term of the swap and at expiration or upon early termination. Consistent with industry "best practices," information regarding specific material risks must identify the material factors that influence the day-to-day changes in valuation, as well as the factors or events that might lead to significant losses.[47] Appropriate disclosures should consider the effect of future economic factors and other material events that could cause the swap to experience such losses. Disclosures should also identify, to the extent possible, the sensitivities of the swap to those factors and conditions, as well as the approximate magnitude of the gains or losses the swap will likely experience.

Swap dealers and major swap participants also should consider the unique risks associated with particular types of swaps, asset classes and trading venues, and tailor their disclosures accordingly.

Request for Comment: The Commission requests comment generally on all of the proposed rules regarding material risk disclosures for swaps and on the following specific issues:

- Are there specific material risks that the Commission should require a swap dealer or major swap participant to disclose to a counterparty? Are there specific risks that should be disclosed with respect to particular types of swaps, asset classes and trading venues?
- NFA and SIFMA/ISDA submitted letters that have suggested that the Commission develop a standard form risk disclosure statement for certain generic-type disclosures, similar to those used today for futures, options and retail foreign currency transactions.[48] Should the Commission undertake such an effort? Should the Commission encourage the industry or SROs to develop such disclosures, in addition, or instead? If it would be beneficial to have such forms, why has the industry not developed such a standard form to date? Would standard form disclosure be inconsistent with the requirement that disclosures be based on the facts and circumstances presented by each swap and counterparty?
- Are there other ways for the Commission to describe the risk disclosure duty required by the CEA that would provide additional guidance or clarify the obligation?
- Should the rule distinguish explicitly risk disclosure requirements for SEF or DCM traded swaps versus bilateral swaps?

3. Scenario Analysis for High-Risk Complex Bilateral Swaps and Counterparty "Opt-In" for Bilateral Swaps Not Available for Trading on a Designated Contract Market or Swap Execution Facility

The Commission is proposing that swap dealers and major swap participants be required to provide scenario analyses when they offer to enter into high-risk complex bilateral swaps to allow the counterparty to assess its potential exposure in connection with the swap.[49] In addition, the rule would allow counterparties to elect to receive scenario analysis when offered bilateral swaps that are not available for trading on a DCM or SEF. The elective aspect of the rule reflects the expectation that there may be circumstances where scenario analysis may be helpful for certain counterparties, even for swaps that are not high-risk complex. Proposed § 23.431(a)(1) is modeled on the CRMPG III industry best practices recommendation for high-risk complex financial instruments.[50]

a. High-Risk Complex Bilateral Swap: Characteristics

The rule's mandatory scenario analysis delivery requirement would apply only when "high-risk complex bilateral swaps" are offered or recommended. Like the industry "best practice" recommendation, the term "high-risk complex bilateral swap" is not defined in the proposed rule; rather, certain flexible characteristics are identified to avoid over inclusive and under inclusive concerns. The characteristics are: The degree and nature of leverage,[51] the potential for periods of significantly reduced liquidity, and the lack of price transparency.[52] The proposed rule would require swap dealers and major swap participants to establish reasonable policies and procedures to identify high-risk complex bilateral swaps, and in connection with such swaps, provide the additional risk disclosure specified in proposed § 23.431(a)(1).

b. Market Risk Disclosures: Scenario Analysis

Scenario analysis, as required by the proposed rule, would be an expression of potential losses to the fair value of the swap in market conditions ranging from normal to severe in terms of stress.[53] Such analyses would be designed to illustrate certain potential economic outcomes that might occur and the effect of these outcomes on the value of the swap. The proposed rule would require that these outcomes or scenarios be developed by the swap dealer or major swap participant in consultation with the counterparty. In addition, the proposed rule would require that all material assumptions underlying a given scenario and its impact on swap valuation be disclosed.[54] In requiring such disclosures, however, the Commission does not propose to require swap dealers or major swap participants to disclose proprietary information about any pricing models.

The Commission does not propose to define the parameters of the scenario analysis in order to provide flexibility to the parties to design the analyses in accordance with the characteristics of the bespoke swap at issue, as well as any criteria developed in consultations with the counterparty. Further, the proposed rule would require swap dealers and major swap participants to consider relevant internal risk analyses including any new product reviews when designing the analyses.[55] As for the format, the proposed rule would require both narrative and tabular expressions of the analyses.

To ensure fair and balanced communications and to avoid misleading counterparties, swap dealers and major swap participants also would

[47] *See* CRMPG III Report, at 60.

[48] *See* NFA Letter, at 2; SIFMA/ISDA Letter, at 12.

[49] Scenario analysis is in addition to required disclosures for swaps which do not qualify as high-risk complex. Such required disclosures include a clear explanation of the economics of the instrument.

[50] CRMPG III Report, at 60–61.

[51] The leverage characteristic is particularly relevant when the swap includes an embedded option, including one in which the counterparty is "short" or selling volatility. Such features can significantly increase counterparty risk exposure in ways that are not transparent.

[52] CRMPG III Report states that:

The aforementioned characteristics are neither an exhaustive list nor should they be assumed to provide a strict definition of high-risk complex instruments, which the Policy Group believes should be avoided. Instead, market participants should establish procedures for determining, based on the key characteristics discussed above, whether an instrument is to be considered high-risk and complex and thus require the special treatment outlined in this section. CRMPG III Report, at 56.

[53] These value changes originate from changes or shocks to the underlying risk factors affecting the given swap, such as interest rates, foreign currency exchange rates, commodity prices and asset volatilities.

[54] Material assumptions include: (1) The assumptions of the valuation model and any parameters applied and (2) a general discussion of the economic state that the scenario is intended to illustrate.

[55] The Commission has proposed that swap dealers and major swap participants adopt policies and procedures regarding a new product policy as part of the risk management system. *See* proposed § 23.600(c)(3), 75 FR 71397, Nov. 23, 2010.

be required to state the limitations of the scenario analysis, including cautions about the predictive value of the scenario analysis, and any limitations on the analysis based on the assumptions used to prepare it. The Commission's proposed rule is aligned with longstanding industry best practice recommendations,[56] and indeed, several large swap dealers told Commission staff that they provide scenario analysis upon request and without separate charge to counterparties today.

Request for Comment: The Commission requests comment generally on all of the proposed rules regarding required scenario analysis for high-risk complex bilateral swaps and opt-in scenario analysis for swaps not available for trading on a DCM or SEF and on the following specific issues:

- Regarding high-risk complex bilateral swaps, should other characteristics be added to the rule? Should any of the proposed high-risk complex bilateral swap characteristics be deleted or modified?
- Instead of high-risk complex bilateral swaps, should the Commission require scenario analysis for all swaps that are: (1) Not accepted or listed for clearing on a derivatives clearing organization ("DCO"), or alternatively, (2) uncleared? What are the costs/benefits of changing the requirement to option one or option two?
- Regarding scenario analysis, should a swap dealer/major swap participant be required to provide such analysis for any swap upon reasonable request by any counterparty? Would there be a charge to counterparties that elect to "opt-in"? How much on average would it cost? If the cost varies by swap type or asset class, provide an average cost by category. What are the costs and benefits to swap dealers and major swap participants and counterparties associated with scenario analysis?
- Are there certain types of counterparties for which a scenario analysis should always be provided? If so, which ones and why?
- Should swap dealers and major swap participants be able to avoid their duty to provide scenario analysis if a counterparty opts out of receiving it?
- Should a Value at Risk ("VaR") type analysis be part of the mandatory scenario analysis?
- In the event that a swap dealer or major swap participant elects to disclose a VaR type analysis, should any minimum parameters apply? For instance, should there be any required confidence levels such as 95 percent or 99 percent? Should there be any minimum standards regarding the type of VaR model chosen? Should there be a required time horizon such as the time between payments, the expected time to liquidate the position, or something else?

4. Material Characteristics

The proposed rule would require swap dealers and major swap participants to include in their disclosures of material characteristics, the material economic terms of the swap, the material terms relating to the operation of the swap and the material rights and obligations of the parties during the term of the swap. Under the proposed rule, the Commission intends that the material characteristics would include the material terms of the swap that would be included in any "confirmation" of any swap sent by the swap dealer or major swap participant to the counterparty upon execution.

5. Material Incentives and Conflicts of Interest

The proposed rule tracks the statutory language under Section 4s(h)(3)(B)(ii) and would require a swap dealer or major swap participant to disclose to any counterparty the material incentives and conflicts of interest that the swap dealer or major swap participant may have in connection with the particular swap. Several stakeholders recommended that the Commission require added transparency concerning the components that make up the price of a transaction. In response, the Commission proposes that swap dealers and major swap participants be required to include with the price of a swap the mid-market value of the swap as defined in proposed § 23.431(c)(2). In addition, swap dealers and major swap participants would be required to disclose any compensation or benefit that they receive from any third party in connection with the swap. In connection with any recommended swap, swap dealers and major swap participants would be expected to disclose whether their compensation related to the recommended swap would be greater than for another instrument with similar economic terms offered by the swap dealer or major swap participant. With respect to conflicts of interest, the Commission expects such disclosure to include the inherent conflicts in a counterparty relationship, particularly when the swap dealer or major swap participant recommends the transaction. The Commission also expects that a swap dealer or major swap participant that engages in business with the counterparty in more than one capacity should consider whether acting in multiple capacities creates material incentives or conflict of interests that require disclosure.[57]

Request for Comment: The Commission requests comment generally on all of the proposed rules regarding material incentives and conflicts of interest and on the following specific issues:

- Should the Commission impose more specific requirements concerning the content of the required disclosures generally?
- Should the Commission require swap dealers and major swap participants to disclose their profit? If so, how should a swap dealer or major swap participant be required to compute profitability for purposes of the rule?

6. Daily Mark

Section 4s(h)(3)(B) directs the Commission to adopt rules that require: (1) For cleared swaps, upon request of the counterparty, receipt of the daily mark from the appropriate DCO; and (2) for uncleared swaps, receipt of the daily mark of the swap from the swap dealer or major swap participant. The term "daily mark" is not defined in the statute, and the Commission understands that the term "mark" is used colloquially to refer to various types of valuation information.

a. Cleared Swaps

For a cleared swap, proposed § 23.431(c)(1) would require the swap dealer or major swap participant to notify a counterparty of their right to receive, upon request, the daily mark from the appropriate DCO.

b. Uncleared Swaps

For uncleared swaps, proposed § 23.431(c)(2) and (3) would require a swap dealer or major swap participant to provide a daily mark to its counterparty on each business day during the term of the swap as of the close of business, or such other time as the parties agree in writing. The Commission is proposing to define daily mark for uncleared swaps as the mid-market value of the swap,[58] which shall

[56] *See* DPG Framework, at Part V(II)(G); *but see* SIFMA/ISDA Letter, at 13–14.

[57] This may exist, for example, when the swap dealer or major swap participant acts both as an underwriter in a bond offering and as a counterparty to the swaps used to hedge such financing. In these circumstances, the swap dealer's or major swap participant's duties to the counterparty would vary depending on the capacities in which it is operating and should be disclosed.

[58] *Cf.* SIFMA and ISDA assert that "[b]y market convention and often by contract, parties generally agree to utilize a mid-market level for margin

Continued

not include amounts for profit, credit reserve, hedging, funding, liquidity or any other costs or adjustments.[59] Based on staff consultations, the consensus was that mid-market value is a transparent measure that would assist counterparties in calculating valuations for their own internal risk management purposes. Further, the Commission is proposing that swap dealers and major swap participants disclose both the methodology and assumptions used to prepare the daily mark, and any material changes to the methodology or assumptions during the term of the swap. The Commission understands that the daily mark for certain bespoke swaps may be generated using proprietary models. The proposed rule does not require the swap dealer or major swap participant to disclose proprietary information relating to its model.

Lastly, the Commission proposes that swap dealers and major swap participants provide appropriate clarifying statements relating to the daily mark. Such disclosures may include, as appropriate, that the daily mark may not necessarily be: (1) A price at which the swap dealer or major swap participant would agree to replace or terminate the swap; (2) the basis for a variation margin call;[60] nor (3) the value of the swap that is marked on the books of the swap dealer or major swap participant.[61]

Industry representatives have asked whether swap dealers and major swap participants may satisfy their obligations to provide daily marks for uncleared swaps by making the relevant information available to counterparties through password protected access to a webpage containing the relevant information.[62] Proposed § 23.402(f) would permit swap dealers and major swap participants to provide daily marks by any reliable means agreed to in writing by the counterparty.

Request for Comment: The Commission requests comments generally on the daily mark and on the following specific issues:

- Should the Commission define the daily mark for uncleared swaps as proposed, on a different basis, or should it be subject to negotiation by the parties? If so, why?
- In addition to the daily mark as defined in the proposed rule, should the Commission require that swap dealers or major swap participants provide executable quotes to counterparties upon request? Should this be left to negotiations between the parties?

E. Proposed § 23.432—Clearing

For swaps where clearing is mandatory,[63] proposed § 23.432(a) would require that a swap dealer or major swap participant notify the counterparty that the counterparty has the sole right to select the DCO that will clear the swap. For swaps that are not required to be cleared, under proposed § 23.432(b), a swap dealer or major swap participant must notify a counterparty that the counterparty may elect to require the swap to be cleared and that it has the sole right to select the DCO for clearing the swap.[64] Neither of these notification provisions would apply where the counterparty is a registered swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant.

Request for Comment: The Commission requests comment generally on all of the proposed rules regarding clearing, and on the following specific issues:

- Are there additional disclosures that a swap dealer or major swap participant should be required to make with respect to clearing of swaps?

F. Proposed § 23.433—Communications—Fair Dealing

The Dodd-Frank Act requires that the Commission establish a duty for swap dealers and major swap participants to communicate in a fair and balanced manner based on principles of fair dealing and good faith. Proposed § 23.433 would establish such a duty and, consistent with statutory language, would apply broadly to all swap dealer and major swap participant communications with counterparties. These principles are well established in the futures and securities markets, particularly through SRO rules.[65] For example, the duty to communicate in a fair and balanced manner is one of the primary requirements of the NFA customer communication rule[66] and is designed to ensure a balanced treatment of potential benefits and risks. In determining whether a communication with a counterparty is fair and balanced, the Commission expects that a swap dealer or major swap participant would consider factors such as whether the communication: (1) Provides a sound basis for evaluating the facts with respect to any swap;[67] (2) avoids making exaggerated or unwarranted claims, opinions or forecasts;[68] and (3) balances any statement that refers to the potential opportunities or advantages presented by a swap with statements of corresponding risks. The Commission also would expect that to deal fairly would require the swap dealer or major swap participant to treat counterparties in such a way so as not to advantage one counterparty or group of counterparties over another. Additionally, communications would be subject to the specific anti-fraud provisions of the CEA and Commission Regulations, as well as applicable SRO rules, if swap dealers and major swap participants are required to be SRO members.

Request for Comment: The Commission requests comment generally on all of the proposed rules regarding fair and balanced communications, and on the following specific issues:

- Should the Commission specify in its final rule any additional

purposes. Counterparties understand that this level does not represent a valuation at which a transaction may be entered into or terminated and accordingly may differ from actual market prices. We recommend that the Commissions endorse this use of mid-market levels for margin purposes as a uniform market practice." SIFMA/ISDA Letter, at 17.

