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Presidential Documents

Title 3—

The President

Proclamation 8482 of March 5, 2010

National Consumer Protection Week, 2010

By the President of the United States of America

A Proclamation

Every day, American consumers decide how and where to spend their money. Their decisions have far-reaching effects for both their financial well-being and our Nation's economic stability. National Consumer Protection Week (NCPW) gives all Americans an opportunity to become better-informed consumers.

This year, NCPW focuses on the importance of being a careful consumer at every stage of life, from grade school to retirement. To help our children grow into financially responsible adults and avoid frauds and scams, we must help them understand the marketplace. Parents and educators can play a role by teaching them about advertising and marketing, smart financial practices, and keeping personal information safe and secure.

My Administration is committed to protecting American consumers. Last month, major reforms went into effect with the Credit Card Accountability, Responsibility, and Disclosure Act of 2009. This landmark legislation reins in deceptive tactics that unfairly penalize responsible consumers with unreasonable costs. However, consumers must also learn to avoid predatory practices and manage their financial resources more effectively. That is why I established the President's Advisory Council on Financial Capability, which is looking for new ways to help individuals make informed financial decisions.

Still, our Government must do more to stand up for consumers. From excessive bank account overdraft fees to abusive mortgage lending practices, our broken financial system produces profits at the expense of American families. I support the creation of an independent Consumer Financial Protection Agency to safeguard ordinary Americans as they navigate the financial marketplace.

Giving Americans of all ages the resources they need to make wise buying decisions is the responsibility of Federal, State, and local consumer protection agencies, private sector organizations, and consumer advocacy groups. This week, I encourage all Americans to visit Consumer.gov/NCPW for informative and interactive resources to help them take full advantage of their consumer rights.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim March 7 through March 13, 2010, as National Consumer Protection Week. I call upon government officials, industry leaders, and consumer advocates across our Nation to share information about consumer protection; and I encourage all Americans to learn more about marketing and business, whether they are shopping at their local store or in the global online marketplace.

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

[FR Doc. 2010–5291
Filed 3–9–10; 8:45 am]
Billing code 3195–W0–P

Presidential Documents

Proclamation 8483 of March 5, 2010

Save Your Vision Week, 2010

By the President of the United States of America

A Proclamation

While many Americans are fortunate to have healthy eyes, millions are affected by low vision or blindness. Maintaining good vision requires early diagnosis and timely treatment of eye conditions. Save Your Vision Week is a time for all Americans to take action to protect their sight.

Vision loss affects everyone, from infants with genetic conditions, to teens and adults with refractive errors, to older individuals with cataracts and other age-related eye diseases. Through recent studies, scientists and clinicians have identified risk factors, early detection methods, and new treatments for many eye conditions, but individuals can also take steps to protect their own vision.

By getting regular eye examinations, Americans can take advantage of medical breakthroughs that allow early detection and treatment of vision loss. Doctors also recommend maintaining a healthy diet, not smoking, and wearing sunglasses or suitable eye protection when playing sports or performing household chores and yard work. This week, I encourage all Americans to visit the National Eye Institute website at www.NEI.NIH.gov to find eye care professionals in communities across our country and to access the latest eye health information.

To remind Americans about the importance of safeguarding their eyesight, the United States Congress, by joint resolution approved December 30, 1963, as amended (77 Stat. 629; 36 U.S.C. 138), has authorized and requested the President to proclaim the first week in March of each year as "Save Your Vision Week."

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim March 7 through March 13, 2010, as Save Your Vision Week. During this time, I invite eye care professionals, teachers, members of the media, and all organizations dedicated to preserving eyesight to join in activities that will raise awareness of eye and vision health.

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

[FR Doc. 2010–5292
Filed 3–9–10; 8:45 am]
Billing code 3195–W0–P

Rules and Regulations

Federal Register
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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 95

[Docket No. 30713; Amdt. No. 486]

IFR Altitudes; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts miscellaneous amendments to the required IFR (instrument flight rules) altitudes and changeover points for certain Federal airways, jet routes, or direct routes for which a minimum or maximum en route authorized IFR altitude is prescribed. This regulatory action is needed because of changes occurring in the National Airspace System. These changes are designed to provide for the safe and efficient use of the navigable airspace under instrument conditions in the affected areas.

DATES: *Effective Date:* 0901 UTC, April 8, 2010.

FOR FURTHER INFORMATION CONTACT: Harry Hodges, Flight Procedure Standards Branch (AMCAFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to part 95 of the Federal Aviation Regulations (14 CFR part 95) amends, suspends, or revokes IFR altitudes governing the operation of all aircraft in flight over a specified route or any portion of that route, as well as the changeover points (COPs) for Federal airways, jet routes, or direct routes as prescribed in part 95.

The Rule

The specified IFR altitudes, when used in conjunction with the prescribed changeover points for those routes, ensure navigation aid coverage that is adequate for safe flight operations and free of frequency interference. The reasons and circumstances that create the need for this amendment involve matters of flight safety and operational efficiency in the National Airspace System, are related to published aeronautical charts that are essential to the user, and provide for the safe and efficient use of the navigable airspace. In addition, those various reasons or circumstances require making this amendment effective before the next scheduled charting and publication date of the flight information to assure its timely availability to the user. The effective date of this amendment reflects those considerations. In view of the close and immediate relationship between these regulatory changes and safety in air commerce, I find that notice and public procedure before adopting this amendment are impracticable and contrary to the public interest and that good cause exists for making the amendment effective in less than 30 days.

Conclusion

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. For the same reason, the FAA certifies that this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 95

Airspace, Navigation (air).

Issued in Washington, DC, on March 5, 2010.

John M. Allen,

Director, Flight Standards Service.

Adoption of the Amendment

■ Accordingly, pursuant to the authority delegated to me by the Administrator, part 95 of the Federal Aviation Regulations (14 CFR part 95) is amended as follows effective at 0901 UTC, April 8, 2010.

PART 95—[AMENDED]

■ 1. The authority citation for part 95 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40106, 40113, 40114, 40120, 44502, 44514, 44719, 44721.

■ 2. Part 95 is amended to read as follows:

REVISIONS TO IFR ALTITUDES & CHANGEOVER POINTS

[Amendment 486 final effective date: April 08, 2010]

From	To	MEA
§ 95.0040 Colored Federal Airways		
§ 95.50 Green Federal Airway G10 Is Amended To Read in Part		
Cape Newenham, AK NDB #HF Comms Required Below 8000	St Paul Island, AK NDB/DME	#4000
St Paul Island, AK NDB/DME	BILBE, AK FIX	3000
Bilbe, AK FIX *3800—MOCA	Elfee, AK NDB	*6000

From	To	MEA	MAA
§ 95.3000 Low Altitude RNAV Routes			
§ 95.3227 RNAV Route T227 Is Amended To Read in Part			
Fairbanks, AK VORTAC	Pesge, AK FIX	5500	17500
Pesge, AK FIX	Fipsu, AK FIX	8400	17500
Fipsu, AK FIX	Cugob, AK FIX	11000	17500
*7000—MCA CUGOB, AK FIX, S BND			
Cugob, AK FIX	Siklv, AK FIX	4500	17500
Siklv, AK FIX	Deadhorse, AK VOR/DME	2200	17500

From	To	MEA
§ 95.6001 Victor Routes—U.S.		
§ 95.6016 VOR Federal Airway V16 Is Amended To Read in Part		
Flat Rock, VA VORTAC	Richmond, VA VORTAC	2600
§ 95.6051 VOR Federal Airway V51 Is Amended To Read in Part		
#Alma, GA VORTAC	#Dublin, GA VORTAC	*3000
*1700—MOCA		
*2000—GNSS MEA		
#Alma R–345 Unusable, USE Dublin R–170.		
§ 95.6104 VOR Federal Airway V104 Is Amended To Read in Part		
Berlin, NH VOR/DME	Ansyn, ME FIX	6500
Ansyn, ME FIX	Bangor, ME VORTAC	4000
§ 95.6195 VOR Federal Airway V195 Is Amended To Read in Part		
Williams, CA VORTAC	Red Bluff, CA VORTAC	*3000
*1700—MOCA		
§ 95.6212 VOR Federal Airway V212 Is Amended To Read in Part		
Navasota, TX VORTAC	Oscer, TX FIX	3000
Oscer, TX FIX	Lufkin, TX VORTAC	*4000
*1900—MOCA		
§ 95.6260 VOR Federal Airway V260 Is Amended To Read in Part		
Flat Rock, VA VORTAC	Richmond, VA VORTAC	2600
§ 95.6483 VOR Federal Airway V483 Is Amended To Read in Part		
Syracuse, NY VORTAC	*Lysan, NY FIX	2300
*3000—MRA		
§ 95.6626 VOR Federal Airway V626 Is Amended To Read in Part		
Myton, UT VORTAC	Ymont, UT FIX	*15000
*12600—MOCA		
*12600—GNSS MEA		

Airway segment		Changeover points	
From	To	Distance	From
§ 95.8003 VOR Federal Airway Changeover Points			
Jacks Creek, TN VOR/DME	Shelbyville, TN VOR/DME	50	Jacks Creek

[FR Doc. 2010–4845 Filed 3–9–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 515

Cuban Assets Control Regulations

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control ("OFAC") is amending the Cuban Assets Control Regulations to implement a provision of the Omnibus Appropriations Act, 2010, containing an interpretation of the term "payment of cash in advance," which is used to

describe one of the two payment or financing terms for authorized exports from the United States to Cuba pursuant to the Trade Sanctions Reform and Export Enhancement Act of 2000.

DATES: *Effective Date:* March 9, 2010.

FOR FURTHER INFORMATION CONTACT: Assistant Director for Compliance, Outreach & Implementation, tel.: 202/622–2490, Assistant Director for Licensing, tel.: 202/622–2480, Assistant Director for Policy, tel.: 202/622–4855, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), tel.: 202/622–2410, Office of the General Counsel, Department of the Treasury (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on demand service, tel.: 202–622–0077.

Background

Section 908(b)(1) of the Trade Sanctions Reform and Export Enhancement Act of 2000 (22 U.S.C. 7207(b)(1)) ("TSRA") specifies that the only payment or financing terms U.S. persons may provide for authorized sales of agricultural commodities or products to Cuba or any person in Cuba are (1) "payment of cash in advance," or (2) financing by third-country financial institutions (excluding U.S. persons or Government of Cuba entities). On February 22, 2005, OFAC amended section 515.533 of the Cuban Assets Control Regulations, 31 CFR part 515 (the "CACR"), to clarify that the term "payment of cash in advance" means that payment is received by the seller or the seller's agent prior to shipment of the goods from the port at which they are loaded.

OFAC is further amending section 515.533 of the CACR to implement Section 619 of the Omnibus Appropriations Act, 2010 (Pub. L. 111–117, 123 Stat. 3034), which directs that during Fiscal Year 2010, for the purposes of TSRA, "* * * the term 'payment of cash in advance' shall be interpreted as payment before the transfer of title to, and control of, the exported items to the Cuban purchaser."

Public Participation

Because the amendments of the CACR involve a foreign affairs function, Executive Order 12866 and the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date are inapplicable. Because no notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act (5 U.S.C. 601–612) does not apply.

Paperwork Reduction Act

The collections of information related to the CACR are contained in the Reporting, Procedures and Penalties Regulations, 31 CFR part 501. Pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), those collections of information have been approved by the Office of Management and Budget under control number 1505–0164. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

List of Subjects in 31 CFR Part 515

Banks, Banking, Cuba, Currency, Exports, Foreign trade.

■ For the reasons set forth in the preamble, the Department of the Treasury's Office of Foreign Assets Control amends 31 CFR part 515 as set forth below:

PART 515—CUBAN ASSETS CONTROL REGULATIONS

■ 1. The authority citation for part 515 is revised to read as follows:

Authority: 18 U.S.C. 2332d; 22 U.S.C. 2370(a), 6001–6010; 22 U.S.C. 7201–7211; 31 U.S.C. 321(b); 50 U.S.C. App 1–44; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 104–114, 110 Stat. 785 (22 U.S.C. 6082); Pub. L. 105–277, 112 Stat. 2681; Pub. L. 111–8, 123 Stat. 524; Pub. L. 111–117, 123 Stat. 3034; E.O. 9193, 7 FR 5205, 3 CFR, 1938–1943 Comp., p. 1174; E.O. 9989, 13 FR 4891, 3 CFR, 1943–1948 Comp., p. 748; Proc. 3447, 27 FR 1085, 3 CFR, 1959–1963 Comp., p. 157; E.O. 12854, 58 FR 36587, 3 CFR, 1993 Comp., p. 614.

Subpart E—Licenses, Authorizations, and Statements of Licensing Policy

■ 2. Amend § 515.533 by revising paragraph (a)(2)(i) to read as follows:

§ 515.533 Transactions incident to exportations from the United States and reexportations of 100% U.S.-origin items to Cuba; negotiation of executory contracts.

(a) * * *

(2) * * *

(i)(A) *Payment of cash in advance.* Except as provided in paragraph (a)(2)(i)(B) of this section, for the purposes of this section, the term "payment of cash in advance" means that payment is received by the seller or the seller's agent prior to shipment of the goods from the port at which they are loaded;

(B) *Payment of cash in advance during Fiscal Year 2010.* For sales of agricultural items delivered to Cuba between October 1, 2009, and September 30, 2010, or delivered pursuant to a contract entered into between October 1, 2009, and September 30, 2010, and shipped within twelve months from the signing of the contract, the term "payment of cash in advance" shall mean payment before the transfer of title to, and control of, the exported items to the Cuban purchaser;

Note to § 515.533(a)(2)(i)(B): The payment rule set forth in this paragraph is required by Section 619 of the Omnibus Appropriations Act, 2010 (Pub. L. 111–117).

* * * * *

Dated: March 5, 2010.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2010–5153 Filed 3–9–10; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Parts 515, 538, and 560

Cuban Assets Control Regulations; Sudanese Sanctions Regulations; Iranian Transactions Regulations

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control ("OFAC") is amending the Sudanese Sanctions Regulations and the Iranian Transactions Regulations to authorize the exportation of certain services and software incident to the exchange of personal communications over the Internet. Similarly, OFAC is amending the Cuban Assets Control Regulations to authorize the exportation of certain services incident to the exchange of personal communications over the Internet.

DATES: *Effective Date:* March 8, 2010.

FOR FURTHER INFORMATION CONTACT: Assistant Director for Compliance, Outreach & Implementation, tel.: 202/622–2490, Assistant Director for Licensing, tel.: 202/622–2480; Assistant Director for Policy, tel.: 202/622–4855, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), tel.: 202/622–2410, Office of the General Counsel, Department of the Treasury (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*). Certain general information pertaining to OFAC's sanctions programs also is available via facsimile through a 24-hour fax-on-demand service, tel.: 202–622–0077.

Background

OFAC is amending the Sudanese Sanctions Regulations, 31 CFR part 538 (the "SSR"), and the Iranian Transactions Regulations, 31 CFR part 560 (the "ITR"), to authorize the exportation to persons in Sudan and Iran, respectively, of certain services and software incident to the exchange of personal communications over the Internet.

Unless authorized by a general or specific license, or otherwise exempt, the exportation of such services and software from the United States or by a United States person, wherever located, to Sudan or Iran is prohibited. Pursuant to section 538.205 of the SSR, the exportation or reexportation, directly or indirectly, to Sudan of any goods, technology, or services from the United States or by a United States person, wherever located, or requiring the issuance of a license by a Federal agency, is prohibited. As set forth in section 538.212(g)(1) of the SSR, however, this prohibition does not apply with respect to most exports and reexports to the Specified Areas of Sudan, as defined in section 538.320. In addition, pursuant to section 538.201 of the SSR, all property and interests in property of the Government of Sudan that are or come within the United States, or that are or come within the possession or control of U.S. persons, including their overseas branches, are blocked and may not be transferred, paid, exported, withdrawn or otherwise dealt in. The term *property,* as defined in section 538.310 of the SSR, specifically includes services. As defined in section 538.305 of the SSR, the term *Government of Sudan* does not include the regional government of Southern Sudan.

Section 560.204 of the ITR provides that the exportation, reexportation, sale, or supply, directly or indirectly, from the United States or by a U.S. person, wherever located, of any goods, technology, or services to Iran or the Government of Iran is prohibited. The Iran-Iraq Arms Non-Proliferation Act of 1992 (Pub. L. 102–484) (50 U.S.C. 1701 note) ("IIANPA") and section 6 of Executive Order 13059 of August 19, 1997 ("Prohibiting Certain Transactions With Respect to Iran") (62 FR 44531, August 21, 1997), generally preclude OFAC from authorizing—whether by general or specific license—the exportation to Iran of any goods or technology listed on the Commerce Control List ("CCL") in the Export Administration Regulations, 15 CFR parts 730 through 774 (the "EAR"), unless the President exercises the waiver authority provided in section 1606 of IIANPA. On September 27, 1994, the President delegated his authorities under IIANPA to the Secretary of State. Since much of the software necessary for the exchange of personal communications or the sharing of information over the Internet is listed on the CCL, the exercise of this waiver authority is necessary before OFAC may generally or specifically license the exportation of such software to Iran.

On December 10, 2009, the Department of State determined that it is essential to the national interest of the United States to exercise the waiver authority in section 1606 of IIANPA with respect to the exportation to Iran of certain dual-use software classified as mass market software by the Department of Commerce ("Commerce") and essential for the exchange of personal communications and/or sharing of information over the Internet. In reporting this determination to Congress on December 15, 2009, the Department of State explained that this software is necessary to foster and support the free flow of information to individual Iranian citizens and, therefore, is essential to the national interest of the United States.

As events in Iran since last June's Presidential election there have shown, personal Internet-based communications are a vital tool for change. Similar considerations apply in Sudan. Accordingly, to ensure that the sanctions on Sudan and Iran do not have an unintended chilling effect on the ability of companies to provide personal communications tools to individuals in those countries, OFAC is adding new § 538.533 to the SSR and new § 560.540 to the ITR. These new sections authorize the exportation from the United States or by U.S. persons, wherever located, to persons in Sudan and Iran, respectively, of certain services and software incident to the exchange of personal communications over the Internet, such as instant messaging, chat and e-mail, social networking, sharing of photos and movies, web browsing, and blogging. To qualify for this authorization, such services and software must be publicly available at no cost to the user. In addition, such software qualifies for this authorization only if it is (1) Classified as "EAR99" under the EAR; (2) not subject to the EAR; or (3) classified by Commerce as mass market software under export control classification number ("ECCN") 5D992 of the EAR. These new sections of the SSR and the ITR, however, do not authorize the direct or indirect exportation of services or software with knowledge or reason to know that such services or software are intended for the Government of Sudan or the Government of Iran.

New § 538.533 of the SSR and new § 560.540 of the ITR each contain a statement of licensing policy in addition to the general licenses authorizing the exportation of certain Internet-based personal communications services and software. Paragraph (c) of each of these two sections provides that specific licenses may be issued on a case-by-case basis for the exportation of services and software not covered by the general license that are incident to the sharing of information over the Internet. To be eligible for consideration under this policy, software must be classified as "EAR99," not subject to the EAR, or classified by Commerce as mass market software under ECCN 5D992 of the EAR.

OFAC also is amending the Cuban Assets Control Regulations, 31 CFR part 515 (the "CACR"), to add a similar general license authorizing the exportation to persons in Cuba of certain services incident to the exchange of personal communications over the Internet. Unless authorized by a general or specific license, the exportation of such services from the United States or by persons subject to U.S. jurisdiction to Cuba is prohibited. Section 515.201 of the CACR prohibits all dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property in which Cuba or a Cuban national has any interest of any nature whatsoever, direct or indirect, by any person subject to the jurisdiction of the United States. The term *property,* as defined in § 515.311 of the CACR, specifically includes services.

On April 13, 2009, the President stated that the promotion of democracy and human rights in Cuba is in the national interest of the United States and is a key component of U.S. foreign policy in the Americas. The President announced an initiative to pursue these goals by, among other things, increasing the flow of information to the Cuban people. Consistent with that initiative, OFAC is adding new § 515.578 to the CACR to authorize the exportation from the United States or by persons subject to U.S. jurisdiction to persons in Cuba of certain services incident to the exchange of personal communications

over the Internet, such as instant messaging, chat and email, social networking, sharing of photos and movies, web browsing, and blogging. To qualify for this authorization, the services must be publicly available at no cost to the user. New § 515.578 does not authorize the direct or indirect exportation of services with knowledge or reason to know that such services are intended for a prohibited official of the Government of Cuba, as defined in § 515.337 of the CACR, or a prohibited member of the Cuban Communist Party, as defined in § 515.338.