[59] For a discussion of mid-market value and costs, *see* ISDA Research Notes, The Value of a New Swap, Issue 3 (2010), available at *http://www.isda.org/researchnotes/pdf/NewSwapRN.pdf.*

[60] *But see* SIFMA/ISDA Letter at 17 (asserting that mid-market level is market convention for margin purposes and not a quote for entering into a transaction or terminating the swap).

[61] *See also* Trading & Capital-Markets Activities Manual, section 2150.1 (Bd. of Gov. Fed. Reserve Sys. Jan. 2009) ("Trading & Capital-Markets Activities Manual") ("When providing a quote to a counterparty, institutions should be careful that the counterparty does not confuse indicative quotes with firm prices. Firms receiving dealer quotes should be aware that these values may not be the same as those used by the dealer for its internal purposes and may not represent other 'market' or model-based valuations."), available at *http://www.federalreserve.gov/boarddocs/supmanual/trading/200901/0901trading.pdf.*

[62] SIFMA/ISDA Letter, at 17; NFA Letter, at 3.

[63] *See* Section 2(h) of the CEA.

[64] With respect to these proposed disclosure requirements, the Commission notes that, as between the parties, the counterparty is entitled to choose whether and where to clear, but that no DCM or SEF must make clearing available through any DCO. In other words, it would be up to the parties to take the swap to a DCM or SEF that provides for clearing through the counterparty's preferred DCO.

[65] *See, e.g.,* 17 CFR 170.5 ("A futures association must establish and maintain a program for * * * the adoption of rules * * * to promote fair dealing with the public."); NFA Compliance Rule 2–29—Communications with the Public and Promotional Material; NFA Interpretative Notice 9041—Obligations to Customers and Other Market Participants.

[66] *See, e.g.,* NFA Compliance Rule 2–29(b)(2), (5); *see also* NFA Interpretive Notice 9043—NFA Compliance rule 2–29: Use of Past or Projected Performance; Disclosing Conflicts of Interest for Security Futures Products (performance must be presented in a balanced manner).

[67] *See, e.g.,* NFA Interpretive Notice 9041, Obligations to Customers and Other Market Participants ("Members * * * and their Associates should provide a sound basis for evaluating the facts regarding any particular security futures product * * *").

[68] *See, e.g.,* NFA Compliance Rule 2–29(b)(4)–(5).

requirements necessary to satisfy the duty? If so, what?

• Should the Commission specify additional considerations in the rule to guide compliance with the rule? Should the Commission adopt interpretive guidance, instead or in addition?

G. Proposed § 23.434—Recommendations to Counterparties—Institutional Suitability

To determine whether the Commission should use its discretionary authority under new Section 4s(h), the Commission considered requirements for professionals in other markets and in other jurisdictions. One common requirement is a suitability obligation which is imposed when a market professional recommends a product to a customer, including institutional or sophisticated customers. For example, federally regulated banks acting as broker-dealers for government securities have an institutional suitability obligation when making recommendations to institutional customers.[69] Securities broker-dealers are also subject to a suitability obligation when recommending any securities to an institutional customer.[70] Municipal securities dealers have a suitability obligation for any municipal security offered to a "sophisticated municipal market professional."[71] And, in the European Union, investment services firms have a suitability obligation with respect to financial instruments recommended to "professional clients" under MiFID.[72]

In light of its broad application in other markets and jurisdictions, the Commission proposes an institutional suitability obligation for any recommendation a swap dealer or major swap participant makes to a counterparty in connection with a swap or swap trading strategy. The Commission recognizes that futures market professionals have not been subject to an explicit "suitability" obligation.[73] Instead, such professionals have been required to meet a variety of related requirements, including NFA "know your customer" duties,[74] mandatory standard form risk disclosure,[75] NFA's fair and balanced communication rules and just and equitable principles,[76] and general anti-fraud provisions.[77] These requirements developed to address the risks and characteristics of standardized exchange-traded futures and options contracts. Because the definition of swap includes a variety of different types of financial instruments and those instruments can be customized to have a wide range of risk/reward profiles, the Commission believes that standard risk disclosure, alone, may not be sufficient to ensure that counterparties understand their potential exposure. The Commission also has considered that many swap dealers and major swap participants already are, or will be, subject to institutional suitability obligations by virtue of their status as banks, broker-dealers or security-based swap dealers. Thus, to promote regulatory consistency[78] and to take account of the nature of swaps, the Commission proposes to adopt an institutional suitability obligation for swap dealers and major swap participants, modeled, in part, on existing obligations for banks and broker-dealers dealing with institutional clients.

Proposed § 23.434 would require a swap dealer or major swap participant to have reasonable grounds to believe that any recommendation for a swap or trading strategy involving swaps is suitable for its counterparty.[79] A suitability determination would be based upon information the swap dealer or major swap participant obtains regarding the counterparty's financial situation and needs, objectives, tax status, ability to evaluate the recommendation, liquidity needs, risk tolerance, ability to absorb potential losses related to the recommended swap or trading strategy, and any other information known by the swap dealer or major swap participant.

A swap dealer or major swap participant could rely on counterparty representations to satisfy its suitability obligations if: (1) It had a reasonable basis to believe that the counterparty was capable of independently evaluating relevant risks with regard to the particular swap or trading strategy; (2) the counterparty had affirmatively indicated that it was exercising independent judgment in evaluating any recommendations;[80] and (3) the swap dealer or major swap participant had a reasonable basis to believe that the counterparty had the capacity to absorb potential losses related to the recommended swap or swap trading strategy. To the extent that a swap dealer or major swap participant cannot rely on a counterparty's representations as contemplated by proposed § 23.434, it would need to undertake a suitability analysis as set forth in the rule.

Whether a swap dealer or major swap participant has made a recommendation and thus triggered its suitability obligation would depend on the facts and circumstances of the particular case. A recommendation would include any communication by which a swap dealer or major swap participant provides information to a counterparty about a particular swap or trading strategy that is tailored to the needs or characteristics of the counterparty, but would not include information that is general transaction, financial, or market information, swap terms in response to a competitive bid request from the counterparty.[81] In implementing the proposed institutional suitability rule, the Commission intends to consult relevant precedents and interpretive guidance under Federal securities and banking requirements in the United States.[82]

The Commission notes that swap dealers and major swap participants are likely to be acting as CTAs[83] when they

[69] *See, e.g.,* 12 CFR 13.4; Trading & Capital-Markets Activities Manual, Section 2150.

[70] *See* NASD Rule 2310, Recommendations to Customers (Suitability); *see also* proposed FINRA Rule 2111 (Suitability), 75 FR 53562, Aug. 26, 2010.

[71] *See* Municipal Securities Rulemaking Board Rule G–19, Suitability of Recommendations and Transactions; Discretionary Accounts.

[72] MiFID Art. 19(3). "Professional clients" under MiFID include certain financial institutions, insurance companies, pension funds, and other entities. *See* MiFID Art. 19(4), Annex II.

[73] The proposed institutional suitability obligation would apply only to swap dealers and major swap participants, and only when they make swap recommendations, not futures.

[74] NFA Compliance Rule 2–30, Customer Information and Risk Disclosure; NFA Interpretive Notice 901—NFA Compliance Rule 2–30: Customer Information and Risk Disclosure.

[75] 17 CFR 1.55.

[76] NFA Compliance Rules 2–29, 2–36, Requirements for Forex Transactions.

[77] *See, e.g.,* Section 4b of the CEA and §§ 32.9, 33.10 of the Commission's Regulations (17 CFR 32.9, 33.10).

[78] *See, e.g.,* 12 CFR 13.4; Trading & Capital-Markets Activities Manual, section 2150.

[79] The rule would not apply to recommendations made to counterparties that are swap dealers, major swap participants, security-based swap dealers or major security-based swap participants.

[80] A counterparty may indicate that it is exercising independent judgment on one or more particular swaps or types of swaps, or in terms of all swaps.

[81] NASD Notice to Members 01–23 (April 2001); FINRA Proposed Suitability Rule, 75 FR 52562, 52564–69, Aug. 26, 2010.

[82] *See, e.g.,* 12 CFR 13.4, 208.25(d), 368.4. In 1997, the Federal banking agencies offered the following guidance regarding recommendations in the context of government securities sales practices: "While the agencies do not believe it is appropriate to define the term 'recommendation,' they note that they would not view the provision of general market information, including market observations, forecasts about interest rates, and price quotations, as making a recommendation under the rule, absent other conduct." 62 FR 13276, 13280, Mar. 19, 1997.

[83] Section 1a(12) of the CEA defines a commodity trading advisor, in relevant part, as any person who, for compensation or profit, trades, or advises (either directly or through publications, writings, or

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make recommendations, particularly recommendations tailored to the needs of their counterparty. As such, they would be subject to any additional duties that might be applicable to CTAs under the CEA and Commission Regulations, including registration requirements and Section 4*o* of the CEA, the anti-fraud provision that applies to CTAs and commodity pool operators.[84]

Request for Comment: The Commission requests comments generally on the proposed rules regarding recommendations and the following specific issues:

- Should the Commission adopt a suitability obligation for swaps in the absence of such an explicit requirement for exchange traded futures and options? Have securities-style suitability obligations for institutional customers had demonstrable benefits for such customers? If so, provide examples.
- Are there additional factors that swap dealers or major swap participants should consider in determining whether a particular swap is suitable for a particular counterparty?
- Should the Commission specify additional considerations in the rule to guide compliance with the rule? Should the Commission adopt interpretive guidance, similar to that provided by the prudential regulators in connection with sales of government securities instead or in addition?
- Should swap dealers be subject to an explicit fiduciary duty when making a recommendation to a counterparty?

H. Proposed § 155.7—Execution Standards

The Commission is proposing a swap execution standard rule that would apply to swaps available for trading on a DCM or SEF to ensure fair dealing and protect against fraud and other abusive practices. The proposed execution standard rule would require Commission registrants, with respect to any swap that is available for trading on a DCM or SEF, to execute the swap on terms that have a "reasonable relationship" to the best terms available.[85] In addition, the registrant would be required, prior to execution of the order, to disclose the DCMs and SEFs on which the swap is available for trading, and on which markets the registrant has trading privileges. The swap execution standards would apply to all Commission registrants executing customer orders for swaps made available for trading on a DCM or SEF, whether execution occurs on or through a DCM, SEF or bilaterally.[86] The Commission notes that bilateral execution of swaps available for trading on a DCM or a SEF would only occur pursuant to the "end user" exemption provided under Section 2(h)(7)(A) of the CEA.

In determining what constitutes a "reasonable relationship," the Commission registrant should consider whether the terms offered to the customer are fair and consistent with principles of fair dealing,[87] good faith, and, when acting as an agent for the customer, the duty of loyalty.[88] To have a reasonable relationship to the best terms available, the terms must be fair and not excessive in light of all other relevant circumstances. Additionally, whether the terms of any swap executed on behalf of a customer satisfy the "reasonable relationship" duty would be analyzed in connection with the specific anti-fraud provisions of the CEA and Commission Regulations and would be considered in connection with the course of dealing between the registrant and the customer.

To satisfy its reasonable relationship obligation, a Commission registrant would be expected to exercise reasonable diligence to ascertain which DCM or SEF offers the best terms available for the transaction. To meet their reasonable diligence duty, Commission registrants would have to survey a sufficient number of DCMs or SEFs to be able to make a reasonable determination as to whether the terms they offer their clients bear a reasonable relationship to the best terms available. Such a survey would not necessarily be confined to markets on which the registrant has trading privileges and would include reviewing available bids and offers, requests for quotes, and real time reporting of trades executed within a reasonable period of time prior to execution of the order. In proposing this execution standard, the Commission notes that in separate rulemakings the Commission is proposing rules requiring DCMs and SEFs to provide market participants with open access to their trading platforms and that current pre-trade price and quote information will be available to all persons with access to DCMs and SEFs. Post-trade data also will be available to registrants on a real-time reporting basis. The Commission's proposed rule lists a number of factors that the Commission would consider in determining compliance with the rule which include an evaluation of the characteristics unique to the customer's swap order as well as the prevailing market conditions.

As swaps trading transitions to and develops on DCMs and SEFs, technology and other innovations are

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electronic media) as to the value of, or the advisability of trading in, a commodity for future delivery, or swap. Section 1a(12)(B) of the CEA excludes from the definition of commodity trading advisor a variety of persons, but only if a person's commodity advice is solely incidental to the conduct of its principal business or profession. The excluded persons include (i) banks and trust companies and their employees, (ii) news reporters, news columnists, and news editors of print or electronic media, (iii) lawyers, accountants, and teachers, (iv) floor brokers and futures commission merchants, (v) publishers and producers of any print or electronic data of general and regular dissemination, including their employees, (vi) fiduciaries of defined benefit plans subject to ERISA, (vii) contract markets, and (viii) other persons that the CFTC, by rule, regulation, or order, may exclude as "not within the intent of" the definition. The revised definition does not exclude swap dealers whose advice is solely incidental to their swap dealer activities. Therefore, any "advisory" activities by a swap dealer could bring it within the statutory definition of a commodity trading advisor.

[84] Depending on the nature of the relationship, swap dealers might also have common law fiduciary duties to their counterparties. *Cf. Commodity Trend Serv., Inc.* v. *CFTC,* 233 F.3d 981, 990 (7th Cir. 2000).

[85] The term "reasonable relationship" has been used in evaluating execution standards over several decades in the securities industry. In an early securities law case, the Second Circuit stated that "[i]n its interpretation of Sec. 17(a) of the Securities Act, the Commission has consistently held that a dealer cannot charge prices not reasonably related to the prevailing market price without disclosing that fact." *Charles Hughes & Co.* v. *SEC,* 139 F.2d 434, 437 (2d Cir. 1943). The SEC issued a release in 1987, "Notice to broker-dealers concerning disclosure requirements for mark-ups on zero-coupon securities," which stated that the "duty of fair dealing includes the implied representation that the price a firm charges bears a reasonable relationship to the prevailing market price." 52 FR 15575, 15576, Apr. 21, 1987 (citing *Charles Hughes,* 139 F.2d at 437). In IM–2440–1 the former NASD stated that "It shall be deemed a violation of Rule 2110 [recommendations] and Rule 2440 [fair prices and commissions] for a member to enter into any transaction with a customer in any security at any price not reasonably related to the current market price of the security or to charge a commission which is not reasonable." Although Rule 2440 and IM–2440–1 related to OTC transactions, FINRA expanded the principle to include fees charged in exchange-traded transactions. *See* FINRA Regulatory Notice 08–36.

[86] The duty under the proposed rule would apply whether the Commission registrant was acting as agent or principal in the transaction. This is consistent with existing duties for broker-dealers under the Federal securities laws. *See Newton* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.,* 135 F.3d 266, 270 n. 1 (3d Cir. 1988) ("[T]he best execution duty 'does not dissolve when the broker/dealer acts in its capacity as a principal.'") (citations omitted). *Accord E.F. Hutton & Co.,* Release No. 34–25887, 49 S.E.C. 829, 832 (1988); NASD Rule 2320(e).