Like the new authorization sections added to the SSR and ITR, new § 515.578 contains a statement of licensing policy in addition to the general license authorizing the exportation of certain Internet-based personal communications services. Paragraph (c) of § 515.578 provides that specific licenses may be issued on a case-by-case basis for the exportation of services not covered by the general license that are incident to the sharing of information over the Internet.

The new general license for Cuba, unlike those for Sudan and Iran, does not include an authorization for the exportation of software, because the exportation of goods and technology, including software, to Cuba is separately licensed or otherwise authorized by Commerce under the EAR. Section 515.533 of the CACR generally licenses all transactions ordinarily incident to the exportation of items from the United States, or the reexportation of 100% U.S.-origin items from a third country, to any person in Cuba, provided the exportation or reexportation is licensed or otherwise authorized by Commerce under the EAR, and provided further that only certain specified payment and financing terms may be used.

By the addition of the authorizations described above to the SSR, ITR, and CACR, OFAC hopes to encourage the exchange of personal communications over the Internet by persons in Sudan, Iran, and Cuba.

Public Participation

Because the amendments of the CACR, SSR, and ITR involve a foreign affairs function, Executive Order 12866 and the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date are inapplicable. Because no notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act (5 U.S.C. 601–612) does not apply.

Paperwork Reduction Act

The collections of information related to the CACR, SSR, and ITR are contained in the Reporting, Procedures and Penalties Regulations, 31 CFR part 501. Pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), those collections of information have been approved by the Office of Management and Budget under control number 1505–0164. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

List of Subjects

31 CFR Part 515

Banks, Banking, Communications, Cuba, Exports, Foreign trade.

31 CFR Part 538

Banks, Banking, Communications, Exports, Foreign trade, Sudan.

31 CFR Part 560

Banks, Banking, Communications, Exports, Foreign trade, Iran.

■ For the reasons set forth in the preamble, the Department of the Treasury's Office of Foreign Assets Control amends 31 CFR parts 515, 538, and 560 as follows:

PART 515—CUBAN ASSETS CONTROL REGULATIONS

■ 1. The authority citation for part 515 is revised to read as follows:

Authority: 18 U.S.C. 2332d; 22 U.S.C. 2370(a), 6001–6010; 22 U.S.C. 7201–7211; 31 U.S.C. 321(b); 50 U.S.C. App 1–44; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 104–114, 110 Stat. 785 (22 U.S.C. 6082); Pub. L. 105–277, 112 Stat. 2681; Pub. L. 111–8, 123 Stat. 524; E.O. 9193, 7 FR 5205, 3 CFR, 1938–1943 Comp., p. 1174; E.O. 9989, 13 FR 4891, 3 CFR, 1943–1948 Comp., p. 748; Proc. 3447, 27 FR 1085, 3 CFR, 1959–1963 Comp., p. 157; E.O. 12854, 58 FR 36587, 3 CFR, 1993 Comp., p. 614.

Subpart E—Licenses, Authorizations, and Statements of Licensing Policy

■ 2. Add a new § 515.578 to subpart E to read as follows:

§ 515.578 Exportation of certain services incident to Internet-based communications.

(a) Except as provided in paragraph (b) of this section, the exportation from the United States or by persons subject to U.S. jurisdiction to persons in Cuba of services incident to the exchange of personal communications over the Internet, such as instant messaging, chat and email, social networking, sharing of photos and movies, web browsing, and blogging, is authorized, provided that such services are publicly available at no cost to the user.

(b) This section does not authorize:

(1) The direct or indirect exportation of services with knowledge or reason to know that such services are intended for a prohibited official of the Government of Cuba, as defined in § 515.337 of this part, or a prohibited member of the Cuban Communist Party, as defined in § 515.338 of this part.

(2) The direct or indirect exportation of Internet connectivity services or telecommunications transmission facilities (such as satellite links or dedicated lines).

Note to § 515.578(b)(2): For general licenses related to the provision of telecommunications services between the United States and Cuba and contracts for telecommunications services provided to particular individuals in Cuba, see § 515.542(b) and § 515.542(c), respectively, of this part. For a general license and a statement of specific licensing policy related to the establishment of telecommunications facilities linking the United States or third countries and Cuba, see § 515.542(d) of this part.

(3) The direct or indirect exportation of web-hosting services that are for purposes other than personal communications (e.g., web-hosting services for commercial endeavors) or of domain name registration services.

(4) The direct or indirect exportation of any items to Cuba.

Note to § 515.578(b)(4): For the rules related to transactions ordinarily incident to the exportation or reexportation of items, including software, to Cuba, see §§ 515.533 and 515.559 of this part.

(c) Specific licenses may be issued on a case-by-case basis for the exportation of other services incident to the sharing of information over the Internet.

PART 538—SUDANESE SANCTIONS REGULATIONS

■ 3. The authority citation for part 538 is revised to read as follows:

Authority: 3 U.S.C. 301; 18 U.S.C. 2339B, 2332d; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); 22 U.S.C. 7201–7211; Pub. L. 109–344, 120 Stat. 1869; Pub. L. 110–96, 121 Stat. 1011 (50 U.S.C. 1705 note); E.O. 13067, 62 FR 59989, 3 CFR, 1997 Comp., p. 230; E.O. 13412, 71 FR 61369, 3 CFR, 2006 Comp., p. 244.

Subpart E—Licenses, Authorizations, and Statements of Licensing Policy

■ 4. Add a new § 538.533 to subpart E to read as follows:

§ 538.533 Exportation of certain services and software incident to Internet-based communications.

(a) To the extent that such transactions are not exempt from the prohibitions of this part and subject to the restrictions set forth in paragraph (b) of this section, the following transactions are authorized:

(1) The exportation from the United States or by U.S. persons, wherever located, to persons in Sudan of services incident to the exchange of personal communications over the Internet, such as instant messaging, chat and email, social networking, sharing of photos and movies, web browsing, and blogging, provided that such services are publicly available at no cost to the user.

(2) The exportation from the United States or by U.S. persons, wherever located, to persons in Sudan of software necessary to enable the services described in paragraph (a)(1) of this section, provided that such software is classified as "EAR99" under the Export Administration Regulations, 15 CFR parts 730 through 774 (the "EAR"), is not subject to the EAR, or is classified by the U.S. Department of Commerce ("Commerce") as mass market software under export control classification number ("ECCN") 5D992 of the EAR, and provided further that such software is publicly available at no cost to the user.

(b) This section does not authorize:

(1) The direct or indirect exportation of services or software with knowledge or reason to know that such services or software are intended for the Government of Sudan.

(2) The direct or indirect exportation of any goods or technology listed on the Commerce Control List in the EAR, 15 CFR part 774, supplement No. 1 ("CCL"), except for software necessary to enable the services described in paragraph (a)(1) of this section that is classified by Commerce as mass market software under ECCN 5D992 of the EAR.

(3) The direct or indirect exportation of Internet connectivity services or telecommunications transmission facilities (such as satellite links or dedicated lines).

(4) The direct or indirect exportation of web-hosting services that are for purposes other than personal communications (e.g., web-hosting services for commercial endeavors) or of domain name registration services.

(c) Specific licenses may be issued on a case-by-case basis for the exportation of other services and software incident to the sharing of information over the Internet, provided the software is classified as "EAR99," not subject to the EAR, or classified by Commerce as mass market software under ECCN 5D992 of the EAR.

(d) Nothing in this section or in any license issued pursuant to paragraph (c) of this section relieves the exporter from compliance with the export license application requirements of another Federal agency.

PART 560—IRANIAN TRANSACTIONS REGULATIONS

■ 5. The authority citation for part 560 is revised to read as follows:

Authority: 3 U.S.C. 301; 18 U.S.C. 2339B, 2332d; 22 U.S.C. 2349aa–9; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); 22 U.S.C. 7201–7211; Pub. L. 110–96, 121 Stat. 1011 (50 U.S.C. 1705 note); E.O. 12613, 52 FR 41940, 3 CFR, 1987 Comp., p. 256; E.O. 12957, 60 FR 14615, 3 CFR, 1995 Comp., p. 332; E.O. 12959, 60 FR 24757, 3 CFR, 1995 Comp., p. 356; E.O. 13059, 62 FR 44531, 3 CFR, 1997 Comp., p. 217.

Subpart E—Licensing, Authorizations, and Statements of Licensing Policy

■ 6. Add a new § 560.540 to subpart E to read as follows:

§ 560.540 Exportation of certain services and software incident to Internet-based communications.

(a) To the extent that such transactions are not exempt from the prohibitions of this part and subject to the restrictions set forth in paragraph (b) of this section, the following transactions are authorized:

(1) The exportation from the United States or by U.S. persons, wherever located, to persons in Iran of services incident to the exchange of personal communications over the Internet, such as instant messaging, chat and email, social networking, sharing of photos and movies, web browsing, and blogging, provided that such services are publicly available at no cost to the user.

(2) The exportation from the United States or by U.S. persons, wherever located, to persons in Iran of software necessary to enable the services described in paragraph (a)(1) of this section, provided that such software is classified as "EAR99" under the Export Administration Regulations, 15 CFR parts 730 through 774 (the "EAR"), is not subject to the EAR, or is classified by the U.S. Department of Commerce ("Commerce") as mass market software under export control classification number ("ECCN") 5D992 of the EAR, and provided further that such software is publicly available at no cost to the user.

(b) This section does not authorize:

(1) The direct or indirect exportation of services or software with knowledge or reason to know that such services or software are intended for the Government of Iran.

(2) The direct or indirect exportation of any goods or technology listed on the Commerce Control List in the EAR, 15 CFR part 774, supplement No. 1 ("CCL"), except for software necessary to enable the services described in paragraph (a)(1) of this section that is classified by Commerce as mass market software under ECCN 5D992 of the EAR.

(3) The direct or indirect exportation of Internet connectivity services or telecommunications transmission facilities (such as satellite links or dedicated lines).

(4) The direct or indirect exportation of web-hosting services that are for purposes other than personal communications (e.g., web-hosting services for commercial endeavors) or of domain name registration services.