[87] *Supra* at footnote 85. The "duty of fair dealing includes the implied representation that the price a firm charges bears a reasonable relationship to the prevailing market price." 52 FR 15575, 15576, Apr. 21, 1987.

[88] *See Newton,* 135 F.3d at 270 ("The duty of best execution * * * has its roots in the common law agency obligations of undivided loyalty and reasonable care that an agent owes to his principal.")

likely to affect how Commission registrants determine whether the terms they offer their customers are reasonably related to the "best terms available" for purposes of satisfying the proposed execution standards. For example, registrants' survey obligations may be satisfied by consulting, where available, information aggregators that facilitate the collection of information about current trading activity across markets. The proposed rule is intended to be sufficiently flexible to take account of such innovations and developments which should further the quality of executions.

Request for Comment: The Commission requests comments generally on the proposed rules regarding the swap execution standard and the following specific issues:

- For the purpose of meeting the duty to use reasonable diligence to determine whether the terms it offers are reasonably related to the best terms available for execution of a swap that is available for trading on a DCM or SEF, should the Commission prescribe a certain percentage of DCMs or SEFs that must be reviewed/considered by the Commission registrant? If so, what percentage is appropriate?
- Should the Commission define what it means for the terms of execution to have a "reasonable relationship to the best terms available"? If so, how should the Commission define the phrase?
- Should the Commission require any additional disclosures to the customer, including for example, the best terms available for execution of the swap order and the difference between the best terms and the terms on which the swap was executed?

III. Proposed Rules for Swap Dealers and Major Swap Participants Dealing With Special Entities

In Section 4s(h), Congress created a separate category of swap counterparty called Special Entities, and imposed heightened duties and requirements for swap dealers that act as advisors to them, and for swap dealers and major swap participants that are their counterparties.

A. Definition of "Special Entity" Under Section 4s(h)(2)(C)

Section 4s(h)(2)(C) defines a "Special Entity" as: (i) A Federal agency; (ii) a State, State agency, city, county, municipality, or other political subdivision of a State; (iii) any employee benefit plan, as defined in Section 3 of ERISA; [89] (iv) any governmental plan, as defined in Section 3 of ERISA; [90] or (v) any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986.[91]

The Commission has received a number of letters from stakeholders identifying a variety of ambiguities in the definition of Special Entity in Section 4s(h)(2)(C) and suggesting clarifications. For example, under Section 4s(h)(2)(C)(iii), the term Special Entity includes employee benefit plans as defined in Section 3 of ERISA.[92] Industry representatives have raised issues concerning whether the definition requires "looking through" investment vehicles to determine whether the vehicle is a Special Entity, including master trusts holding the assets of one or more pension plans of a single employer, and collective investment vehicles in which Special Entities invest.[93]

Stakeholders similarly have raised issues with respect to whether plans defined in but not subject to ERISA (unless they are covered by another applicable prong of the Special Entity definition) are Special Entities,[94] and whether only those plans subject to the fiduciary responsibility provisions of ERISA should be included within the Special Entity definition.[95]

Under Section 4s(h)(2)(C)(v), the term Special Entity includes any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986.[96] Non-profit organizations that enter into swaps have asked whether they will be treated as Special Entities if their endowment is pledged as collateral or is used to make payments on those swaps or whether the definition of endowment is limited to those endowments that are the named counterparty to the swap.[97] Others have suggested that the phrase "any endowment" be limited to endowments that are non-profit organizations described in Section 501(c) of the Internal Revenue Code or are established for the benefit of such an organization.

Given the range of issues surrounding the definition of Special Entity, the Commission is not proposing to clarify the definition at this time but, instead, is seeking comment on whether clarification is necessary.

Request for Comment: The Commission requests comments on the definition of Special Entity in general and on the following specific issues:

- Should the definition of State, State agency, city, county, municipality, or other political subdivision of a State be clarified in any way?
- Should the definition "employee benefit plans, as defined in Section 3 of ERISA" be clarified in any way?
- Should the definition "employee benefit plans, as defined in Section 3 of ERISA" be limited to plans subject to regulation under ERISA?
- Should the Commission "look through" an entity to determine whether it is a Special Entity for the purposes of these rules? If so, why? If not, why not? If so, should the Commission clarify that master trusts, or similar entities, that hold assets of more than one pension plan from the same plan sponsor are within the definition of Special Entity?
- Should the Commission clarify in any way the definition of governmental plan under Section 4s(h)(C)(iv)?
- Should the Commission clarify the definition of endowment to include or exclude charitable organizations that enter into swaps but whose endowments have contractual obligations regarding that swap?
- Should the Commission clarify the definition of endowment to include or exclude foreign endowments? If so, why? If not, why not?

[89] 29 U.S.C. 1002. The term "Special Entities" includes employee benefit plans defined in section 3 of ERISA. This class of employee benefit plans is broader than the category of plans that are "subject to" ERISA for purposes of Section 4s(h)(5)(A)(i)(VII). Employee benefit plans not "subject to" regulation under ERISA include: (1) Governmental plans; (2) church plans; (3) plans maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws; (4) plans maintained outside the U.S. primarily for the benefit of persons substantially all of whom are nonresident aliens; or (5) unfunded excess benefit plans. *See* 29 U.S.C. 1003(b).

[90] Section 3(32) of ERISA defines "governmental plan" as a "plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." 29 U.S.C. 1002(32).

[91] The term "endowment" is not defined in the Dodd-Frank Act or in the CEA.

[92] 29 U.S.C. 1002.

[93] *See, e.g.,* SIFMA/ISDA Letter, at 5 (investment vehicle which 25 percent or more of its equity interest is owned by benefit plan investors and is subject to DOL plan assets rules (29 CFR 2510.3–101) for purposes of ERISA).

[94] *See, e.g.,* SIFMA/ISDA Letter, at 2.

[95] SIFMA/ISDA Letter, at 5 ("This would exclude such plans as (i) unfunded plans for highly compensated employees; (ii) foreign pension plans (including foreign-based governmental plans); (iii) church plans that have elected not to subject themselves to ERISA; (iv) Section 403(b) plans that accept only employee contributions; and (v) Section 401(a), 403(b) and 457 plans sponsored by governmental entities.") (citations omitted).

[96] 26 U.S.C. 501(c)(3). Section 501(c)(3) lists tax exempt organizations including: "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes * * *."

[97] SIFMA/ISDA Letter, at 6; SFG Presentation, at 8.

B. Proposed § 23.440—Requirements for Swap Dealers Acting as Advisors to Special Entities

Section 4s(h)(4) provides that a swap dealer that "acts as an advisor to a Special Entity" must act in the "best interests" of the Special Entity and undertake "reasonable efforts" to obtain information necessary to determine that a recommended swap is in the best interests of the Special Entity. These terms are not defined in the statute. The Commission's proposed rules incorporate the statutory language and clarify that "acts as an advisor to a Special Entity" includes to make a swap recommendation to a Special Entity.

1. Act as an Advisor to a Special Entity

With respect to what it means to "act as an advisor to a Special Entity," the Commission proposes to clarify that a swap dealer that makes a recommendation to a Special Entity falls within the definition. The Commission also proposes to clarify that a swap dealer that merely provides to a Special Entity general transaction, financial, or market information or that provides swap terms as part of a response to a competitive bid request from the Special Entity does not fall within the definition. The proposed definition does not address what it means to act as an advisor in connection with any other dealings between a swap dealer and a Special Entity.

2. Best Interests

The proposed rule would not define the term "best interests." There are established principles in case law under the CEA, with respect to the duties of advisors which will inform the meaning of the term on a case-by-case basis. The Commission believes that those best interest principles, in the context of a recommended swap or swap trading strategy, would impose affirmative duties to act in good faith and make full and fair disclosure of all material facts and conflicts of interest, and to employ reasonable care that any recommendation given to a Special Entity is designed to further the purposes of the Special Entity.[98] The Commission's proposal is guided by the statutory language in Sections 4s(h)(4) and (5) and Congressional intent that swap dealers could act both as an advisor to a Special Entity when recommending a swap and then as a counterparty by entering into the same swap with the Special Entity, where the Special Entity has a representative independent of the swap dealer on which it can rely.[99] The proposed rules are intended to allow existing business relationships to continue, albeit subject to the new, higher statutory standards of care.[100] Thus, the proposed rule is not intended to preclude, *per se,* a swap dealer from both recommending a swap to a Special Entity and entering into that swap with the same Special Entity where the parties abide by the requirements of Sections 4s(h)(4) and (5) and the Commission's proposed regulations.[101]

3. Reasonable Efforts

Section 4s(h)(4)(C) requires swap dealers to undertake "reasonable efforts" to obtain information necessary to determine that a recommended swap is in the best interests of the Special Entity. Such information includes the financial and tax status of the Special Entity and the financing objectives of the Special Entity. The statute grants the Commission discretionary authority to prescribe additional types of information. The Commission proposes to add: (1) The authority of the Special Entity to enter into a swap; (2) future funding needs of the Special Entity; (3) the experience of the Special Entity with respect to entering into swaps, generally, and swaps of the type and complexity being recommended; (4) whether the Special Entity has a representative as provided in proposed § 23.450 and Section 4s(h)(5) that is capable of evaluating the recommended swap in light of the needs and circumstances of the Special Entity; and (5) whether the Special Entity has the financial capability to withstand changes in market conditions during the term of the swap. The Commission believes that this non-exclusive list would assist a swap dealer in meeting its duty to act in the "best interests" of a Special Entity in recommending a swap or swap trading strategy.

4. Reasonable Reliance To Satisfy the "Reasonable Efforts" Obligation

Proposed § 23.440(c) would allow a swap dealer to rely on the Special Entity's representations to satisfy its "reasonable efforts" obligations. The Commission understands from stakeholders, including a number of Special Entities, that Special Entities are sometimes reluctant to provide complete information to swap dealers about their investment portfolio or other information that might be relevant to the appropriateness of a particular recommendation. To address this circumstance, the Commission proposes to allow a swap dealer to meet its "reasonable efforts" duty by relying on representations of the Special Entity[102] and any other information known by the swap dealer. In such circumstances, the swap dealer would be expected to make clear to the Special Entity that the recommendation is based on the limited information known to the swap dealer, and that the recommendation might be different if the swap dealer had more complete information as provided in Section 4s(h)(4)(C) and proposed § 23.440(b)(2).[103]

To rely, the swap dealer must have a reasonable basis to believe that the representations of the Special Entity are reliable based on the facts and

[98] There is similar language in *SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 191–94 (1963) in which the Supreme Court construed Advisers Act Section 206 (15 U.S.C. 80b–6) as creating an enforcement mechanism for violations of fiduciary duties under the common law. The fiduciary duty imposes upon investment advisers the "affirmative duty of 'utmost good faith, and full and fair disclosure of all material facts,' as well as an affirmative obligation to 'employ reasonable care to avoid misleading'" their clients.

[99] Senator Blanche Lincoln stated in a floor colloquy that:

[N]othing in [CEA Section 4s(h)] prohibits a swap dealer from entering into transactions with Special Entities. Indeed, we believe it will be quite common that swap dealers will both provide advice and offer to enter into or enter into a swap with a special entity. However, unlike the status quo, in this case, the swap dealer would be subject to both the acting as advisor and business conduct requirements under subsections (h)(4) and (h)(5).

156 Cong. Rec. S5923 (daily ed. Jul. 15, 2010) (statement of Sen. Lincoln). However, swap dealers have an obligation to ensure that any Special Entity counterparty is represented by a sophisticated representative, independent of the swap dealer, when the swap dealer is acting both as an advisor and as counterparty to the Special Entity. (Section 4s(h)(5)).

[100] The Commission anticipates that swap dealers and Special Entities will continue to rely on representations to inform the nature of their relationships, including, for example, representations that the Special Entity: (1) Is not relying on the swap dealer; (2) has an independent representative that, by virtue of their relationship, is legally obligated to act in the best interests of the Special Entity; and (3) is relying on the independent representative's advice in evaluating any recommendation from a swap dealer. The parties' agreement, however, does not bind the Commission or override the protections granted to market participants under the CEA. *Cf.* Complaint at ¶ 18, *SEC* v. *Barclays Bank,* 07–CV–04427 (S.D.N.Y. May 30, 2007) (so-called "Big Boy" letters may not insulate parties from enforcement actions brought by the SEC for insider trading); *SEC* v. *Barclays Bank,* SEC Litig. Release No. 20132 (May 30, 2007) (Barclays Bank settles insider trading charges).

[101] The Commission staff has consulted with DOL staff, who has advised that any determination of status under the Dodd-Frank Act is separate and distinct from the determination of whether an entity is a fiduciary under ERISA.

[102] Certain Special Entity trade associations supported this approach. *See* ABC Letter, at 6–7; ABC/CIEBA Letter, at 3.

[103] In the absence of sufficient representations from the Special Entity, and if a swap dealer's reasonable efforts produce incomplete information, the swap dealer would be required to assess whether it is able to make a swap recommendation that is in the best interests of the Special Entity as required by proposed § 23.440.

circumstances of the particular swap and the Special Entity. The representations themselves must be detailed and include information regarding the Special Entity's ability to: evaluate the recommended transaction; exercise independent judgment; and absorb potential losses associated with the swap. The Special Entity also would have to have a representative that meets the criteria in Section 4s(h)(5) and proposed § 23.450. This mechanism would not relieve a swap dealer of its duty to act in the "best interests" of the Special Entity.

Request for Comment: The Commission requests comment generally on all of the proposed rules regarding swap dealers that act as advisors to Special Entities, and on the following specific issues:

- Is the proposed clarification of the term "acts as an advisor to a Special Entity" appropriate? Should the Commission further define the term?
- Should the Commission define "best interests" in this context, and if so, what should the definition be?
- Because a swap dealer has an inherent conflict of interest when it acts as both an advisor and a counterparty to Special Entity, are there additional disclosures that a swap dealer should have to make that could mitigate the conflicts of interest?
- When acting as both an advisor and a counterparty to a Special Entity, should a swap dealer have to disclose any positions it holds from which it may profit should the swap in question move against the Special Entity?
- Should swap dealers have to disclose to a Special Entity the profit it expects to make on swaps it enters into with the Special Entity.
- Should swap dealers be subject to an explicit fiduciary duty when acting as an advisor to a Special Entity?
- Would the proposed rule preclude swap dealers from continuing their current practice of both recommending and entering into swaps with Special Entities? If so, why?
- Should the Commission prescribe additional information that would be relevant to a swap dealer's "reasonable efforts" and "best interests" duties under the proposed rule?

C. Proposed § 23.450—Requirements for Swap Dealers and Major Swap Participants Acting as Counterparties to Special Entities

Section 4s(h)(5) requires that swap dealers and major swap participants [104] that offer swaps to or enter into swaps with Special Entities comply with any duty established by the Commission that requires them to have a reasonable basis to believe that the Special Entity has an independent representative that meets certain criteria.[105] The Commission interprets the statute as imposing this duty on swap dealers and major swap participants when they are counterparties to any Special Entity.[106] In making this determination the Commission considered staff's consultations with staff at other Federal regulators, stakeholders, letters from the public,[107] as well as legislative history.[108] To meet their duties under the proposed rule, swap dealers and major swap participants would be able to rely on reasonable, detailed representations of the Special Entity concerning the qualifications of the independent representative.[109]

1. Qualifications of the Independent Representative

The proposed rule would require swap dealers and major swap participants to have a reasonable basis to believe that a Special Entity has a representative that satisfies the enumerated criteria.[110] The proposed rule provides that relevant considerations would include: (1) The nature of the Special Entity-representative relationship; (2) the representative's capability of making hedging or trading decisions; (3) use of consultants or, with respect to employee benefit plans subject to ERISA, use of a Qualified Professional Asset Manager [111] or In-House Asset Manager; [112] (4) the representative's general level of experience in the financial markets and particular experience with the type of product under consideration; (5) the representative's ability to understand the economic features of the swap; (6) the representative's ability to evaluate how market developments would affect the swap; and (7) the complexity of the swap.

2. Statutory Disqualification

To guide swap dealers and major swap participants, the proposed rule defines "statutory disqualification" as grounds for refusal to register or to revoke, condition or restrict the registration of any registrant or applicant for registration as set forth in Sections 8a(2) and 8a(3) of the CEA.

3. Independent

Proposed § 23.450(b) would require that a swap dealer or major swap participant "have a reasonable basis to believe a Special Entity has a

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[104] Although the title of Section 4s(h)(5) refers only to swap dealers, the specific requirements in Section 4s(h)(5)(A) are imposed on both swap dealers and major swap participants that offer to or enter into a swap with a Special Entity. Accordingly, the Commission proposes to apply the counterparty requirements to major swap participants as well as to swap dealers.

[105] Pursuant to Section 4s(h)(7), the duty would not apply to transactions initiated on a DCM or SEF where the swap dealer or major swap participant does not know the counterparty to the transaction.

[106] The statutory language is ambiguous as to whether the duty is intended to apply with respect to all types of Special Entity counterparties, or just a sub-group. The ambiguities arise, in part, from the reference to subclauses (I) and (II) of Section 1a(18)(A)(vii) of the CEA, which include certain governmental entities and multinational or supranational government entities. Yet, multinational and supranational government entities do not fall within the definition of Special Entity in Section 4s(h)(2)(C), and State agencies, which are defined as Special Entities, are not included in Section 1a(18)(A)(vii)(I) and (II) but are included in (III).

[107] *See, e.g.,* Ropes & Gray Letter, at 1; ABC/CIEBA Statement letter, at 2; SIFMA/ISDA Letter, at 11.

[108] *See* H.R. Rep. No. 111–517, at 869 (June 29, 2010) (Conf. Rep.) ("When acting as counterparties to a pension fund, endowment fund, or state or local government, dealers are to have a reasonable basis to believe that the fund or governmental entity has an independent representative advising them.").

[109] *See, e.g.,* ABC Letter, at 4; ABC/CIEBA Letter, at 2; SIFMA/ISDA Letter, at 11. Stakeholders have asserted that, even if Congress did intend for Section 4s(h)(5)(A) to apply to non-governmental Special Entities, it did not intend for it to apply to ERISA plans. Stakeholders further assert that, even if Section 4s(h)(5)(A) applies to ERISA plans, swap dealers and major swap participants should only be expected to verify that the independent representative satisfies the criteria of Section 4s(h)(5)(A)(i)(VII)—that the independent representative is a fiduciary as defined in Section 3 of ERISA (29 U.S.C. 1002)—and not the criteria of Section 4s(h)(5)(A)(i)(I)–(VI). They contend that verification of the duty under Section 4s(h)(5)(A)(i)(VII) is the equivalent of verification of Section 4s(h)(5)(A)(i)(I)–(VI) and that to require verification of all the criteria would lead to regulatory conflicts under ERISA and the CEA.

[110] The criteria for an independent representative based generally on the statute and under proposed § 23.450 would be: (1) Sufficient knowledge to evaluate the transaction and risks; (2) not subject to a statutory disqualification; (3) independent of the swap dealer or major swap participant; (4) undertakes a duty to act in the best interests of the Special Entity it represents; (5) makes appropriate and timely disclosures to the Special Entity; (6) evaluates, consistent with any guidelines provided by the Special Entity, fair pricing and the appropriateness of the swap; (7) in the case of employee benefit plans subject to the ERISA, is a fiduciary as defined in Section 3 of ERISA (29 U.S.C. 1002); and 8) in the case of a municipal entity as defined in proposed § 23.451, whether the representative is subject to restrictions on certain political contributions imposed by the Commission, the SEC or a self-regulatory organization subject to the jurisdiction of the Commission or the SEC. Criterion 8 is not in the statutory text under Section 4s(h)(5)(A)(i)(I)–(VII). The Commission is proposing this criterion using its discretionary authority under Section 4s(h)(5)(B).

[111] *See* DOL Prohibited Transaction Exemption ("PTE") 84–14, 70 FR 49305, Aug. 23, 2005.

[112] *See* DOL PTE 96–23, 61 FR 15975, Apr. 10, 1996; Proposed Amendment to PTE 96–23, 75 FR 33642, June 14, 2010.

representative that * * * is independent of the swap dealer or major swap participant * * *"[113] This formulation of the duty is intended to clarify that "independent" as it relates to a representative of a Special Entity means independent of the swap dealer or major swap participant,[114] not independent of the Special Entity.[115]

As to what it means for the representative to be independent of the swap dealer or major swap participant, the Commission's proposed rule provides that a representative would be deemed to be independent if: (1) It is not (with a one-year look back) an associated person of the swap dealer or major swap participant within the meaning of Section 1a(4) of the CEA; (2) there is no "principal" relationship between the representative and the swap dealer or major swap participant within the meaning of § 3.1(a)[116] of the Commission's Regulations; and (3) the representative does not have a material business relationship with the swap dealer or major swap participant. However, if the representative received any compensation from the swap dealer or major swap participant within one year of an offer to enter into a swap, the swap dealer or major swap participant would have to ensure that the Special Entity is informed of the compensation and that the Special Entity agrees in writing, in consultation with the representative, that the compensation does not constitute a material business relationship between the representative and the swap dealer or major swap participant. The proposed rule defines a material business relationship as any relationship with a swap dealer or major swap participant, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision making of the representative.

4. Best Interests

The Commission is not proposing to define what "best interests" means in this context. As the Commission explained regarding proposed § 23.440, the scope of the duty will be related to the nature of the relationship between the independent representative and the Special Entity. There are established principles in case law which will inform the meaning of the term on a case-by-case basis.[117]

We would expect that, at a minimum, the swap dealer or major swap participant would have a reasonable basis for believing that the representative could assess: (1) How the proposed swap fits within the Special Entity's investment policy; (2) what role the particular swap plays in the Special Entity's portfolio; and (3) the Special Entity's potential exposure to losses. The swap dealer or major swap participant would also need to have a reasonable basis for believing that the representative has sufficient information to understand and assess the appropriateness of the swap prior to the Special Entity's entering into the transaction.[118]

5. Makes Appropriate and Timely Disclosures

The proposed rule refines the criterion under Section 4s(h)(5)(A)(i)(V), "appropriate disclosures," to mean "appropriate and timely disclosures." A swap dealer or major swap participant would have to have a reasonable basis to believe that a representative makes appropriate and timely disclosures to the Special Entity for the representative to meet the requirements of the proposed rule.

6. Evaluates Fair Pricing and the Appropriateness of the Swap

The Commission has received a number of questions regarding the statutory criterion in Section 4s(h)(5)(A)(i)(VI) which states that the representative will provide "written representations to the Special Entity regarding fair pricing and the appropriateness of the transaction."[119] The Commission's proposed rule refines the statutory language to say that the representative "evaluates, consistent with any guidelines provided by the Special Entity, fair pricing and the appropriateness of the swap." The Commission proposes to allow swap dealers and major swap participants to rely on appropriate legal arrangements between Special Entities and their independent representatives in applying this criterion. For example, where a pension plan has a plan fiduciary that by contract has discretionary authority to carry out the investment guidelines of the plan, the swap dealer would be able to rely, absent red flags, on the Special Entity's representations regarding the legal obligations of the fiduciary. Evidence of the legal relationship between the plan and its fiduciary would enable the swap dealer or major swap participant to conclude that the fiduciary is evaluating fair pricing and the appropriateness of all transactions prior to entering into such transactions on behalf of the plan. To comply with this criterion, the swap dealer or major swap participant should also have a reasonable basis to believe that the

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[113] Section 4s(h)(5)(A)(i) provides in relevant part: "reasonable basis to believe that the counterparty that is a Special Entity has an independent representative that * * * (III) is independent of the swap dealer or major swap participant * * *" By including the word "independent" twice, an ambiguity was created as to whether the representative had to be independent of both the swap dealer or major swap participant and the Special Entity. The legislative history indicates that was not the intent of Congress. Thus, the proposed rule drops the first "independent" to clarify that the representative of a Special Entity only needs to be independent of the swap dealer or major swap participant.

[114] *See, e.g.,* ABC Letter, at 6; ABC/CIEBA Letter, at 3; Ropes & Gray Letter, at 2; SIFMA/ISDA Letter, at 12; NFA Letter, at 6.

[115] *See* 156 Cong. Rec. S5903 (daily ed. Jul. 15, 2010) (statements of Sens. Lincoln and Harkin):

Mrs. LINCOLN Our intention in imposing the independent representative requirement was to ensure that there was always someone independent of the swap dealer or the security-based swap dealer reviewing and approving swap or security-based swap transactions. However, we did not intend to require that the special entity hire an investment manager independent of the special entity. Is that your understanding, Senator Harkin?

Mr. HARKIN. Yes, that is correct. We certainly understand that many special entities have internal managers that may meet the independent representative requirement. For example, many public electric and gas systems have employees whose job is to handle the day-to-day hedging operations of the system, and we intended to allow them to continue to rely on those in-house managers to evaluate and approve swap and security-based swap transactions, provided that the manager remained independent of the swap dealer or the security-based swap dealer and meet the other conditions of the provision. Similarly, the named fiduciary or in-house asset manager-INHAM-for a pension plan may continue to approve swap and security-based swap transactions.

[116] 17 CFR 3.1(a).

[117] Under the CEA, a commodity trading advisor will have a fiduciary duty towards its customer when it offers personalized advice. *See Savage* v. *CFTC,* 548 F.2d 192, 194 (7th Cir. 1977); *Commodity Trend Serv.,* 233 F.3d at 990 ("the party in [*Savage*] offered personalized advice and so would be considered a fiduciary under the common law") (citing *Capital Gains,* 375 U.S. at 194). Under the Advisers Act, an adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own. An adviser must deal fairly with clients and prospective clients, seek to avoid conflicts with its clients and, at a minimum, make full disclosure of any material conflict or potential conflict. "Amendments to Form ADV," Release No. IA–3060 (Aug. 12, 2010) (citing *Capital Gains,* 375 U.S. at 191–94). Under ERISA, "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and * * * for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan" (29 U.S.C. 1104(a)(1)(A)) and act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims * * *" (29 U.S.C. 1104(a)(1)(B)).

[118] The description of the duties under Section 4s(h)(5)(A)(i)(IV) is drawn from a description of ERISA fiduciary obligations in connection with the use of derivatives in the management of a portfolio of assets of a pension plan that is subject to ERISA. *See* Letter of Olena Berg, DOL, to Honorable Eugene A. Ludwig, Comptroller of the Currency (March 21, 1996), available at, *http://www.dol.gov/ebsa/programs/ori/advisory96/driv4ltr.htm.*

[119] *See, e.g.,* ABC Letter, at 8; SFG Letter, at 1.

independent representative is documenting its decisions about appropriateness and pricing of all swap transactions and that such documentation is being retained in accordance with any regulatory requirements that might apply to the independent representative.[120] This approach would apply to in-house independent representatives as well.

7. ERISA Fiduciary

The proposed rule tracks the statutory language that in the case of employee benefit plans subject to ERISA, the independent representative is a fiduciary as defined in Section 3 of that Act.[121] Certain ERISA plans, fiduciaries and their trade associations, have urged the Commission to interpret the statute to mean that the independent representative of a plan subject to ERISA would not have to satisfy the additional criteria in Section 4s(h)(5)(A)(i)(I)–(VI), because such criteria would be duplicative of or inconsistent with ERISA requirements.[122] After consultations with DOL staff, the Commission is inclined, at this time, to treat ERISA fiduciaries like other independent representatives of Special Entities with respect to the criteria in Section 4s(h)(5)(A)(i)(I)–(VI). The Commission would expect that such ERISA fiduciaries and plans would be able to provide adequate representations to swap dealers and major swap participants to meet the additional criteria without incurring significant costs. The Commission seeks further comment from interested parties as to this approach, particularly with respect to whether the additional criteria, as proposed in the rule, are inconsistent in any way with the requirements under ERISA.

8. Restrictions on Political Contributions by Independent Representative of a Municipal Entity

As part of the process of determining the qualifications of an independent representative of a Special Entity that is a municipal entity,[123] the Commission proposes [124] to require swap dealers and major swap participants to ensure that the independent representative is subject to restrictions on certain political contributions, known as "pay-to-play" rules.[125] The requirement would not apply to in-house independent representatives of a municipal entity.[126]

9. Unqualified Independent Representative

Some stakeholders have expressed concern that the independent representative requirement places undue influence in the hands of the swap dealer or major swap participant by allowing it to use Section 4s(h)(5)(A)(i) to control who qualifies as an independent representative.[127] Thus, the proposed rule also provides that, if a swap dealer or major swap participant were to determine that the independent representative of a Special Entity did not meet the criteria established in this provision, the swap dealer or major swap participant would be required to make a written record of the basis for such determination and submit such determination to its Chief Compliance Officer for review to ensure that the swap dealer or major swap participant had a substantial, unbiased basis for the determination.

10. Disclosure of Capacity

Section 4s(h)(5)(A)(ii) requires swap dealers and major swap participants to disclose in writing to Special Entities the capacity in which they are acting before initiation of a swap transaction. The Commission proposes to adopt the statutory standard in a rule, and to require that, if a swap dealer or major swap participant were to engage in business with the Special Entity in more than one capacity, the swap dealer or major swap participant would have to disclose the material differences between the capacities. This would apply, for example, when the swap dealer acts both as an advisor and as a counterparty to the Special Entity, or when firms act both as underwriters in a bond offering and as counterparties in swaps used to hedge such financing. In these circumstances, the swap dealers' or major swap participants' duties to the Special Entities would vary depending on the capacities in which they are operating.

11. Inapplicability

Proposed § 23.450 would not apply with respect to a swap that is initiated on a DCM or SEF where the swap dealer or major swap participant does not know the Special Entity's identity.