(c) Specific licenses may be issued on a case-by-case basis for the exportation of other services and software incident to the sharing of information over the Internet, provided the software is classified as "EAR99," not subject to the EAR, or classified by Commerce as mass market software under ECCN 5D992 of the EAR.

Dated: March 3, 2010.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2010–5023 Filed 3–8–10; 10:00 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2008–0124]

RIN 1625–AA87

Security Zone; Freeport LNG Basin, Freeport, TX

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard has established a permanent security zone in the Freeport LNG Basin. This security zone is needed to protect vessels, waterfront facilities, the public, and other surrounding areas from destruction, loss, or injury caused by sabotage, subversive acts, accidents, or other actions of a similar nature. Entry into this zone is prohibited, except for vessels that have obtained the express

permission from the Captain of the Port Houston-Galveston or his designated representative.

DATES: This rule is effective April 9, 2010.

ADDRESSES: Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2008–0124 and are available online by going to *http://www.regulations.gov,* inserting USCG–2008–0124 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or e-mail Lieutenant Commander Kevin Ivey, Marine Safety Unit Galveston, Coast Guard; telephone 409–978–2704, e-mail *Kevin.L.Ivey@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On April 30, 2009 we published a notice of proposed rulemaking (NPRM) entitled Security Zone; Freeport LNG Basin, Freeport, TX in the **Federal Register** (33 FR 19926). We received no comments on the proposed rule.

Background and Purpose

Heightened awareness of potential terrorist acts requires enhanced security of our ports, harbors, and vessels. To enhance security, the Captain of the Port Houston-Galveston has established a permanent security zone.

This rule establishes a new distinct security zone within the port of Freeport, TX. This zone protects waterfront facilities, persons, and vessels from subversive or terrorist acts. Vessels operating within the Captain of the Port Houston-Galveston Zone are potential targets of terrorist attacks, or platforms from which terrorist attacks may be launched upon from other vessels, waterfront facilities, and adjacent population centers.

This zone is for an area concentrated with commercial facilities considered critical to national security. This rule is not designed to restrict access to vessels engaged, or assisting in commerce with waterfront facilities within the security zones, vessels operated by port authorities, vessels operated by waterfront facilities within the security zones, and vessels operated by federal, state, county or municipal agencies. By limiting access to this area the Coast Guard reduces potential methods of attack on vessels, waterfront facilities, and adjacent population centers located within the zones. All vessels not exempted under § 165.814 desiring to enter this zone are required to obtain express permission from the Captain of the Port Houston-Galveston or his designated representative prior to entry.

Discussion of Comments and Changes

No comments were received regarding this rule. The Coast Guard is implementing the rule as proposed, without change.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. The economic impact of this rule is so minimal that a full Regulatory Evaluation was unnecessary. The basis of this finding is that this security zone does not interfere with regular vessel traffic within the Freeport Ship Channel or the Intracoastal Waterway.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule does not have a significant economic impact on a substantial number of small entities for the following reason: This rule does not interfere with regular vessel traffic within the Freeport Ship Channel and/or the Intracoastal Waterway.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), in the NPRM we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction because this rule involves a regulation establishing, disestablishing, or changing Regulated Navigation Areas and security or safety zones.

An environmental analysis checklist and a categorical exclusion determination are available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. In § 165.814—

■ a. Remove paragraph (b);

■ b. Redesignate paragraph (c) as (b); and

■ c. Add paragraph (a)(5)(vi) and revise redesignated paragraph (b)(2) to read as follows:

§ 165.814 Security Zone; Captain of the Port Houston-Galveston Zone.

(a) * * *

(5) * * *

(vi) The Freeport LNG Basin containing all waters shoreward of a line drawn between the eastern point at latitude 28°56′25″ N, 095°18′13″ W, and the western point at 28°56′28″ N, 095°18′31″ W, east towards the jetties.

(b) * * *

(2) Other persons or vessels requiring entry into a zone described in this section must request express permission to enter from the Captain of the Port Houston-Galveston, or designated representative. The Captain of the Port Houston-Galveston's designated representatives are any personnel granted authority by the Captain of the Port Houston-Galveston to receive, evaluate, and issue written security zone entry permits, or the designated on-scene U.S. Coast Guard patrol personnel described in paragraph (b)(4).

* * * * *

Dated: December 28, 2009.

M.E. Woodring,

Captain, U.S. Coast Guard, Captain of the Port Houston-Galveston.

[FR Doc. 2010–5056 Filed 3–9–10; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 261

[EPA–R04–RCRA–2008–0900; FRL–9124–8]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Final Rule

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: Environmental Protection Agency (EPA) is granting the petition submitted by The Valero Refining Company—Tennessee, LLC (Valero) to exclude or "delist" a certain sediment generated by its Memphis Refinery in Memphis, Tennessee from the lists of hazardous wastes. This final rule responds to a petition submitted by Valero to delist F037 waste. The F037 waste is sediment generated in the Storm Water Basin.

After careful analysis and use of the Delisting Risk Assessment Software (DRAS), EPA has concluded the petitioned waste is not hazardous waste. The F037 exclusion is a one-time exclusion for 2,700 cubic yards of the F037 Storm Water Basin sediment. Accordingly, this final rule excludes the petitioned waste from the requirements of hazardous waste regulations under the Resource Conservation and Recovery Act (RCRA).

DATES: *Effective Date:* March 10, 2010.

ADDRESSES: The public docket for this final rule is available either electronically at *http://www.regulations.gov* or in hard copy at the RCRA and OPA Enforcement and Compliance Branch, RCRA Division, U.S. Environmental Protection Agency Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303 and is available for viewing through the EPA Freedom of Information Act (FOIA) from 9 a.m. to 4 p.m., Monday through Friday, excluding Federal holidays. Call the FOIA Officer at (404) 562–8028 for appointments. The public may copy material from any regulatory docket at no cost for the first 100 pages and at a cost of $0.15 per page for additional copies.

FOR FURTHER INFORMATION CONTACT: Kristin Lippert, North Enforcement and Compliance Section, (Mail Code 4WD–RCRA), RCRA and OPA Enforcement and Compliance Branch, U.S. Environmental Protection Agency, Region 4, Sam Nunn Atlanta Federal Center, 61 Forsyth Street, SW., Atlanta, Georgia 30303 or call (404) 562–8605 or via electronic mail at *lippert.kristin@epa.gov*.

SUPPLEMENTARY INFORMATION: The information in this section is organized as follows:

I. Overview Information

A. What Action Is EPA Finalizing?

After evaluating the petition for Valero, EPA proposed, on July 9, 2009, to exclude the waste from the lists of hazardous waste under § 261.31. EPA is finalizing the decision to grant Valero's delisting petition to have its F037 Storm Water Basin Sediment excluded, or delisted, from the definition of a hazardous waste, once it is disposed in a Subtitle D landfill.

B. Why Is EPA Approving This Action?

Valero's petition requests a delisting from the F037 waste listing under 40 CFR 260.20 and 260.22. Valero does not believe that the petitioned waste meets the criteria for which EPA listed it. Valero also believes no additional constituents or factors could cause the waste to be hazardous. EPA's review of this petition included consideration of the original listing criteria, and the additional factors required by the Hazardous and Solid Waste Amendments of 1984 (HSWA). See section 3001(f) of RCRA, 42 U.S.C. 6921(f), and 40 CFR 260.22(d)(1)–(4) (hereinafter all sectional references are to 40 CFR unless otherwise indicated). In making the final delisting determination, EPA evaluated the petitioned waste against the listing criteria and factors cited in § 261.11(a)(2) and (a)(3). Based on this review, EPA agrees with the petitioner that the waste is nonhazardous with respect to the original listing criteria. (If EPA had found, based on this review, that the waste remained hazardous based on the factors for which the waste was originally listed, EPA would have proposed to deny the petition.) EPA evaluated the waste with respect to other factors or criteria to assess whether there is a reasonable basis to believe that such additional factors could cause the wastes to be hazardous. EPA considered whether the waste is acutely toxic, the concentrations of the constituents in the waste, their tendency to migrate and to bioaccumulate, their persistence in the environment once released from the waste, plausible and specific types of management of the petitioned waste, the quantities of waste generated, and waste variability. EPA believes that the petitioned waste does not meet the listing criteria and thus should not be a listed waste. EPA's final decision to delist the waste from Valero's facility is based on the information submitted in support of this rule, including description of the waste and analytical data from the Memphis, Tennessee facility.

C. What Are the Limits of This Exclusion?

This exclusion applies to the waste described in Valero's petition only if the requirements described in 40 CFR part 261, Appendix IX, Table 1 and the conditions contained herein are satisfied.

D. How Will Valero Manage the Waste, When Delisted?

The delisted F037 Storm Water Basin Sediment will be dispose of in a Subtitle D landfill which is permitted, licensed, or registered by a State to manage industrial waste.

E. When Is the Final Delisting Exclusion Effective?

This rule is effective March 10, 2010. The Hazardous and Solid Waste Amendments of 1984 amended section 3010 of RCRA, 42 U.S.C. 6930(b)(1), allow rules to become effective in less than six months after the rule is published when the regulated community does not need the six-month period to come into compliance. That is the case here because this rule reduces, rather than increases, the existing requirements for persons generating hazardous waste. This reduction in existing requirements also provides a basis for making this rule effective immediately, upon publication, under the Administrative Procedure Act, pursuant to 5 U.S.C. 553(d).

F. How Does This Final Rule Affect States?

Because EPA is issuing this exclusion under the Federal RCRA delisting program, only States subject to Federal RCRA delisting provisions would be affected. This would exclude States which have received authorization from EPA to make their own delisting decisions.

EPA allows States to impose their own non-RCRA regulatory requirements that are more stringent than EPA's, under section 3009 of RCRA, 42 U.S.C. 6929. These more stringent requirements may include a provision that prohibits a Federally issued exclusion from taking effect in the State. A dual system (that is, both Federal (RCRA) and State (non-RCRA) programs) may regulate a petitioner's waste, EPA urges petitioners to contact the State regulatory authority to establish the status of their wastes under the State law.

EPA has also authorized some States (for example, Louisiana, Oklahoma, Georgia, Illinois) to administer a RCRA delisting program in place of the Federal program, that is, to make State delisting decisions. Therefore, this exclusion does not apply in those authorized States unless that State makes the rule part of its authorized program. If Valero transports the petitioned waste to or manages the waste in any State with delisting authorization, Valero must obtain delisting authorization from that State before it can manage the waste as nonhazardous in the State.