Request for Comment: The Commission requests comment generally on all of the proposed rules regarding swap dealers and major swap participants that act as counterparties to Special Entities, and on the following specific issues:

- Should the rule clarify the statutory language to give more guidance to the criteria in Section 4s(h)(5)(A)(i)(I)–(VI)? If, yes, how?
- Are there any specific qualifications that should be considered in forming a reasonable basis regarding whether the independent representative has sufficient knowledge to evaluate the transaction and risks?
- Should the criterion in Section 4s(h)(5)(A)(i)(VII) be the only criterion that applies to employee benefit plans subject to ERISA? Why or why not? Are the criteria in Section 4s(h)(5)(A)(i)(I)–(VI) inconsistent with a fiduciary's duties under ERISA? Do the criteria in Section 4s(h)(5)(A)(i)(I)–(VI) add any protections for plans subject to ERISA that are not otherwise provided under ERISA?
- To resolve the ambiguity in the statutory text referenced in footnote 106, should the rule be limited to certain types of Special Entities? Why or why not? Which types should be included or excluded from coverage under the proposed rule?
- Should the rule define what it means for the independent representative to be independent of the swap dealer or major swap participant? If yes, should independence be measured in relation to ownership and control, material business relationships, or another measure? Should any "independence" test apply to employees of the independent representative, as well as to the representative, itself?
- Should the Commission specify a de minimis threshold below wh ich an independent representative will not be deemed to have a material business relationship with the swap dealer or major swap participant? If so, what would be an appropriate threshold?

D. Proposed § 23.451—Political Contributions by Certain Swap Dealers and Major Swap Participants

Using its discretionary rulemaking authority under Section 4s(h) to impose business conduct requirements in the

[120] For example, CTAs are required to maintain books and records for 5 years pursuant to § 1.31 of the Commission's regulations. (17 CFR 1.31).

[121] 29 U.S.C. 1002.

[122] *See, e.g.,* ABC Letter, at 4–5; ABC/CIEBA Letter, at 2–5.

[123] Proposed § 23.451.

[124] The Commission proposes this requirement pursuant to its discretionary authority in Section 4s(h) of the CEA, including in particular Section 4s(h)(5)(B).

[125] *See, e.g.,* SEC Rule 206(4)–5 under the Advisers Act (17 CFR 275.206(4)–5); MSRB Rule G–37: Political Contributions and Prohibitions on Municipal Securities Business. The Commission proposes to impose comparable requirements on swap dealers and major swap participants that act as advisors or counterparties to Special Entities. *See* proposed § 23.432. In a separate release, the Commission will also propose comparable requirements on registered commodity trading advisors when they advise municipal entities.

[126] The definition of "municipal advisor" in Section 15B of the Exchange Act (15 U.S.C. 78o–4) excludes employees of a municipal entity.

[127] *E.g.,* ABC Letter, at 8.

public interest,[128] the Commission is proposing to prohibit swap dealers and major swap participants from entering into swaps with "municipal entities" if they make certain political contributions to officials of such entities.[129] The proposed rule is intended to complement existing pay-to-play prohibitions imposed by Federal securities regulators to deter undue influence and other fraudulent practices that harm the public. The Commission's proposed rule would promote consistency in the business conduct standards that apply to financial market professionals dealing with municipal entities.

The existing restrictions on pay-to-play practices are contained in SEC Rule 206(4)–5 under the Investment Advisers Act of 1940,[130] which prohibits certain political contributions by investment advisers providing or seeking to provide investment advisory services to public pension plans and other government investors,[131] and under the Municipal Securities Rule Making Board ("MSRB") Rules G–37 and G–38,[132] which impose pay-to-play restrictions on municipal securities dealers and broker-dealers engaging or seeking to engage in the municipal securities business. The proposed rule is intended to deter swap dealers and major swap participants from engaging in pay-to-play practices.

1. Prohibitions

Proposed § 23.451, generally, would make it unlawful for a swap dealer or major swap participant to offer to enter or to enter into a swap with a municipal entity for a two-year period after the swap dealer or major swap participant or any of its covered associates makes a contribution to an official of the municipal entity. The proposed rule also would prohibit a swap dealer or major swap participant from paying a third-party to solicit municipal entities to enter into a swap, unless the third-party is a "regulated person" that is itself subject to a pay-to-play restriction under applicable law.[133] The proposed rule also would ban a swap dealer or major swap participant from soliciting or coordinating contributions to an official of a municipal entity with which the swap dealer or major swap participant is seeking to enter into, or has entered into a swap, or payments to a political party of a state or locality with which the swap dealer or major swap participant is seeking to enter into, or has entered into a swap. These proposed prohibitions are similar to those contained in SEC Advisers Act Rule 206(4)–5 and MSRB Rules G–37 and G–38.

The proposed rule also includes a provision that would make it unlawful for a swap dealer or major swap participant to do indirectly or through another person or means anything that would, if done directly, result in a violation of the prohibitions contained in the proposed rule.

a. Two-Year "Time Out"

The proposed rule would prohibit swap dealers and major swap participants from offering to enter into or entering into a swap with a municipal entity within two years after a contribution to an official of such municipal entity was made by the swap dealer or major swap participant or any of its covered associates. The two-year time out is consistent with the time out provisions contained in SEC Advisers Act Rule 206(4)–5 and MSRB Rule G–37.

b. Covered Associates

Political contributions made to influence the firm selection process are typically made not by the firm itself, but by officers and employees of the firm who have a stake in the business relationship with the municipal client. For this reason, contributions by such persons, which the rule defines as "covered associates," would trigger the two-year time out. A "covered associate" of a swap dealer or major swap participant is defined as (i) any general partner, managing member or executive officer, or other individual with a similar status or function; (ii) any employee who solicits a municipal entity for the swap dealer or major swap participant and any person who supervises, directly or indirectly, such employee; and (iii) any political action committee controlled by the swap dealer or major swap participant or any of its covered associates. This definition mirrors a similar provision in SEC Advisers Act Rule 206(4)–5.

Because the proposed rule attributes to a firm contributions made by a person even prior to becoming a covered associate of the firm, swap dealers and major swap participants must "look back" in time to determine whether the time out applies when an employee becomes a covered associate. For example, if the contribution was made less than two years (or six months, as applicable) before an individual becomes a covered associate, the proposed rule would prohibit the firm from entering into a swap with the relevant municipal entity until the two-year time out period has expired.

2. Exceptions

a. De Minimis Contributions

The proposed rule would permit an individual that is a covered associate to make aggregate contributions up to $350 per election, without being subject to the two-year time out period for any one official for whom the individual is entitled to vote, and up to $150, per election, to an official for whom the individual is not entitled to vote. The Commission believes this two-tiered de minimis approach is reasonable because of the more remote interest an individual is likely to have in contributing to a person for whom such individual is not entitled to vote. This provision is similar to the one contained in SEC Advisers Act Rule 206(4)–5.

b. New Covered Associates

The prohibitions of the proposed rule would not apply to contributions by an individual made more than six months prior to becoming a covered associate of the swap dealer or major swap participant, unless such individual solicits the municipal entity after becoming a covered associate.

c. Exchange and SEF Transactions

The prohibitions of the proposed rule would not apply to a swap that is initiated on a DCM or SEF, for which the swap dealer or major swap participant does not know the identity of the counterparty.

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[128] Section 4s(h)(5)(B).

[129] *See* proposed § 23.451(a)(3). The proposed definition of "municipal entity" is based on Exchange Act Section 15B(e)(8) (15 U.S.C. 78o–4(e)(8)) and means any State, political subdivision of a State, or municipal corporate instrumentality of a State, including—

(A) Any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality;

(B) Any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and

(C) Any other issuer of municipal securities.

[130] 17 CFR 275.206(4)–5 ("SEC Advisers Act Rule 206(4)–5").

[131] *See* "Political Contributions by Certain Investment Advisers," Release No. IA–3043 (Jul. 1, 2010), 75 FR 41018, Jul. 14, 2010 (adopting a rule that prohibits certain political contributions by investment advisers providing or seeking to provide investment advisory services to public pension plans and other government investors).

[132] *See* MSRB Rule G–37, Political Contributions and Prohibitions on Municipal Securities Business; MSRB Rule G–38, Solicitation of Municipal Securities Business.

[133] The Commission is proposing to define "regulated person," for purposes of the rule, to mean generally a person that is subject to rules of the SEC, the MSRB, a self-regulatory organization, or the Commission prohibiting it from engaging in specified activities if certain political contributions have been made, or its officers or employees.

3. Exemptions

A swap dealer or major swap participant would be exempt from the prohibitions of the proposed rule where the contribution that was made by a covered associate did not exceed $150 or $350, as applicable, was discovered by the swap dealer or major swap participant within four months of the date of contribution, and was returned to the contributor within 60 calendar days of the date of discovery. This automatic exemption mirrors similar provisions contained in SEC Advisers Act Rule 206(4)–5 and MSRB Rule G–37.

In addition, the Commission proposes a provision under which a swap dealer or major swap participant may apply to the Commission for an exemption from the two-year ban. In determining whether to grant the exemption, the Commission would consider, among other factors: (i) Whether the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes of the CEA; (ii) whether the swap dealer or major swap participant, before the contribution resulting in a prohibition was made, had adopted and implemented policies and procedures reasonably designed to prevent violations of the proposed rule, prior to or at the time of the contribution, had any actual knowledge of the contribution, and, after learning of the contribution, has taken all available steps to cause the contributor to obtain return of the contribution and such other remedial or preventative measures as may be appropriate under the circumstances; (iii) whether, at the time of the contribution, the contributor was a covered associate or otherwise an employee of the swap dealer or major swap participant, or was seeking such employment; (iv) the timing and amount of the contribution; (v) the nature of the election (*e.g.,* Federal, State or local); and (vi) the contributor's intent or motive in making the contribution, as evidenced by the facts and circumstances surrounding the contribution.[134] This exemption is similar to automatic exemption provisions contained in SEC Rule 206(4)–5 and MSRB Rule G–37.

Request for Comment: The Commission requests comments generally on the proposed rules regarding restrictions on certain political contributions by swap dealers and major swap participants and the following specific issues:

- Is the term "municipal entity" appropriately defined? If not, should the Commission refer to "a State, State agency, city, county, municipality, or other political subdivision of a State, or any governmental plan, as defined in Section 3 of [ERISA] (29 U.S.C. 1002)" within the meaning of Section 4s(h)(2)(C)? Should the Commission use the definition of "government entity" from SEC Advisers Act Rule 206(4)–5?[135] Should the Commission instead follow the approach of MSRB Rule G–37?[136]
- Should the proposed rule apply not to all swap dealers and major swap participants, but instead to only swap dealers? If so, why?

IV. Request for Comment

A. Generally

The Commission requests comment on all aspects of the proposed rules. In addition, the Commission seeks comment on the following specific issues:

- Should any proposed requirements be modified or deemed satisfied with respect to swaps that are traded and/or cleared on a registered entity? If so, which requirements should be modified or deemed satisfied, and why?
- Should the Commission use its discretionary authority, where applicable, to distinguish among swap dealers depending on their size and the nature of their business? If so, under what circumstances and how?
- Should any additional business conduct requirements be imposed on swap dealers and/or major swap participants? If so, which requirements should be imposed, and why?
- Should the Commission delay the effective date of any of the proposed requirements to allow additional time to comply with the requirements? If so, which requirements, and what is the compliance burden that should merit a delay?

B. Consistency With SEC Approach

The SEC is proposing rules related to business conduct standards for swap dealers and major swap participants as required under Section 764 of the Dodd-Frank Act. Understanding that the Commission and the SEC regulate different products and markets and thus, appropriately may be proposing alternative regulatory requirements, we request comments generally on the impact of any differences between the Commission and SEC approaches to business conduct regulation in this area.

- Do the regulatory approaches proposed by the Commission and the SEC result in duplicative or inconsistent business conduct standards for market participants subject to both regulatory regimes? Do the approaches result in gaps or different levels of regulation between those regimes? If so, in what ways do commenters believe that such duplication, inconsistencies, or gaps should be minimized?
- Do commenters believe there are ways that would make the approaches more consistent?

V. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[137] requires that agencies consider whether the rules they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis respecting the impact.[138] The business conduct rules proposed by the Commission generally will affect swap dealers and major swap participants. Prior to Dodd-Frank, the Commission did not have jurisdiction over swaps, swap dealers and major swap participants. Thus, the Commission has not previously addressed the question of whether swap dealers and major swap participants are, in fact, "small entities" for purposes of the RFA.

However, the Commission has previously established certain definitions for small entities to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.[139] For example, the Commission has previously determined that futures commission merchants ("FCMs") are not small entities for the purpose of the

[134] Proposed § 23.451(d).

[135] As used in SEC Advisers Act Rule 206(4)–5(f)(5) (17 CFR 275.206(4)–5(f)(5)), the term "government entity" means any State or political subdivision of a State, including:

(i) Any agency, authority, or instrumentality of the State or political subdivision;

(ii) A pool of assets sponsored or established by the State or political subdivision or any agency, authority or instrumentality thereof, including, but not limited to a "defined benefit plan" as defined in section 414(j) of the Internal Revenue Code (26 U.S.C. 414(j)), or a State general fund;

(iii) A plan or program of a government entity; and

(iv) Officers, agents, or employees of the State or political subdivision or any agency, authority or instrumentality thereof, acting in their official capacity.

[136] MSRB Rule G–37(g)(ii) references "the governmental issuer specified in section 3(a)(29) of the [Exchange] Act" which includes "a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one more States * * *" (15 U.S.C. 78c(29)).

[137] 5 U.S.C. 601 *et seq.*

[138] *Id.*

[139] 47 FR 18618, Apr. 30, 1982.

RFA[140] based upon, among other things, the requirements that FCMs meet certain minimum financial requirements that enhance the protection of customers' segregated funds and protect the financial condition of FCMs generally. The analogy to FCMs is appropriate in that we anticipate that swap dealers and major swap participants may have to register as FCMs depending on the nature of their business. Moreover, swap dealers and major swap participants will be subject to minimum capital and margin requirements, and are expected to comprise the largest global financial firms. Entities that engage in a *de minimis* quantity of swap dealing in connection with transactions with or on behalf of customers are exempt from the definition of swap dealers and major swap participants. Accordingly, the Commission is hereby determining that swap dealers and major swap participants not be considered to be "small entities" for essentially the same reasons that FCMs have previously been determined not to be small entities.

Similarly, the Commission has also previously determined that large traders are not "small entities" for RFA purposes.[141] The Commission considered the size of a trader's position to be the only appropriate test for purposes of large trader reporting.[142] Major swap participants maintain substantial positions in swaps, creating substantial counterparty exposure that could have serious adverse effects on the financial stability of the United States banking system or financial markets. Accordingly, the Commission is hereby determining that major swap participants not be considered "small entities" for essentially the same reasons that large traders have previously been determined not to be small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act ("PRA") provides that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget ("OMB"). [143]

This rulemaking contains collections of information, notably the proposed rules that will require swap dealers and major swap participants to make records, document processes, and make disclosures to counterparties with whom they propose to enter into swaps. OMB has not yet assigned a control number to the new collections. OMB has not yet assigned a control number to the new collection.

The collections of information contained herein overlap the requirements that are being proposed by the Commission in other rulemakings implementing the Dodd-Frank Act. The Commission is seeking or will seek control numbers from OMB for these collections in association with the other rulemakings. The other proposed rulemakings are being issued contemporaneously within the CFTC's Business Conduct Standard–Internal related rulemakings[144] implementing the Dodd-Frank Act. The Commission invites public comment on the accuracy of its estimate that no additional recordkeeping or information collection requirements or changes to existing collection requirements would result from the rules proposed herein.