II. Background

A. What Is a Delisting Petition?

A delisting petition is a request from a generator to EPA or another agency with jurisdiction to exclude or delist, from the RCRA list of hazardous waste, waste the generator believes should not be considered hazardous under RCRA.

B. What Regulations Allow Facilities To Delist a Waste?

Under 40 CFR 260.20 and 260.22, facilities may petition EPA to remove their wastes from hazardous waste regulation by excluding them from the lists of hazardous wastes contained in §§ 261.31 and 261.32. Specifically,

§ 260.20 allows any person to petition the Administrator to modify or revoke any provision of 40 CFR parts 260 through 265 and 268. Section 260.22 provides generators the opportunity to petition the Administrator to exclude a waste from a particular generating facility from the hazardous waste lists.

C. What Information Must the Generator Supply?

Petitioners must provide sufficient information to EPA to allow EPA to determine that the waste to be excluded does not meet any of the criteria under which the waste was listed as a hazardous waste. In addition, the Administrator must determine, where he/she has a reasonable basis to believe that factors (including additional constituents) other than those for which the waste was listed could cause the waste to be a hazardous waste and that such factors do not warrant retaining the waste as a hazardous waste.

III. EPA's Evaluation of the Waste Information and Data

A. What Waste Did Valero Petition EPA To Delist?

On July 25, 2008, Valero petitioned EPA to exclude from the lists of hazardous waste contained in § 261.31 and 261.32, F037 Storm Water Basin Sediment.

B. How Much Waste Did Valero Propose To Delist?

Valero requested that EPA grant a one-time exclusion for 2,700 cubic yards of the F037 Storm Water Basin Sediment.

C. How did Valero Sample and Analyze the Waste Data in This Petition?

To support its petition, Valero submitted: (1) Facility information on production processes and waste generation processes including analytical data from twelve (12) samples collected on August 7, 2007, in the Storm Water Basin; (2) Results of the total constituent list for 40 CFR Part 264 Appendix IX volatiles, semivolatiles, metals, pesticides, herbicides, dioxins and PCB for the sampling on August 7, 2007; (3) Results of the constituent list for Appendix IX on Toxicity Characteristic Leaching Procedure (TCLP) extract for volatiles, semivolatiles, and metals for the sampling on August 7, 2007; (4) Analytical constituents of concern for F037 for the sampling on August 7, 2007; (5) Results from total oil and grease analyses for the sampling on August 7, 2007; and (6) Summary of the July 2006 Sediment Data (Highest Results from Detections).

IV. Public Comments Received on the Proposed Exclusions

A. Who Submitted Comments on the Proposed Rules?

No comments were received on the proposed rule for the F037 waste.

V. Statutory and Executive Order Reviews

Under Executive Order 12866, "Regulatory Planning and Review" (*58 FR 51735*, October 4, 1993), this rule is not of general applicability and therefore is not a regulatory action subject to review by the Office of Management and Budget (OMB). This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) because it applies to a particular facility only. Because this rule is of particular applicability relating to a particular facility, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), or to sections 202, 204, and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA). Because this rule will affect only a particular facility, it will not significantly or uniquely affect small governments, as specified in section 203 of UMRA. Because this rule will affect only a particular facility, this final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, "Federalism," (64 FR 43255, August 10, 1999). Thus, Executive Order 13132 does not apply to this rule. Similarly, because this rule will affect only a particular facility, this final rule does not have Tribal implications, as specified in Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" (59 FR 22951, November 9, 2000). Thus, Executive Order 13175 does not apply to this rule. This rule also is not subject to Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. The basis for this belief is that the Agency used the DRAS program, which considers health and safety risks to infants and children, to calculate the maximum allowable concentrations for this rule. This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866. 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. As required by Section 3 of Executive Order 12988, "Civil Justice Reform," (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. 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. Section 804 exempts from section 801 the following types of rules (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding today's action under Section 801 because this is a rule of particular applicability.

List of Subjects in 40 CFR Part 261

Environmental protection, Hazardous waste, Recycling, Reporting and recordkeeping requirements.

Authority: Section 3001(f) RCRA, 42 U.S.C. 6921(f).

Dated: March 1, 2010.

G. Alan Farmer,

Director, RCRA Division, Region 4.

■ For the reasons set out in the preamble, 40 CFR part 261 is amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

■ 1. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 6905, 6912(a), 6921, 6922, and 6938.

■ 2. In Table 1 of Appendix IX of part 261 add the following waste stream in alphabetical order by facility to read as follows:

Appendix IX to Part 261—Waste Excluded Under §§ 260.20 and 260.22

TABLE 1—WASTE EXCLUDED FROM NON-SPECIFIC SOURCES

Facility	Address	Waste description
*	*	* * * * * * *
The Valero Refining Company—Tennessee, LLC.	Memphis, TN	Storm Water Basin sediment (EPA Hazardous Waste No. F037) generated one-time at a volume of 2,700 cubic yards March 10, 2010 and disposed in Subtitle D landfill. This is a one-time exclusion and applies to 2,700 cubic yards of Storm Water Basin sediment. (1) Reopener. (A) If, anytime after disposal of the delisted waste, Valero possesses or is otherwise made aware of any environmental data (including but not limited to leachate data or ground water monitoring data) or any other data relevant to the delisted waste indicating that any constituent identified for the delisting verification testing is at level higher than the delisting level allowed by the Division Director in granting the petition, then the facility must report the data, in writing, to the Division Director within 10 days of first possessing or being made aware of that data. (B) If Valero fails to submit the information described in paragraph (A) or if any other information is received from any source, the Division Director will make a preliminary determination as to whether the reported information requires EPA action to protect human health or the environment. Further action may include suspending, or revoking the exclusion, or other appropriate response necessary to protect human health and the environment. (C) If the Division Director determines that the reported information does require EPA action, the Division Director will notify the facility in writing of the actions the Division Director believes are necessary to protect human health and the environment. The notice shall include a statement of the proposed action and a statement providing the facility with an opportunity to present information as to why the proposed EPA action is not necessary. The facility shall have 10 days from the date of the Division Director's notice to present such information. (D) Following the receipt of information from the facility described in paragraph (C) or if no information is presented under paragraph initial receipt of information described in paragraphs (A) or (B), the Division Director will issue a final written determination describing EPA actions that are necessary to protect human health or the environment. Any required action described in the Division Director's determination shall become effective immediately, unless the Division Director provides otherwise. (2) Notification Requirements: Valero must do the following before transporting the delisted waste: Failure to provide this notification will result in a violation of the delisting petition and a possible revocation of the decision. (A) Provide a one-time written notification to any State Regulatory Agency to which or through which they will transport the delisted waste described above for disposal, 60 days before beginning such activities. (B) Update the one-time written notification, if they ship the delisted waste to a different disposal facility. (C) Failure to provide this notification will result in a violation of the delisting variance and a possible revocation of the decision.
*	*	* * * * * * *

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BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 541

[Docket No. NHTSA–2009–0085]

Final Theft Data; Motor Vehicle Theft Prevention Standard

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Publication of final theft data.

SUMMARY: This document publishes the final data on thefts of model year (MY) 2007 passenger motor vehicles that occurred in calendar year (CY) 2007. The final 2007 theft data indicated a decrease in the vehicle theft rate experienced in CY/MY 2007. The final theft rate for MY 2007 passenger vehicles stolen in calendar year 2007 is 1.86 thefts per thousand vehicles, a decrease of ten percent from the rate of 2.08 thefts per thousand in 2006. Publication of these data fulfills NHTSA's statutory obligation to periodically obtain accurate and timely theft data and publish the information for review and comment.

FOR FURTHER INFORMATION CONTACT: Ms. Deborah Mazyck, Office of International Policy, Fuel Economy and Consumer Programs, NHTSA, 1200 New Jersey Avenue, SE., Washington, DC 20590. Ms. Mazyck's telephone number is (202) 366–0846. Her fax number is (202) 493–2990.

SUPPLEMENTARY INFORMATION: NHTSA administers a program for reducing motor vehicle theft. The central feature of this program is the Federal Motor Vehicle Theft Prevention Standard, 49 CFR part 541. The standard specifies performance requirements for inscribing and affixing vehicle identification numbers (VINs) onto certain major original equipment and replacement parts of high-theft lines of passenger motor vehicles.

The agency is required by 49 U.S.C. 33104(b)(4) to periodically obtain, from the most reliable source, accurate and

timely theft data and publish the data for review and comment. To fulfill this statutory mandate, NHTSA has published theft data annually beginning with MYs 1983/84. Continuing to fulfill the § 33104(b)(4) mandate, this document reports the final theft data for CY 2007, the most recent calendar year for which data are available.

In calculating the 2007 theft rates, NHTSA followed the same procedures it used in calculating the MY 2006 theft rates. (For 2006 theft data calculations, *see* 73 FR 60633, October 14, 2008). As in all previous reports, NHTSA's data were based on information provided to NHTSA by the National Crime Information Center (NCIC) of the Federal Bureau of Investigation. The NCIC is a government system that receives vehicle theft information from nearly 23,000 criminal justice agencies and other law enforcement authorities throughout the United States. The NCIC data also include reported thefts of self-insured and uninsured vehicles, not all of which are reported to other data sources.