C. Cost-Benefit Analysis

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before issuing a rulemaking under the CEA. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

Summary of proposed requirements. The proposed regulations would implement Section 4s(h) which requires the Commission to promulgate rules to establish business conduct standards for swap dealers and major swap participants governing their relationships with counterparties including special requirements with respect to Special Entities. Among other things, the statute mandates that the Commission adopt rules requiring swap dealers and major swap participants to verify that counterparties meet eligibility criteria, disclose material information about the contemplated swaps to counterparties, including material risks, characteristics, incentives and conflicts of interest; and an ongoing duty to provide counterparties a daily mark for swaps. The Commission also is directed to establish a duty for swap dealers and major swap participants to communicate in a fair and balanced manner based on principles of fair dealing and good faith.

Costs. The Commission's proposed rules implement new Section 4s(h) and enhance transparency, protect counterparties from fraud and abuse, bolster confidence in markets, reduce risk, and allow regulators to better monitor and manage our financial system. With respect to efficiency, the Commission has determined that adhering to the new requirements under the proposed rules will not be unduly burdensome for swap dealers and major swap participants. Indeed, the proposed rules, in part, reflect existing regulatory requirements in other markets as well as current industry practices in the swaps market.[145] In addition, the Commission has determined that the cost to market participants and the public if these rules are not adopted could be substantial. Significantly, without these rules to promote transparency and fair dealing, the financial integrity and stability of the swaps markets could be undermined.

Benefits. With respect to benefits, the Commission has determined that the proposed regulations would require a swap dealer or major swap participant to transact with market participants according to the principles of fair

[140] *Id.* at 18619.

[141] *Id.* at 18620.

[142] *Id.*

[143] 44 U.S.C. 3501 *et seq.*

[144] The Business Conduct Standard-Internal Rulemakings are: Regulations Establishing and Governing the Duties of Swap Dealers and Major Swap Participants, 75 FR 71397, Nov. 23, 2010; Designation of a Chief Compliance Officer, Required Compliance Policies, and Annual Report of a Futures Commission Merchant, Swap Dealer, Major Swap Participant, 75 FR 70881, Nov. 19, 2010; and Implementation of Conflict-of-Interest Standards by Swap Dealers and Major Swap Participants, 75 FR 71391, Nov. 23, 2010. In addition, the Commission will be issuing proposed rules regarding recordkeeping, reporting and daily trading records for swap transactions consistent with § 1.31 of the Commission's Regulations. (17 CFR § 1.31).

[145] *See, e.g.,* Trading & Capital-Markets Activities Manual, Section 2150; CRMPG III Report.

dealing and good faith in a manner intended to heighten the protection of market participants and the public. The additional protections for Special Entities reduces the overall risk to institutions critical to the public interest and the stability of the financial system by providing tools and safeguards to market participants in order to accurately assess risk, make informed decisions, and avoid crises. The proposed rules, if adopted, will result in greater certainty, reduced risk, increased transparency and market integrity in the swap market. Therefore, the Commission believes it is prudent to issue these business conduct requirements for swap dealers and major swap participants.

The Commission invites public comment on its cost-benefit considerations. Commenters are also are invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the proposed regulations with their comment letters.

List of Subjects in 17 CFR Part 23

Antitrust, Commodity futures, Business conduct standards, Conflict of Interests, Counterparties, Information, Major swap participants, Registration, Reporting and recordkeeping, Special entities, Swap dealers, Swaps.

List of Subjects in 17 CFR Part 155

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements, Swaps.

For the reasons presented above, the Commodity Futures Trading Commission proposes to amend part 23 (as proposed to be added by FR Doc 2010–29024, published on November 23, 2010, 75 FR 71379) and part 155 of Title 17 of the Code of Federal Regulations as follows:

PART 23—SWAP DEALERS AND MAJOR SWAP PARTICIPANTS

Authority and Issuance

1. The authority citation for part 23 shall be revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6b, 6c, 6p, 6s, 9, 9a, 12a, 13b, 13c, 16a, 18, 19, 21 as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (Jul. 21, 2010).

2. Add subpart H to read as follows:

Subpart H—Business Conduct Standards for Swap Dealers and Major Swap Participants Dealing With Counterparties, Including Special Entities

Sec.
23.400 Scope.
23.401 Definitions.
23.402 General provisions.
23.403–23.409 [Reserved]
23.410 Prohibition on fraud, manipulation and other abusive practices.
23.411–23.429 [Reserved]
23.430 Verification of counterparty eligibility.
23.431 Disclosures of material information.
23.432 Clearing.
23.433 Communications—fair dealing.
23.434 Recommendations to counterparties—institutional suitability.
23.435–23.439 [Reserved]
23.440 Requirements for swap dealers acting as advisors to special entities.
23.441–23.449 [Reserved]
23.450 Requirements for swap dealers and major swap participants acting as counterparties to special entities.
23.451 Political contributions by certain swap dealers and major swap participants.

§ 23.400 Scope.

(a) *Scope.* The sections of this subpart shall apply to swap dealers and major swap participants. These rules are not intended to limit, or restrict the applicability of other provisions of the Act, and rules and regulations thereunder, or other applicable laws, rules and regulations. The provisions of this subpart shall apply in connection with transactions in swaps as well as in connection with swaps that are offered but not entered into.

§ 23.401 Definitions.

Counterparty. The term "counterparty," as appropriate in this subpart, includes any person who is a prospective counterparty to a swap.

Major swap participant. The term "major swap participant" means any person defined in Section 1a(33) of the Act and § 1.33(bbb) of this chapter and, as appropriate in this subpart, any person acting for or on behalf of a major swap participant, including an associated person defined in Section 1a(4) of the Act.

Special Entity. The term Special Entity means:

(1) A Federal agency;

(2) A State, State agency, city, county, municipality, or other political subdivision of a State or;

(3) Any employee benefit plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002);

(4) Any governmental plan, as defined in Section 3 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002); or

(5) Any endowment, including an endowment that is an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)).

Swap dealer. The term "swap dealer" means any person defined in Section 1a(49) of the Act and § 1.3(aaa) of this chapter and, as appropriate in this subpart, any person acting for or on behalf of a swap dealer, including an associated person defined in Section 1a(4) of the Act.

§ 23.402 General provisions.

(a) *Policies and Procedures to Ensure Compliance and Prevent Evasion of the Requirements of this Subpart.*

(1) Swap dealers and major swap participants shall have policies and procedures reasonably designed to:

(i) Ensure compliance with the requirements of this subpart; and

(ii) Prevent a swap dealer or major swap participant from evading or participating in or facilitating an evasion of any provision of the Act or any regulation promulgated thereunder.

(2) Swap dealers and major swap participants shall implement and monitor compliance with such policies and procedures as part of their supervision and risk management requirements specified in subpart J of this part.

(b) *Diligent Supervision.* Swap dealers and major swap participants shall diligently supervise their compliance with the requirements of this subpart in accordance with the diligent supervision requirements of subpart J of this part.

(c) *Know your counterparty.* Each swap dealer or major swap participant shall use reasonable due diligence to know and retain a record of the essential facts concerning each counterparty and the authority of any person acting for such counterparty, including facts necessary to:

(1) Comply with applicable laws, regulations and rules;

(2) Effectively service the counterparty;

(3) Implement any special instructions from the counterparty; and

(4) Evaluate the previous swaps experience, financial wherewithal and flexibility, trading objectives and purposes of the counterparty.

(d) *True name and owner.* Each swap dealer or major swap participant shall keep a record which shall show the true name and address of each counterparty, the principal occupation or business of such counterparty as well as the name and address of any other person

guaranteeing the performance of such counterparty and any person exercising any control with respect to the positions of such counterparty.

(e) *Reasonable Reliance on Representations.* A swap dealer or major swap participant that seeks to rely on the written representations of a counterparty with respect to any requirements under this subpart must have a reasonable basis to believe that the representations are reliable taking into consideration the facts and circumstances of the particular relationship, assessed in the context of the particular transaction. The representations shall include information sufficiently detailed for the swap dealer or major swap participant reasonably to conclude that the relevant requirement is satisfied. If agreed to by the counterparties, such representations may be contained in a master or other written agreement between the counterparties and may satisfy the relevant requirements of this subpart for subsequent swaps offered to or entered into with a counterparty, unless the representations are inadequate to meet the requirements of this subpart with respect to any subsequent swap.

(f) *Manner of disclosure.* A swap dealer or major swap participant may provide the information required by this subpart by any reliable means agreed to in writing by the counterparty.

(g) *Disclosures in a standard format.* If agreed to by a counterparty, the disclosure of material information that is applicable to multiple swaps between a swap dealer or major swap participant and a counterparty, may be made in a standard format, including in a master or other written agreement between the counterparties.

(h) *Record Retention.* Swap dealers and major swap participants shall create a record of their compliance with the requirements in this subpart and shall retain such records in accordance with subpart F of this part and § 1.31 of this chapter and make them available to applicable prudential regulators, upon request.

§§ 23.403–23.409 [Reserved]

§ 23.410 Prohibition on fraud, manipulation and other abusive practices.

(a) It shall be unlawful for a swap dealer or major swap participant–

(1) To employ any device, scheme, or artifice to defraud any Special Entity or prospective customer who is a Special Entity;

(2) To engage in any transaction, practice, or course of business that operates as a fraud or deceit on any Special Entity or prospective customer who is a Special Entity; or

(3) To engage in any act, practice, or course of business that is fraudulent, deceptive, or manipulative.

(b) *Confidential treatment of counterparty information.* It shall be unlawful for any swap dealer or major swap participant to disclose to any other person any material confidential information obtained from a counterparty, unless such disclosure is necessary for the effective execution of any swap for or with the counterparty or to hedge any exposure created by such swap, and the counterparty specifically consents to such disclosure, or such disclosure is made upon request of the Commission, Department of Justice or an applicable prudential regulator.

(c) *Trading ahead and front running prohibited.* It shall be unlawful for any swap dealer or major swap participant knowingly to enter into a transaction for its own benefit ahead of:

(1) Any executable order for a swap received from a counterparty, or

(2) Any swap that is the subject of negotiation with a counterparty, unless the counterparty specifically consents to the prior execution of such swap transaction.

§§ 23.411–23.429 [Reserved]

§ 23.430 Verification of counterparty eligibility.

(a) *Eligibility.* A swap dealer or major swap participant shall verify that a counterparty meets the eligibility standards for an eligible contract participant, as defined in Section 1a(18) of the Act and § 1.3(m) of this chapter, before offering to enter into or entering into a swap with that counterparty.

(b) *Special Entity.* In verifying the eligibility of a counterparty pursuant to paragraph (a) of this section, a swap dealer or major swap participant shall also verify whether the counterparty is a Special Entity.

(c) This section shall not apply with respect to a transaction that is:

(1) Initiated on a swap execution facility; and

(2) One in which the swap dealer or major swap participant does not know the identity of the counterparty to the transaction.

§ 23.431 Disclosures of material information.

(a) At a reasonably sufficient time prior to entering into a swap, a swap dealer or major swap participant shall disclose to any counterparty to the swap (other than a swap dealer, major swap participant, security-based swap dealer or major security-based swap participant) material information concerning the swap in a manner reasonably designed to allow the counterparty to assess–

(1) The material risks of the particular swap, which may include, market, credit, liquidity, foreign currency, legal, operational, and any other applicable risks. In addition to the disclosures of material risks required in paragraph (a) of this section:

(i) Prior to entering into a bilateral swap that is not available for trading on a designated contract market or swap execution facility, swap dealers and major swap participants shall notify the counterparty that it can request a scenario analysis as provided in paragraph (a)(1) of this section. Swap dealers and major swap participants shall, upon request of such counterparty, provide such scenario analysis.

(ii) For a high-risk complex bilateral swap with a counterparty, a swap dealer or major swap participant shall provide a scenario analysis designed in consultation with the counterparty to allow the counterparty to assess its potential exposure in connection with the swap. The scenario analysis shall be done over a range of assumptions, including severe downside stress scenarios that would result in a significant loss.

(iii) For the purposes of paragraph (a)(1)(ii) of this section, a swap dealer or major swap participant shall use reasonable policies and procedures to determine whether a bilateral swap is a high-risk complex swap based on the material characteristics of the swap including, but not limited to, one or more of the following criteria:

(A) The degree and nature of leverage;

(B) The potential for periods of significantly reduced liquidity; and

(C) The lack of price transparency.

(iv) The scenario analysis required by paragraphs (a)(1)(i) and (a)(1)(ii) of this section shall be provided by the swap dealer or major swap participant in both tabular and narrative formats. The swap dealer or major swap participant shall disclose all material assumptions and explain the calculation methodologies used to perform the required analysis; provided that, the swap dealer or major swap participant is not required to disclose confidential, proprietary information about any model it may use to value the swap.

(v) In designing the scenario analysis required by paragraphs (a)(1)(i) and (a)(1)(ii) of this section, a swap dealer or major swap participant shall consider any relevant analyses that it undertakes for its own risk management purposes, including analyses performed as part of its "New Product Policy" specified in § 23.600(c)(3);

(2) The material characteristics of the particular swap, which shall include the material economic terms of the swap, the terms relating to the operation of the swap and the rights and obligations of the parties during the term of the swap; and

(3) The material incentives and conflicts of interest that the swap dealer or major swap participant may have in connection with the particular swap, which shall include:

(i) With respect to disclosure of the price of a swap, the price of the swap and the mid-market value of the swap as defined in paragraph (c)(2) of this section; and

(ii) Any compensation or other incentive from any source other than the counterparty that the swap dealer or major swap participant may receive in connection with the swap.

(b) Paragraph (a) of this section shall not apply with respect to a transaction that is:

(1) Initiated on a designated contract market or a swap execution facility; and

(2) One in which the swap dealer or major swap participant does not know the identity of the counterparty to the transaction.

(c) *Daily mark.* A swap dealer or major swap participant shall:

(1) For cleared swaps, notify a counterparty of the counterparty's right to receive, upon request, the daily mark from the appropriate derivatives clearing organization; and

(2) For uncleared swaps, provide the counterparty with a daily mark which shall be the mid-market value of the swap. The mid-market value of the swap shall not include amounts for profit, credit reserve, hedging, funding, liquidity or any other costs or adjustments. The daily mark shall be provided to the counterparty on each business day during the term of the swap as of the close of business, or such other time as the parties agree in writing.

(3) For uncleared swaps, disclose to the counterparty:

(i) The methodology and assumptions used to prepare the daily mark and any material changes during the term of the swap, provided that, the swap dealer or major swap participant is not required to disclose to the counterparty confidential, proprietary information about any model it may use to prepare the daily mark.

(ii) Additional information concerning the daily mark to ensure a fair and balanced communication, including, as appropriate:

(A) The daily mark may not necessarily be a price at which either the counterparty or the swap dealer or major swap participant would agree to replace or terminate the swap;

(B) Depending upon the agreement of the parties, calls for margin may be based on considerations other than the daily mark provided to the counterparty; and

(C) The daily mark may not necessarily be the value of the swap that is marked on the books of the swap dealer or major swap participant.