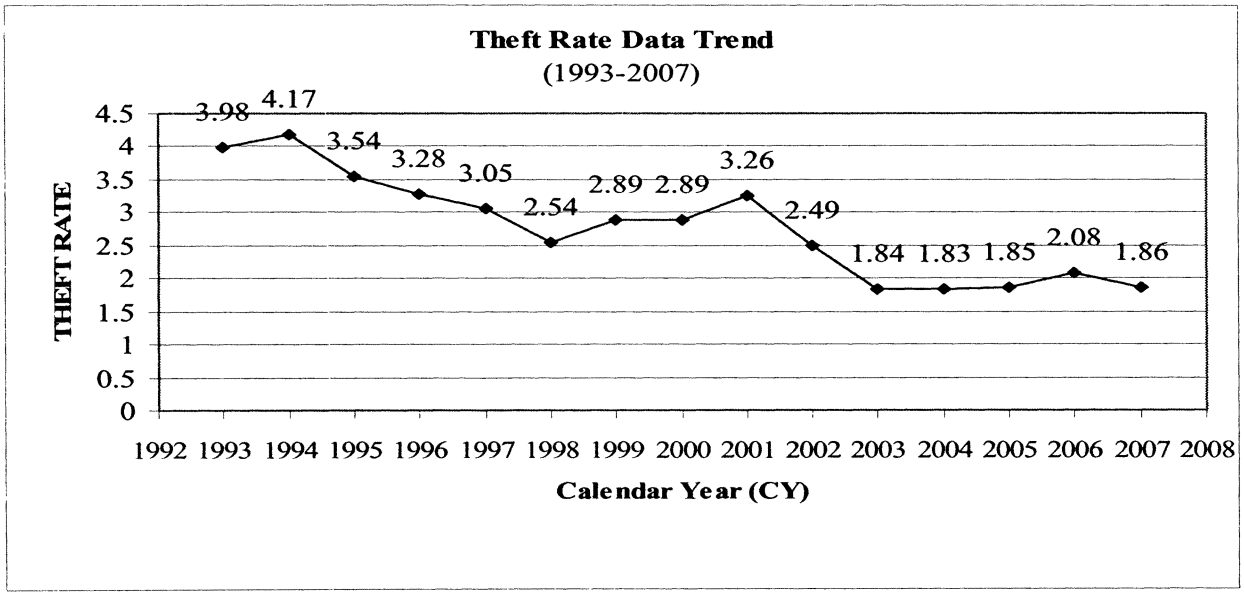
The 2007 theft rate for each vehicle line was calculated by dividing the number of reported thefts of MY 2007 vehicles of that line stolen during calendar year 2007 by the total number of vehicles in that line manufactured for MY 2007, as reported to the Environmental Protection Agency (EPA).

The final 2007 theft data show a decrease in the vehicle theft rate when compared to the theft rate experienced in CY/MY 2006. The final theft rate for MY 2007 passenger vehicles stolen in calendar year 2007 decreased to 1.86 thefts per thousand vehicles produced, a decrease of 10.6 percent from the rate of 2.08 thefts per thousand vehicles experienced by MY 2006 vehicles in CY 2006. The data has shown an overall decreasing trend in theft rates since CY 1993, with periods of increase from one year to the next.

For MY 2007 vehicles, out of a total of 206 vehicle lines, 16 lines had a theft rate higher than 3.5826 per thousand vehicles, the established median theft rate for MYs 1990/1991. (*See* 59 FR 12400, March 16, 1994). Of the 16 vehicle lines with a theft rate higher than 3.5826, 14 are passenger car lines, two are a multipurpose passenger vehicle lines, and none are light-duty truck lines.

The MY 2007 theft rate reduction is consistent with the general decreasing trend of theft rates over the past 15 years as indicated by Figure 1. We note, however, that the theft rate from 2003 to 2007 is virtually unchanged (1.84 to 1.86). This suggests that the progress made since 1992 may have reached the limits of current approaches to reducing vehicle thefts, and that some new approaches should be added.

Figure 1: Theft Rate Data Trend (1993-2007)



Theft rate per thousand vehicles produced

The agency believes that the theft rate reduction could be the result of several factors including the increased use of standard antitheft devices (*i.e.,* immobilizers), vehicle parts marking, increased and improved prosecution efforts by law enforcement organizations and increased public awareness measures.

On Wednesday, June 10, 2009, NHTSA published the preliminary theft rates for CY 2007 passenger motor vehicles in the **Federal Register** (74 FR 27493). The agency tentatively ranked each of the MY 2007 vehicle lines in descending order of theft rate. The public was requested to comment on the accuracy of the data and to provide final production figures for individual vehicle lines. The agency used written comments to make the necessary adjustments to its data. As a result of the adjustments, some of the final theft rates and rankings of vehicle lines changed from those published in the June 2009 notice. The agency received written comments from Volkswagen Group of America, Inc. (VW) and Nissan North America, Inc. (Nissan).

In its comments, VW informed the agency that the entries for the Audi RS4, Audi A8, Audi A4/A4 Quattro/S4/S4 Avant and Audi RS4 were listed with incorrect manufacturer designations. The final theft data has been revised to reflect that Audi is the manufacturer for

the Audi RS4, Audi A8, Audi A4/A4 Quattro/S4/S4 Avant and Audi RS4 vehicles.

Additionally, Nissan informed the agency that its Nissan Xterra and Versa vehicle lines were not listed in the agency's June 2009 publication of preliminary data. Upon review, the agency found that the Xterra vehicle line has a gross vehicle weight rating (GVWR) over 6,000 pounds. Therefore, because the scope of the Federal Motor Vehicle Theft Prevention Standard applies to only vehicles with a GVWR of 6,000 pounds or less, the Nissan Xterra was not included on the agency's publication. The agency also notes that the Nissan Versa was erroneously omitted from the publication of preliminary theft data and therefore, has corrected the final theft data to reflect the theft rate information for the Nissan Versa. As a result of this correction, the Nissan Versa is ranked No. 95 with a theft rate of 1.3216.

Further reanalysis of the theft rate data also revealed that the production volume listed for the Pontiac G5 was incorrect. The production volume for the Pontiac G5 has been corrected and the final theft list has been revised accordingly. As a result of the correction, the Pontiac G5 previously ranked No. 94 with a theft rate of 1.3216 is now ranked No. 2 with a theft rate of 11.2523.

Review of the theft rate data also revealed that the Chrysler Crossfire was not included on the publication of preliminary theft data. NHTSA has corrected the final theft data to include the Chrysler Crossfire. As a result of this correction, the final theft list has been revised accordingly. The Chrysler Crossfire, previously omitted, is now ranked No. 193 with a theft rate of 0.0000.

The following list represents NHTSA's final calculation of theft rates for all 2007 passenger motor vehicle lines. This list is intended to inform the public of calendar year 2007 motor vehicle thefts of model year 2007 vehicles and does not have any effect on the obligations of regulated parties under 49 U.S.C. Chapter 331, Theft Prevention.

FINAL REPORT OF THEFT RATES FOR MODEL YEAR 2007 PASSENGER MOTOR VEHICLES STOLEN IN CALENDAR YEAR 2007

	Manufacturer	Make/model (line)	Thefts 2007	Production (Mfr's) 2007	2007 theft rate (per 1,000 vehicles produced)
1	CHRYSLER	DODGE MAGNUM	344	28059	12.2599
2	GENERAL MOTORS	PONTIAC G5	54	4799	11.2523
3	CHRYSLER	DODGE CHARGER	1148	120636	9.5162
4	GENERAL MOTORS	CHEVROLET MONTE CARLO	174	21689	8.0225
5	GENERAL MOTORS	PONTIAC GRAND PRIX	534	77689	6.8736
6	CHRYSLER	300	715	121529	5.8834
7	MITSUBISHI	LANCER	12	2355	5.0955
8	ROLLS ROYCE	PHANTOM	2	398	5.0251
9	MERCEDES-BENZ	215 (CL-CLASS)	43	9296	4.6256
10	FORD MOTOR CO	TAURUS	510	114616	4.4496
11	CHRYSLER	SEBRING	338	78059	4.3301
12	CHRYSLER	PT CRUISER	443	104546	4.2374
13	SUZUKI	FORENZA	133	34236	3.8848
14	GENERAL MOTORS	PONTIAC G6	629	164306	3.8282
15	GENERAL MOTORS	CHEVROLET MALIBU	487	127718	3.8131
16	MITSUBISHI	GALANT	103	27141	3.7950
17	MAZDA	6	201	56178	3.5779
18	AUDI	AUDI RS4	5	1475	3.3898
19	CHRYSLER	PACIFICA	197	60392	3.2620
20	GENERAL MOTORS	CHEVROLET COBALT	703	215663	3.2597
21	FORD MOTOR CO	MUSTANG	518	159345	3.2508
22	FORD MOTOR CO	LINCOLN TOWN CAR	114	35281	3.2312
23	CHRYSLER	DODGE CALIBER	560	175537	3.1902
24	KIA	OPTIMA	127	40914	3.1041
25	NISSAN	350Z	49	15831	3.0952
26	NISSAN	INFINITI FX35	40	13346	2.9972
27	GENERAL MOTORS	CADILLAC DTS	140	47396	2.9538
28	GENERAL MOTORS	CHEVROLET IMPALA	769	267375	2.8761
29	KIA	SPECTRA	171	64591	2.6474
30	KIA	RIO	83	31947	2.5981
31	MITSUBISHI	ECLIPSE	107	42300	2.5296
32	FORD MOTOR CO	FOCUS	576	229738	2.5072
33	GENERAL MOTORS	CHEVROLET AVEO	166	67104	2.4738
34	HYUNDAI	SONATA	302	123439	2.4466
35	VOLVO	S40	53	21905	2.4195
36	HYUNDAI	ELANTRA	192	80133	2.3960
37	NISSAN	MAXIMA	152	63601	2.3899
38	BMW	M6	8	3400	2.3529
39	MITSUBISHI	ENDEAVOR	30	12805	2.3428
40	NISSAN	SENTRA	225	96584	2.3296
41	FORD MOTOR CO	CROWN VICTORIA	17	7424	2.2899
42	CHRYSLER	JEEP LIBERTY	209	91466	2.2850
43	GENERAL MOTORS	CHEVROLET HHR	223	99681	2.2371
44	MERCEDES-BENZ	220 (S-CLASS)	91	41867	2.1735
45	TOYOTA	COROLLA	740	351414	2.1058
46	NISSAN	INFINITI FX45	1	475	2.1053

FINAL REPORT OF THEFT RATES FOR MODEL YEAR 2007 PASSENGER MOTOR VEHICLES STOLEN IN CALENDAR YEAR 2007—Continued

	Manufacturer	Make/model (line)	Thefts 2007	Production (Mfr's) 2007	2007 theft rate (per 1,000 vehicles produced)
47	GENERAL MOTORS	CHEVROLET TRAILBLAZER	257	122918	2.0908
48	GENERAL MOTORS	BUICK LACROSSE/ALLURE	113	54938	2.0569
49	HUMMER	H3	95	46341	2.0500
50	NISSAN	ALTIMA	413	202162	2.0429
51	SUZUKI	RENO	62	30424	2.0379
52	FORD MOTOR CO	MERCURY GRAND MARQUIS	81	39757	2.0374
53	JAGUAR	XK8	6	2965	2.0236
54	KIA	SORENTO	64	31798	2.0127
55	MAZDA	5	33	16424	2.0093
56	GENERAL MOTORS	SATURN ION	185	94117	1.9656
57	AUDI	AUDI A8	10	5106	1.9585
58	HYUNDAI	ACCENT	86	44314	1.9407
59	GENERAL MOTORS	CADILLAC CTS	97	53360	1.8178
60	FORD MOTOR CO	FUSION	266	146464	1.8161
61	NISSAN	PATHFINDER	76	42137	1.8036
62	HYUNDAI	AZERA	40	22218	1.8003
63	CHRYSLER	DODGE CARAVAN/GRAND CARAVAN	284	164003	1.7317
64	GENERAL MOTORS	CHEVROLET CORVETTE	65	37744	1.7221
65	BMW	M5	2	1163	1.7197
66	VOLKSWAGEN	JETTA	146	84922	1.7192
67	GENERAL MOTORS	PONTIAC G6	54	32894	1.6416
68	BMW	6	11	6779	1.6227
69	FORD MOTOR CO	FREESTAR VAN	30	18579	1.6147
70	NISSAN	INFINITI M35/M45	48	30144	1.5924
71	TOYOTA	YARIS	252	159292	1.5820
72	HONDA	ACCORD	664	421206	1.5764
73	CHRYSLER	DODGE NITRO	133	84441	1.5751
74	MAZDA	RX–8	9	5728	1.5712
75	FORD MOTOR CO	MERCURY MILAN	55	35375	1.5548
76	AUDI	AUDI A6/A6 QUATTRO/S6/S6 AVANT	18	11660	1.5437
77	FORD MOTOR CO	FIVE HUNDRED	94	61270	1.5342
78	TOYOTA	AVALON	121	79137	1.5290
79	NISSAN	MURANO	137	92516	1.4808
80	TOYOTA	HIGHLANDER	148	100956	1.4660
81	TOYOTA	CAMRY/SOLARA	1003	685729	1.4627
82	NISSAN	INFINITI G35	83	57041	1.4551
83	GENERAL MOTORS	CHEVROLET UPLANDER VAN	87	60061	1.4485
84	GENERAL MOTORS	CADILLAC STS	24	16746	1.4332
85	GENERAL MOTORS	CADILLAC XLR	2	1400	1.4286
86	HONDA	S2000	7	4907	1.4265
87	KIA	AMANTI	6	4343	1.3815
88	MERCEDES-BENZ	208 (CLK-CLASS)	19	13825	1.3743
89	NISSAN	FRONTIER PICKUP	87	64010	1.3592
90	GENERAL MOTORS	CHEVROLET COLORADO PICKUP	95	70012	1.3569
91	GENERAL MOTORS	GMC CANYON PICKUP	25	18483	1.3526
92	BMW	7	22	16421	1.3397
93	TOYOTA	FJ CRUISER	112	83830	1.3360
94	MAZDA	3	153	114723	1.3336
95	NISSAN	VERSA	107	80962	1.3216
96	SUBARU	IMPREZA	51	39198	1.3011
97	AUDI	AUDI A4/A4 QUATTRO/S4/S4 AVANT	64	49645	1.2892
98	NISSAN	QUEST VAN	47	36661	1.2820
99	HONDA	ACURA TSX	29	22669	1.2793
100	KIA	SPORTAGE	58	45512	1.2744
101	TOYOTA	TACOMA PICKUP	206	165714	1.2431
102	FORD MOTOR CO	RANGER PICKUP	94	77539	1.2123
103	TOYOTA	4RUNNER	132	109124	1.2096
104	MERCEDES-BENZ	170 (SLK-CLASS)	9	7459	1.2066
105	GENERAL MOTORS	SATURN AURA	77	64851	1.1873
106	GENERAL MOTORS	PONTIAC TORRENT	35	29918	1.1699
107	HONDA	HONDA CIVIC	389	332639	1.1694
108	GENERAL MOTORS	CADILLAC FUNERAL COACH/HEARSE	1	857	1.1669
109	MITSUBISHI	OUTLANDER	37	31873	1.1609
110	AUDI	AUDI A3/A3 QUATTRO	8	6992	1.1442
111	VOLKSWAGEN	GOLF/RABBIT/GTI	46	41314	1.1134
112	GENERAL MOTORS	CHEVROLET EQUINOX	94	87031	1.0801
113	HYUNDAI	TIBURON	15	13951	1.0752
114	VOLKSWAGEN	PASSAT	42	39867	1.0535

FINAL REPORT OF THEFT RATES FOR MODEL YEAR 2007 PASSENGER MOTOR VEHICLES STOLEN IN CALENDAR YEAR 2007—Continued

	Manufacturer	Make/model (line)	Thefts 2007	Production (Mfr's) 2007	2007 theft rate (per 1,000 vehicles produced)
115	MERCEDES-BENZ	129 (SL-CLASS)	8	7648	1.0460
116	FORD MOTOR CO	MERCURY MONTEGO	16	15439	1.0363
117	GENERAL MOTORS	GMC ENVOY	38	36989	1.0273
118	HYUNDAI	TUCSON	45	44033	1.0220
119	HONDA	ACURA 3.2 TL	5	4905	1.0194
120	GENERAL MOTORS	BUICK TERRAZA VAN	8	7865	1.0172
121	FORD MOTOR CO	ESCAPE	110	108788	1.0111
122	JAGUAR	X-TYPE	3	3018	0.9940
123	HONDA	ACURA 3.5 RL	49	49471	0.9905
124	JAGUAR	VANDEN PLAS/SUPER V8	1	1010	0.9901
125	SUZUKI	SX4	15	15421	0.9727
126	VOLVO	S80	10	10805	0.9255
127	GENERAL MOTORS	PONTIAC VIBE	30	32499	0.9231
128	HONDA	ELEMENT	31	33688	0.9202
129	MAZDA	B SERIES PICKUP	3	3285	0.9132
130	BMW	5	47	51970	0.9044
131	GENERAL MOTORS	SATURN SKY	14	15546	0.9006
132	GENERAL MOTORS	BUICK LUCERNE	76	85922	0.8845
133	TOYOTA	LEXUS LS	31	35167	0.8815
134	HONDA	ACURA RDX	22	25159	0.8744
135	CHRYSLER	JEEP WRANGLER	88	100955	0.8717
136	FORD MOTOR CO	EDGE	105	121525	0.8640
137	KIA	RONDO	22	25524	0.8619
138	TOYOTA	LEXUS RX	82	98473	0.8327
139	VOLKSWAGEN	EOS	11	13406	0.8205
140	TOYOTA	RAV4	145	181051	0.8009
141	FORD MOTOR CO	FREESTYLE	30	38047	0.7885
142	HYUNDAI	SANTA FE	89	113815	0.7820
143	BMW	Z4/M	8	10568	0.7570
144	GENERAL MOTORS	PONTIAC SOLSTICE	16	21310	0.7508
145	SUZUKI	AERIO	4	5544	0.7215
146	PORSCHE	CAYMAN	4	5552	0.7205
147	PORSCHE	911	9	12521	0.7188
148	TOYOTA	LEXUS IS	41	57055	0.7186
149	MERCEDES-BENZ	203 (C-CLASS)	83	116282	0.7138
150	BENTLEY MOTORS	CONTINENTAL	3	4265	0.7034
151	BMW	X3	22	31365	0.7014
152	SUBARU	B9 TRIBECA	8	11538	0.6934
153	BMW	3	97	139966	0.6930
154	MAZDA	MAZDA CX–7	52	75137	0.6921
155	VOLVO	S60	14	20268	0.6907
156	CHRYSLER	JEEP PATRIOT	20	29421	0.6798
157	ASTON MARTIN	VANTAGE	1	1474	0.6784
158	KIA	SEDONA VAN	41	60873	0.6735
159	HONDA	FIT	46	68642	0.6701
160	SUBARU	LEGACY/OUTBACK	10	14963	0.6683
161	TOYOTA	SIENNA VAN	63	96072	0.6558
162	HONDA	ACURA MDX	35	53550	0.6536
163	FORD MOTOR CO	MERCURY MONTEREY VAN	1	1553	0.6439
164	FORD MOTOR CO	LINCOLN MKX	22	34571	0.6364
165	GENERAL MOTORS	BUICK RAINIER	3	4723	0.6352
166	SUBARU	OUTBACK	27	42747	0.6316
167	HONDA	PILOT	77	122033	0.6310
168	FORD MOTOR CO	LINCOLN ZEPHYR	20	32952	0.6069
169	JAGUAR	XKR	3	5030	0.5964
170	TOYOTA	LEXUS GS	17	28638	0.5936
171	VOLVO	V50	2	3373	0.5929
172	MERCEDES-BENZ	210 (E-CLASS)	31	52557	0.5898
173	MAZDA	MX–5 MIATA	7	13353	0.5242
174	VOLVO	XC90	15	30762	0.4876
175	GENERAL MOTORS	BUICK RENDEZVOUS	14	29187	0.4797
176	VOLKSWAGEN	NEW BEETLE	13	27249	0.4771
177	HYUNDAI	VERACRUZ	6	12726	0.4715
178	VOLVO	XC70	6	13197	0.4546
179	HONDA	CR–V	104	229378	0.4534
180	PORSCHE	BOXSTER	2	4427	0.4518
181	TOYOTA	LEXUS ES	54	121577	0.4442
182	SUBARU	FORESTER	19	43985	0.4320

FINAL REPORT OF THEFT RATES FOR MODEL YEAR 2007 PASSENGER MOTOR VEHICLES STOLEN IN CALENDAR YEAR 2007—Continued

	Manufacturer	Make/model (line)	Thefts 2007	Production (Mfr's) 2007	2007 theft rate (per 1,000 vehicles produced)
183	BMW	MINI COOPER	15	38511	0.3895
184	JAGUAR	S-TYPE	1	2582	0.3873
185	TOYOTA	PRIUS	53	158715	0.3339
186	SAAB	9–3	7	22401	0.3125
187	HONDA	ODYSSEY VAN	64	208166	0.3074
188	FORD MOTOR CO	MERCURY MARINER	6	20842	0.2879
189	VOLVO	C70	1	5612	0.1782
190	TOYOTA	LEXUS SC	8	80617	0.0992
191	ASTON MARTIN	DB9	0	688	0.0000
192	BENTLEY MOTORS	ARNAGE	0	140	0.0000
193	BENTLEY MOTORS	AZURE	0	184	0.0000
194	CHRYSLER	CROSSFIRE	0	3412	0.0000
195	FERRARI	141	0	364	0.0000
196	FERRARI	612 SCAGLIETTI	0	66	0.0000
197	FERRARI	430	0	1382	0.0000
198	GENERAL MOTORS	CADILLAC LIMOUSINE	0	648	0.0000
199	JAGUAR	XJ8/XJ8L	0	1645	0.0000
200	JAGUAR	XJR	0	221	0.0000
201	LAMBORGHINI	MURCIELAGO	0	164	0.0000
202	LAMBORGHINI	GALLARDO	0	558	0.0000
203	MASERATI	QUATTROPORTE	0	2176	0.0000
204	SAAB	9–5	0	4084	0.0000
205	SPYKER	C8	0	7	0.0000
206	VOLVO	V70	0	3899	0.0000

Issued on: March 4, 2010.