§ 23.432 Clearing.

(a) *For swaps required to be cleared—right to select derivatives clearing organization.* A swap dealer or major swap participant shall notify any counterparty (other than a registered swap dealer, securities-based swap dealer, major swap participant or major securities-based swap participant) that enters into a swap or is offered to enter into a swap that is subject to mandatory clearing under Section 2(h) of the Act, that the counterparty has the sole right to select the derivatives clearing organization at which the swap will be cleared.

(b) *For swaps not required to be cleared—right to clearing.* A swap dealer or major swap participant shall notify any counterparty (other than a registered swap dealer, securities-based swap dealer, major swap participant or major securities-based swap participant) that enters into a swap that is not subject to the mandatory clearing requirements under Section 2(h) of the Act that the counterparty:

(1) May elect to require clearing of the swap, and

(2) Shall have the sole right to select the derivatives clearing organization at which the swap will be cleared.

§ 23.433 Communications—fair dealing.

With respect to any communication between a swap dealer or major swap participant and any counterparty, the swap dealer or major swap participant shall communicate in a fair and balanced manner based on principles of fair dealing and good faith.

§ 23.434 Recommendations to counterparties—institutional suitability.

(a) A swap dealer or major swap participant shall have a reasonable basis to believe that any swap or trading strategy involving swaps recommended to a counterparty is suitable for the counterparty based on information obtained through reasonable due diligence concerning the counterparty's financial situation and needs, objectives, tax status, ability to evaluate the recommendation, liquidity needs, risk tolerance, ability to absorb potential losses related to the recommended swap or trading strategy, and any other information known by the swap dealer or major swap participant.

(b)(1) A swap dealer or major swap participant will fulfill its obligations under paragraph (a) of this section if:

(i) The swap dealer has a reasonable basis to believe that the counterparty is capable of evaluating, independently, the risks related to a particular swap or trading strategy involving swaps recommended to the counterparty;

(ii) The counterparty affirmatively indicates that it is exercising independent judgment in evaluating the recommendations; and

(iii) The swap dealer has a reasonable basis to believe that the counterparty has the capacity to absorb potential losses related to the recommended swap or trading strategy involving swaps.

(2) Provided that, where a counterparty has delegated discretionary authority to another person, such as a registered commodity trading advisor, the factors contained in paragraphs (b)(1)(i) and (b)(1)(ii) of this section shall be applied to such person.

(c) This section shall not apply:

(1) To any recommendations made to another swap dealer, major swap participant, security-based swap dealer, or major security-based swap participant; or

(2) Where a swap dealer or major swap participant provides:

(i) Information that is general transaction, financial, or market information; or

(ii) Swap terms in response to a competitive bid request from the counterparty.

§§ 23.435–23.439 [Reserved]

§ 23.440 Requirements for swap dealers acting as advisors to special entities.

(a) For purposes of this section the term "acts as an advisor to a Special Entity" shall include where a swap dealer recommends a swap or trading strategy that involves the use of swaps to a Special Entity. The term shall not include where a swap dealer provides:

(1) Information to a Special Entity that is general transaction, financial, or market information or

(2) Swap terms in response to a competitive bid request from the Special Entity.

(b) A swap dealer that acts as an advisor to a Special Entity regarding a swap shall comply with the following requirements:

(1) *Duty.* Any swap dealer that acts as an advisor to a Special Entity shall have a duty to act in the best interests of the Special Entity.

(2) *Reasonable Efforts.* Any swap dealer that acts as an advisor to a

Special Entity shall make reasonable efforts to obtain such information as is necessary to make a reasonable determination that any swap or trading strategy involving a swap recommended by the swap dealer is in the best interests of the Special Entity. This information shall include information relating to:

(i) The authority of the Special Entity to enter into a swap;

(ii) The financial status of the Special Entity, as well as future funding needs;

(iii) The tax status of the Special Entity;

(iv) The investment or financing objectives of the Special Entity (including review of any written derivatives, financing and investment policies, plans or similar documents);

(v) The experience of the Special Entity with respect to entering into swaps, generally, and swaps of the type and complexity being recommended;

(vi) Whether the Special Entity has an independent representative that meets the criteria enumerated in § 23.450(b);

(vii) Whether the Special Entity has the financial capability to withstand potential market-related changes in the value of the swap during the term of the swap; and

(viii) Such other information as is relevant to the particular facts and circumstances of the Special Entity, market conditions and the type of swap recommended.

(c) *Reasonable reliance on representations of the Special Entity.* The swap dealer may rely on written representations of the Special Entity to satisfy its requirement in paragraph (b) of this section to make "reasonable efforts" to obtain necessary information, provided that:

(1) The swap dealer has a reasonable basis to believe that the representations are reliable taking into consideration the facts and circumstances of a particular swap dealer-Special Entity relationship, assessed in the context of a particular transaction; and

(2) The representations include information sufficiently detailed for the swap dealer to reasonably conclude that the Special Entity is:

(i) Capable of evaluating independently the material risks inherent in the recommendation;

(ii) Exercising independent judgment in evaluating the recommendation; and

(iii) Capable of absorbing potential losses related to the recommended swap; and

(3) The swap dealer has a reasonable basis to believe that the Special Entity has a representative that meets the criteria enumerated in § 23.450(b).

§§ 23.441–23.449 [Reserved]

§ 23.450 Requirements for swap dealers and major swap participants acting as counterparties to special entities.

(a) *Definitions.* For purposes of this section:

(1) The term "material business relationship" means any relationship with a swap dealer or major swap participant, whether compensatory or otherwise, that reasonably could affect the independent judgment or decision making of the representative, provided however, that material business relationship does not include payment of fees by the swap dealer or major swap participant to the representative at the written direction of the Special Entity for services provided by the representative in connection with the swap executed between the Special Entity and the swap dealer or major swap participant. The term "material business relationship" shall be subject to a one-year look back; and

(2) The term "principal relationship" means where a swap dealer or major swap participant is a principal of the representative of a Special Entity or the representative of a Special Entity is a principal of the swap dealer or major swap participant, as the term "principal" is defined in § 3.1(a) of this chapter;

(3) The term "statutory disqualification" means grounds for refusal to register or to revoke, condition or restrict the registration of any registrant or applicant for registration as set forth in Sections 8a(2) and 8a(3) of the Act.

(b) Any swap dealer or major swap participant that offers to or enters into a swap with a Special Entity shall have a reasonable basis to believe that the Special Entity has a representative that:

(1) Has sufficient knowledge to evaluate the transaction and risks;

(2) Is not subject to a statutory disqualification;

(3) Is independent of the swap dealer or major swap participant;

(4) Undertakes a duty to act in the best interests of the Special Entity it represents;

(5) Makes appropriate and timely disclosures to the Special Entity;

(6) Evaluates, consistent with any guidelines provided by the Special Entity, fair pricing and the appropriateness of the swap;

(7) In the case of employee benefit plans subject to the Employee Retirement Income Security Act of 1974, is a fiduciary as defined in Section 3 of that Act (29 U.S.C. 1002); and

(8) In the case of a municipal entity as defined in § 23.451, is subject to restrictions on certain political contributions imposed by the Commission, the Securities and Exchange Commission or a self-regulatory organization subject to the jurisdiction of the Commission or the Securities and Exchange Commission, provided that, this paragraph shall not apply if the representative is an employee of the Special Entity.

(c) For purposes of paragraph (b)(3) of this section, a representative of a Special Entity will be deemed to be independent of the swap dealer or major swap participant if:

(1) The representative is not and, within one year, was not an associated person of the swap dealer or major swap participant, within the meaning of Section 1a(4) of the Act;

(2) There is no principal relationship between the representative of the Special Entity and the swap dealer or major swap participant; and

(3) The representative does not have a material business relationship with the swap dealer or major swap participant, provided however, that if the representative received any compensation from the swap dealer or major swap participant, the swap dealer or major swap participant must ensure that the Special Entity is informed of the compensation and the Special Entity agrees in writing, in consultation with the representative, that the compensation does not constitute a material business relationship.

(d) *Reasonable reliance on representations of the Special Entity.* A swap dealer may rely on written representations of a Special Entity to satisfy its obligation to have a reasonable basis to believe that the Special Entity has a representative that satisfies the criteria in paragraph (b) of this section provided that:

(1) The swap dealer has a reasonable basis to believe that the representations are reliable taking into consideration the facts and circumstances of a particular Special Entity-representative relationship, assessed in the context of a particular transaction;

(2) The representations include information sufficiently detailed for the swap dealer reasonably to conclude that the representative satisfies the criteria in paragraph (b) of this section. Relevant considerations would include:

(i) The nature of the relationship between the Special Entity and the representative and the duties of the representative, including the obligation of the representative to act in the best interests of the Special Entity;

(ii) The representative's capability to make hedging or trading decisions, and the resources available to the

representative to make informed decisions;

(iii) The use by the representative of one or more consultants;

(iv) The general level of experience of the representative in financial markets and specific experience with the type of instruments, including the specific asset class, under consideration;

(v) The representative's ability to understand the economic features of the swap involved;

(vi) The representative's ability to evaluate how market developments would affect the swap; and

(vii) The complexity of the swap or swaps involved.

(e) *Unqualified representative.* If a swap dealer or major swap participant determines that the representative of a Special Entity does not meet the criteria established in this section, the swap dealer or major swap participant shall make a written record of the basis for such determination and submit such determination to its Chief Compliance Officer for review to ensure that the swap dealer or major swap participant has a substantial, unbiased basis for the determination.

(f) Before the initiation of a swap, a swap dealer or major swap participant shall disclose to the Special Entity in writing:

(1) The capacity in which it is acting in connection with the swap; and

(2) If the swap dealer or major swap participant engages in business with the Special Entity in more than one capacity, the swap dealer or major swap participant shall disclose the material differences between such capacities in connection with the swap and any other financial transaction or service involving the Special Entity.

(g) This section shall not apply with respect to a transaction that is:

(1) Initiated on a designated contract market or swap execution facility; and

(2) One in which the swap dealer or major swap participant does not know the identity of the counterparty to the transaction.

§ 23.451 Political contributions by certain swap dealers and major swap participants.

(a) *Definitions.* For the purposes of this section:

(1) The term "*contribution*" means any gift, subscription, loan, advance, or deposit of money or anything of value made:

(i) For the purpose of influencing any election for state or local office;

(ii) For payment of debt incurred in connection with any such election; or

(iii) For transition or inaugural expenses incurred by the successful candidate for state or local office.

(2) The term "*covered associate*" means:

(i) Any general partner, managing member or executive officer, or other person with a similar status or function;

(ii) Any employee who solicits a municipal entity for the swap dealer or major swap participant and any person who supervises, directly or indirectly, such employee; and

(iii) Any political action committee controlled by the swap dealer or major swap participant or by any person described in paragraphs (a)(2)(i) and (a)(2)(ii) of this section.

(3) The term "*municipal entity*" means any State, political subdivision of a State, or municipal corporate instrumentality of a State, including—

(i) Any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality;

(ii) Any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and any other issuer of municipal securities.

(4) The term "*official*" of a municipal entity means any person (including any election committee for such person) who was, at the time of the contribution, an incumbent, candidate or successful candidate for elective office of a municipal entity, if the office:

(i) Is directly or indirectly responsible for, or can influence the outcome of, the selection of a swap dealer or major swap participant by a municipal entity; or

(ii) Has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the selection of a swap dealer or major swap participant by a municipal entity.

(5) The term "*payment*" means any gift, subscription, loan, advance, or deposit of money or anything of value.

(6) The term "*regulated person*" means:

(i) A person that is subject to restrictions on certain political contributions imposed by the Commission, the Securities and Exchange Commission or a self-regulatory agency subject to the jurisdiction of the Commission or the Securities and Exchange Commission;

(ii) A general partner, managing member or executive officer of such person, or other individual with a similar status or function; or

(iii) An employee of such person who solicits a municipal entity for the swap dealer or major swap participant and any person who supervises, directly or indirectly, such employee.

(7) The term "*solicit*" means a direct or indirect communication by any person with a municipal entity for the purpose of obtaining or retaining an engagement related to a swap.

(b) *Prohibitions and Exceptions.*

(1) As a means reasonably designed to prevent fraud, no swap dealer or major swap participant shall offer to enter into or enter into a swap or a trading strategy involving a swap with a municipal entity within two years after any contribution to an official of such municipal entity was made by the swap dealer or major swap participant, or by any covered associate of the swap dealer or major swap participant, provided however, that:

(2) This prohibition does not apply:

(i) If the only contributions made by the swap dealer or major swap participant to an official of such municipal entity were made by a covered associate:

(A) To officials for whom the covered associate was entitled to vote at the time of the contributions, provided that the contributions in the aggregate do not exceed $350 to any one official per election; or

(B) To officials for whom the covered associate was not entitled to vote at the time of the contributions, provided that the contributions in the aggregate do not exceed $150 to any one official, per election;

(ii) To a swap dealer or major swap participant as a result of a contribution made by a natural person more than six months prior to becoming a covered associate of the swap dealer or major swap participant, provided that this exclusion shall not apply if the natural person, after becoming a covered associate, solicits the municipal entity on behalf of the swap dealer or major swap participant to offer to enter into or to enter into a swap or trading strategy involving; or

(iii) With respect to a swap that is initiated on a designated contract market or swap execution facility if the swap dealer or major swap participant does not know the identity of the counterparty to the transaction at the time of the transaction.

(3) No swap dealer or major swap participant or any covered associate of the swap dealer or major swap participant shall:

(i) Provide or agree to provide, directly or indirectly, payment to any person to solicit a municipal entity to offer to enter into, or to enter into, a swap with that swap dealer or major swap participant unless such person is a regulated person; or

(ii) Coordinate, or solicit any person or political action committee to make, any:

(A) Contribution to an official of a municipal entity with which the swap dealer or major swap participant is offering to enter into, or has entered into, a swap; or

(B) Payment to a political party of a state or locality with which the swap dealer or major swap participant is offering to enter into or has entered into a swap or a trading strategy involving a swap.

(c) *Circumvention of Rule.* No swap dealer or major swap participant shall, directly or indirectly, through or by any other person or means, do any act that would result in a violation of paragraph (b) of this section.

(d) *Requests for Exemption.* The Commission, upon application, may conditionally or unconditionally exempt a swap dealer or major swap participant from the prohibition under paragraph (b) of this section. In determining whether to grant an exemption, the Commission will consider, among other factors:

(1) Whether the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes of the Act;

(2) Whether the swap dealer or major swap participant:

(i) Before the contribution resulting in the prohibition was made, adopted and implemented policies and procedures reasonably designed to prevent violations of this section;

(ii) Prior to or at the time the contribution which resulted in such prohibition was made, had no actual knowledge of the contribution; and

(iii) After learning of the contribution:

(A) Has taken all available steps to cause the contributor involved in making the contribution which resulted in such prohibition to obtain a return of the contribution; and

(B) Has taken such other remedial or preventive measures as may be appropriate under the circumstances;

(3) Whether, at the time of the contribution, the contributor was a covered associate or otherwise an employee of the swap dealer or major swap participant, or was seeking such employment;

(4) The timing and amount of the contribution which resulted in the prohibition;

(5) The nature of the election (*e.g.,* Federal, State or local); and

(6) The contributor's apparent intent or motive in making the contribution that resulted in the prohibition, as evidenced by the facts and circumstances surrounding the contribution.

(e) *Prohibitions Inapplicable.* (1) The prohibitions under paragraph (b) of this section shall not apply to a contribution made by a covered associate of the swap dealer or major swap participant if:

(i) The swap dealer or major swap participant discovered the contribution within 120 calendar days of the date of such contribution;

(ii) The contribution did not exceed the amounts permitted by paragraphs (b)(2)(i)(A) or (B) of this section; and

(iii) The covered associate obtained a return of the contribution within 60 calendar days of the date of discovery of the contribution by the swap dealer or major swap participant.

(2) A swap dealer or major swap participant may not rely on paragraph (e)(1) of this section more than twice in any 12-month period.

(3) A swap dealer or major swap participant may not rely on paragraph (e)(1) of this section more than once for any covered associate, regardless of the time between contributions.

PART 155—TRADING STANDARDS

Authority and Issuance

3. The authority citation for part 155 shall be revised to read as follows:

Authority: 7 U.S.C. 6b, 6c, 6g, 6j, 6s, and 12a as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (Jul. 21, 2010).

4. Add § 155.7 to read as follows:

§ 155.7 Execution standards.

(a) In connection with any customer order to enter into a swap where such swap is available for trading on one or more designated contract markets or swap execution facilities, a Commission registrant shall:

(1) Prior to execution of the swap, disclose to the customer:

(i) The designated contract markets and swap execution facilities on which the swap is available for trading; and

(ii) The designated contract markets and swap execution facilities on which the registrant has trading privileges.

(2) Execute the order on terms that have a reasonable relationship to the best terms available for such swap on designated contract markets or swap execution facilities trading such swap.

(b) As part of the execution requirements in paragraph (a) of this section, the registrant shall use reasonable diligence to ascertain the best terms available. Among the factors that will be considered in determining whether a Commission registrant has used "reasonable diligence" are:

(1) The character of the market for the swap, including price, volatility, speed, certainty of execution, and liquidity;

(2) The size and type of transaction;

(3) The number of markets checked;

(4) Accessibility of quotations; and

(5) The terms and conditions of the order which results in the transaction, as communicated to the Commission registrant.

By the Commission, this 9th day of December 2010.

David A. Stawick,

Secretary.

Appendices to Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties—Commission Voting Summary and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Sommers, Chilton and O'Malia voted in the affirmative; no Commissioner voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the proposed rulemaking to establish business conduct standards for swap dealers and major swap participants in their dealings with counterparties. Today's proposal implements important new authorities that Congress granted the Commission to establish and enforce robust sales practices in the swap markets. The proposed rule will level the playing field and bring needed transparency. It will strengthen confidence in the market to benefit hedgers and other market participants.

The proposed rule would prohibit fraud and certain abusive practices. It also would implement requirements for swap dealers and major swap participants to deal fairly with customers, provide balanced communications and disclose conflicts of interest and material incentives before entering into a swap. The rule also would implement the Dodd-Frank heightened duties on swap dealers and major swap participants when they deal with certain entities, such as pension plans, governmental entities and endowments.

The proposed rule is intended to ensure that swaps customers get fair treatment in the execution of their transactions. It would require swap dealers to disclose what access they have to swap execution facilities and designated contract markets. These rules also prohibit a swap dealer from defrauding a customer by executing a transaction on terms that have no "reasonable relationship" to the market. The proposed rule provides flexibility to accommodate developments in

the swaps markets while also protecting customers.

[FR Doc. 2010–31588 Filed 12–21–10; 8:45 am]

BILLING CODE 6351–01–P

Federal Register

Wednesday,
December 22, 2010

Part IV

Environmental Protection Agency

Sixty-Seventh Report of the TSCA Interagency Testing Committee to the Administrator of the Environmental Protection Agency; Receipt of Report and Request for Comments; Notice

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2010–0924; FRL–8854–1]

Sixty-Seventh Report of the TSCA Interagency Testing Committee to the Administrator of the Environmental Protection Agency; Receipt of Report and Request for Comments

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Toxic Substances Control Act (TSCA) Interagency Testing Committee (ITC) transmitted its Sixty-Seventh Report to the Administrator of EPA on November 9, 2010. In the 67th ITC Report, which is included with this notice, the ITC is not making any changes to the TSCA section 4(e) *Priority Testing List.*

DATES: Comments must be received on or before January 21, 2011.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2010–0924, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Document Control Office (7407M), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Hand Delivery:* OPPT Document Control Office (DCO), EPA East Bldg., Rm. 6428, 1201 Constitution Ave., NW., Washington, DC. Attention: Docket ID Number EPA–HQ–OPPT–2010–0924. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 564–8930. Such deliveries are only accepted during the DCO's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to docket ID number EPA–HQ–OPPT–2010–0924. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov,* or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

FOR FURTHER INFORMATION CONTACT: *For technical information contact:* John D. Walker, Interagency Testing Committee (7401M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–7527; fax number: (202) 564–7528; e-mail address: *walker.johnd@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This notice is directed to the public in general. It may, however, be of particular interest to you if you manufacture (defined by statute to include import) and/or process TSCA-covered chemicals and you may be identified by the North American Industrial Classification System (NAICS) codes 325 and 32411. Because this notice is directed to the general public and other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be interested in this action. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

The Toxic Substances Control Act (TSCA) (15 U.S.C. 260l *et seq.*) authorizes the Administrator of EPA to promulgate regulations under TSCA section 4(a) requiring testing of chemicals and chemical groups in order to develop data relevant to determining the risks that such chemicals and chemical groups may present to health or the environment. Section 4(e) of TSCA established the ITC to recommend chemicals and chemical groups to the Administrator of EPA for priority testing consideration. Section 4(e) of TSCA directs the ITC to revise the TSCA section 4(e) *Priority Testing List* at least every 6 months.

You may access additional information about the ITC at *http://www.epa.gov/opptintr/itc.*

A. The 67th ITC Report

The ITC is not making any changes to the TSCA section 4(e) *Priority Testing List.*

B. Status of the Priority Testing List

The *Priority Testing List* includes 2 alkylphenols, 12 lead compounds, 16 chemicals with insufficient dermal absorption rate data, and 207 High Production Volume (HPV) Challenge Program orphan chemicals.

List of Subjects

Environmental protection, Chemicals, Hazardous substances.

Dated: December 14, 2010.

Wendy C. Hamnett,

Director, Office of Pollution Prevention and Toxics.

Sixty-Seventh Report of the TSCA Interagency Testing Committee to the Administrator of the Environmental Protection Agency

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I. Background
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III. The TSCA Interagency Testing Committee

Summary

The ITC is not making any changes to the Toxic Substances Control Act (TSCA) section 4(e) *Priority Testing List.*

The TSCA section 4(e) *Priority Testing List* is Table 1 of this unit.

TABLE 1—TSCA SECTION 4(e) PRIORITY TESTING LIST

[December 2010]

ITC report	Date	Chemical name/group	Action
31	January 1993	2 Chemicals with insufficient dermal absorption rate data, methylcyclohexane and cyclopentane.	Designated.
32	May 1993	10 Chemicals with insufficient dermal absorption rate data.	Designated.
35	November 1994	4 Chemicals with insufficient dermal absorption rate data, cyclopentadiene, formamide, 1,2,3-trichloropropane and m-nitrotoluene.	Designated.
37	November 1995	Branched 4-nonylphenol (mixed isomers).	Recommended.
41	November 1997	Phenol, 4-(1,1,3,3-tetramethylbutyl).	Recommended.
55	December 2004	203 High Production Volume (HPV) Challenge Program orphan chemicals.	Recommended.
56	August 2005	4 HPV Challenge Program orphan chemicals.	Recommended.
60	May 2007	12 Lead and lead compounds.	Recommended.

I. Background

The ITC was established by section 4(e) of TSCA "to make recommendations to the Administrator respecting the chemical substances and mixtures to which the Administrator should give priority consideration for the promulgation of rules for testing under section 4(a) * * * At least every six months * * *, the Committee shall make such revisions to the *Priority Testing List* as it determines to be necessary and transmit them to the Administrator together with the Committee's reasons for the revisions" (Public Law 94–469, 90 Stat. 2003 *et seq.,* 15 U.S.C. 2601 *et seq.*). ITC reports are available from the ITC's website (*http://www.epa.gov/opptintr/itc*) within a few days of submission to the EPA Administrator and from regulations.gov (*http://www.regulations.gov*) after publication in the **Federal Register.** The ITC produces its revisions to the *Priority Testing List* with administrative and technical support from the ITC staff, ITC members, and their U.S. Government organizations, and contract support

provided by EPA. ITC members and staff are listed at the end of this report.

II. ITC's Activities During This Reporting Period (June 2010 to December 2010)

During this reporting period, the ITC reviewed the Nonylphenol (NP) & Nonylphenol Ethoxylates (NPEs) Action Plan available at *http://www.epa.gov/oppt/existingchemicals/pubs/actionplans/np-npe.html.*

III. The TSCA Interagency Testing Committee

Statutory Organizations and Their Representatives

Council on Environmental Quality

Diane Poster, Alternate.

Department of Commerce

National Institute of Standards and Technology

Carlos Gonzalez, Member.

National Oceanographic and Atmospheric Administration

Kimani Kimbrough, Member.

Environmental Protection Agency

John Schaeffer, Member, Vice-Chair.

National Cancer Institute

Vacant.

National Institute of Environmental Health Sciences

Nigel Walker, Member.
Scott Masten, Alternate.

National Institute for Occupational Safety and Health

Gayle DeBord, Member.
Dennis W. Lynch, Alternate.

National Science Foundation

Margaret Cavanaugh, Alternate.

Occupational Safety and Health Administration

Thomas Nerad, Member, Chair.

Liaison Organizations and Their Representatives

Agency for Toxic Substances and Disease Registry

Daphne Moffett, Member.
Glenn D. Todd, Alternate.

Consumer Product Safety Commission

Dominique Williams, Member.

Department of Agriculture

Clifford P. Rice, Member.
Laura L. McConnell, Alternate.

Department of Defense

Vacant.

Department of the Interior

Barnett A. Rattner, Member.

Food and Drug Administration

Kirk Arvidson, Member.
Ronald F. Chanderbhan, Alternate.

TSCA Interagency Testing Committee Staff

Technical Support Contractor

Syracuse Research Corporation.

Environmental Protection Agency

John D. Walker, Director.
Carol Savage, Administrative Assistant (NOWCC Employee).

TSCA Interagency Testing Committee (7401M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; e-mail address: *savage.carol@epa.gov;* url: *http://www.epa.gov/opptintr/itc.*

[FR Doc. 2010–32149 Filed 12–21–10; 8:45 am]

BILLING CODE 6560–50–P

Federal Register

Wednesday,
December 22, 2010

Part V

The President

Proclamation 8617—Wright Brothers Day, 2010

Federal Register
Vol. 75, No. 245
Wednesday, December 22, 2010

Presidential Documents

Title 3—

The President

Proclamation 8617 of December 17, 2010

Wright Brothers Day, 2010

By the President of the United States of America

A Proclamation

On December 17, 1903, after years of determination and creativity, Orville and Wilbur Wright's wooden aircraft sailed the steady winds of Kitty Hawk, North Carolina and conquered the age-old dream of manned flight. That day, the two brothers from Dayton, Ohio, could only imagine what we now know—that those moments aloft in the North Carolina sky would send mankind on a revolutionary journey and modernize transportation. On this day, we celebrate their historic accomplishment, the limitless potential they represent, and the vision they spurred for the next generation of inventors and entrepreneurs.

The Wright brothers' monumental achievement solidified their place in history and earned them status as American and global icons. They moved aviation from a curiosity into an indispensable global industry. Self-taught and relentless in their years of work and experimentation, these brothers were a shining illustration of the limitless capacity of human intellect and the resourcefulness of the American entrepreneur. As part of an era of great visionaries, Orville and Wilbur Wright helped hasten an age of discovery and great technological advancement. Their unyielding pursuit of powered flight stands as a proud example for young and curious minds eager to transform and advance the world around them.

Just as the Wright brothers' breakthrough led to a new industry that forever altered our world, a new generation of space pioneers is now following in their footsteps and setting our Nation's sights even higher. Working with the National Aeronautics and Space Administration and the Federal Aviation Administration, leaders in spaceflight are making great progress in ushering in a new commercial space industry that can help boost our economy, create new jobs, and take Americans to soaring new heights.

America's long history of technological leadership and innovation has been the product of learning and ingenuity. To maintain this tradition and propel it forward, America must empower the next generation of doers and makers. We must ensure our Nation's students receive the world-class mathematics and science education they need to challenge the boundaries of human knowledge and realize tomorrow what we can only dream today. We must also ready our children to become the entrepreneurs whose tenacity and creativity will power the engine of our Nation's economy for centuries to come. On Wright Brothers Day, in remembrance of that celebrated flight, let us recommit to preparing the next generation of scientists, engineers, inventors, and entrepreneurs to create a future of promise and progress.

The Congress, by a joint resolution approved December 17, 1963, as amended (77 Stat. 402; 36 U.S.C. 143), has designated December 17 of each year as "Wright Brothers Day" and has authorized and requested the President to issue annually a proclamation inviting the people of the United States to observe that day with appropriate ceremonies and activities.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim December 17, 2010, as Wright Brothers Day.

IN WITNESS WHEREOF, I have hereunto set my hand this seventeenth day of December, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fifth.

[FR Doc. 2010–32402
Filed 12–21–10; 11:15 am]
Billing code 3195–W1–P

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H.R. 2480/P.L. 111–313

Truth in Fur Labeling Act of 2010 (Dec. 18, 2010; 124 Stat. 3326)

H.R. 3237/P.L. 111–314

To enact certain laws relating to national and commercial space programs as title 51, United States Code, ''National and Commercial Space Programs''. (Dec. 18, 2010; 124 Stat. 3328)

H.R. 6184/P.L. 111–315

To amend the Water Resources Development Act of 2000 to extend and modify the program allowing the Secretary of the Army to accept and expend funds contributed by non-Federal public entities to expedite the evaluation of permits, and for other purposes. (Dec. 18, 2010; 124 Stat. 3450)

H.R. 6399/P.L. 111–316

To improve certain administrative operations of the Office of the Architect ofthe Capitol, and for other purposes. (Dec. 18, 2010; 124 Stat. 3452)

H.J. Res. 105/P.L. 111–317

Making further continuing appropriations for fiscal year 2011, and for other purposes. (Dec. 18, 2010; 124 Stat. 3454)

S. 3789/P.L. 111–318

Social Security Number Protection Act of 2010 (Dec. 18, 2010; 124 Stat. 3455)

S. 3987/P.L. 111–319

Red Flag Program Clarification Act of 2010 (Dec. 18, 2010; 124 Stat. 3457)

S. 3817/P.L. 111–320

CAPTA Reauthorization Act of 2010 (Dec. 20, 2010; 124 Stat. 3459)

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