Stephen R. Kratzke,

Associate Administrator for Rulemaking.

[FR Doc. 2010–5080 Filed 3–9–10; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R1–ES–2009–0010]
[MO 92210-0-0009-B4]

RIN 1018–AV87

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Oregon Chub (*Oregonichthys crameri*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the Oregon chub (*Oregonichthys crameri*) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 53 hectares (ha) (132 acres (ac)) located in Benton, Lane, Linn, and Marion Counties, Oregon, fall within the boundaries of the critical habitat designation.

DATES: This rule becomes effective on April 9, 2010.

ADDRESSES: This final rule, the economic analysis, comments and materials received, as well as supporting documentation we used in preparing this final rule, are available for viewing at *http://regulations.gov*at Docket No. FWS–R1–ES–2009–0010 and, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office, 2600 SE 98th Ave., Portland, OR 97266; telephone 503–231–6179; facsimile 503–231–6195.

FOR FURTHER INFORMATION CONTACT: Paul Henson, State Supervisor, U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office (see **ADDRESSES**). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

It is our intent to discuss only those topics directly relevant to the development and designation of critical habitat for the Oregon chub in this final rule. For a more complete discussion of the ecology and life history of this species, please see the Oregon Chub 5–year Review Summary and Evaluation completed February 11, 2008, which is available at: *http://www.fws.gov/pacific/ecoservices/endangered/recovery/Documents/Oregonchub.pdf* and the March 10, 2009, proposed rule (74 FR 10412).

Description and Taxonomy

The Oregon chub (*Oregonichthys crameri*) was first described in scientific literature in 1908 (Snyder 1908, pp. 181–182), but it wasn't until 1991 that it was identified as a unique species (Markle *et al.* 1991, pp. 284–289). Oregon chub have an olive-colored back (dorsum) grading to silver on the sides and white on the belly. Scales are relatively large with fewer than 40 occurring along the lateral line; scales near the back are outlined with dark pigment (Markle *et al.* 1991, pp. 286–288). While young of the year range in length from 7 to 32 millimeters (mm) (0.3 to 1.3 inches (in)), adults can be up to 90 mm (3.5 in) in length (Pearsons 1989, p. 17). The species is distinguished from its closest relative, the Umpqua chub (*Oregonichthys kalawatseti*), by Oregon chub's longer caudal peduncle (the narrow part of a fish's body to which the tail is attached), mostly scaled breast, and more terminal mouth position (Markle *et al.* 1991, p. 290).

Distribution and Habitat

Oregon chub are found in slack-water, off-channel habitats with little or no flow, silty and organic substrate, and considerable aquatic vegetative cover for hiding and spawning (Pearsons 1989, p.

10; Markle *et al.* 1991, p. 288; Scheerer and Jones 1997, p. 5; Scheerer *et al.* 2007, p. 3). The species' aquatic habitat is typically at depths of less than or equal to 2 meters (m) (6.6 feet (ft)), and has a C) (61Celsius (summer subsurface water temperature exceeding 15 F)) (Scheerer and Apke 1997, p. 45; Scheerer 2002, p. 1073; ScheererFahrenheit (and McDonald 2003, p. 69). Optimal Oregon chub habitat provides 1 square meter (11 square feet) of aquatic surface area per adult, at depths between 0.5 m (1.6 ft) to 2 m (6.6 ft) (Scheerer 2008b). Oregon chub can be relatively long-lived with males living up to 7 years and females up to 9 years, although less than 10 percent of fish in most Oregon chub populations are older than 3 years (Scheerer and McDonald 2003, p. 71). Outside of spawning season, the species is social and nonaggressive with fish of similar size classes schooling and feeding together (Pearsons 1989, pp. 16–17).

The species is endemic to the Willamette River drainage of western Oregon (Markle *et al.* 1991, p. 288) and was formerly distributed throughout the Willamette River Valley in a dynamic network of off-channel habitats such as beaver ponds, oxbows, side channels, backwater sloughs, low-gradient tributaries, and flooded marshes in the floodplain (Snyder 1908, p. 182). Records show Oregon chub were found as far downstream as Oregon City, as far upstream as Oakridge, and in various tributaries within the Willamette basin (Markle *et al.* 1991, p. 288).

Historically, Oregon chub would be dispersed and their habitat regularly altered, increased, or eliminated due to regular winter and spring flood events (Benner and Sedell 1997, pp. 27–28); this dispersal created opportunities for interbreeding between different populations. The installation of the flood control projects in the Willamette River basin altered the natural flow regime, and flooding no longer plays a positive role in creating Oregon chub habitat or providing opportunities for genetic mixing of populations. Flood events now threaten Oregon chub populations due to the dispersal of nonnative species that compete with or prey on Oregon chub. In the Santiam River basin, the two largest natural populations of Oregon chub declined substantially after nonnative fishes invaded these habitats during the 1996 floods, and no new populations of Oregon chub were discovered in habitats located downstream of existing chub populations during thorough sampling in 1997–2000. This suggests that no successful colonization occurred as a result of the flooding event (Scheerer 2002, p. 1078).

Currently, the largest populations of Oregon chub occur in locations with the highest diversity of native fish, amphibian, reptile and plant species (Scheerer and Apke 1998, p. 11). Beaver (*Castor canadensis*) appear to be especially important in creating and maintaining habitats that support these diverse native species assemblages (Scheerer and Apke 1998, p. 45). Conversely, the establishment and expansion of nonnative species in Oregon have contributed to the decline of the Oregon chub, limiting the species' ability to expand beyond its current range (Scheerer 2007, p. 92). Many sites formerly inhabited by the Oregon chub are now occupied by nonnative species (Scheerer *et al.* 2007, p. 9; Scheerer 2007a, p. 96). Sites with high connectivity to adjacent flowing water frequently contain nonnative predatory fishes and rarely contain Oregon chub (Scheerer 2007, p. 99). The presence of centrarchids (e.g., *Micropterus* spp. (largemouth bass, smallmouth bass, bluegill) and *Pomoxis* spp. (crappies)), and bullhead catfishes (*Ameiurus* spp.) is probably preventing Oregon chub from recolonizing suitable habitats throughout the basin (Markle *et al.* 1991, p. 291).

Although surveys conducted by the Oregon Department of Fish and Wildlife (ODFW) prior to the 1993 listing of Oregon chub as endangered under the Act indicated the presence of the species at 17 different locations, the impacts of floodplain alteration and nonnative predators and competitors were clearly represented in the relatively small numbers of Oregon chub found at these sites. At the time of listing, these surveys were the best evidence of the then-current distribution of the species. Of these 17 sites, only 9 supported populations of 10 or more Oregon chub, and all but 1 of those populations were found within a 30-kilometer (km) (19-mile (mi)) reach of the Middle Fork Willamette River in the vicinity of Dexter and Lookout Point Reservoirs in Lane County, Oregon; this reach represented just 2 percent of the species' historical range (58 FR 53800). Very small numbers of the species, between 1 and 7 individuals, were found at the remaining 8 of the 17 sites at the time of listing. Currently, the distribution of Oregon chub is limited to 25 known naturally occurring populations and 11 reintroduced populations scattered throughout the Willamette Valley (Scheerer *et al.* 2007, p. 2; 2008a, p. 2).

Previous Federal Actions

On October 18, 1993, we listed the Oregon chub as endangered under the Endangered Species Act (Act) (58 FR 53800), and concluded that the designation of critical habitat was prudent but not determinable. A recovery plan for the Oregon chub (Recovery Plan) was completed in 1998 (USFWS 1998). The Recovery Plan established certain criteria for downlisting the species from endangered to threatened, which included establishing and managing 10 populations of at least 500 adults each that exhibit a stable or increasing trend for 5 years. The Recovery Plan states that for purposes of downlisting the species, at least three populations must be located in each of the three sub-basins of the Willamette River identified in the plan (Mainstem Willamette River, Middle Fork Willamette, and Santiam River). The Recovery Plan also established criteria for delisting the Oregon chub (i.e., removing it from the List of Endangered and Threatened Wildlife). These criteria include establishing and managing 20 populations of at least 500 adults each, which demonstrate a stable or increasing trend for 7 years. In addition, at least four populations must be located in each of the three sub-basins (Mainstem Willamette River, Middle Fork Willamette, and Santiam River). The management of these populations must be assured in perpetuity.

On June 17, 1999, we published a Safe Harbor Policy to encourage private and other non-Federal property owners to voluntarily undertake management activities on their property to enhance, restore, or maintain habitat to benefit federally listed species (62 FR 32717). Safe Harbor Agreements (SHAs) manage habitat for listed species, and provide assurances to landowners that additional land, water, and/or natural resource use restrictions will not be imposed as a result of their voluntary conservation actions to benefit covered species. In 2001 and 2007, Safe Harbor Agreements (SHAs) for the Oregon chub were established in Lane County, Oregon (66 FR 30745, June 7, 2001; 72 FR 50976, September 5, 2007). These two SHAs established new populations of Oregon chub in artificial ponds as refugia for natural populations, and contribute to the conservation of the species by reducing the risk of the complete loss of donor populations and any of their unique genetic material.

On March 8, 2007, we issued a notice that we would begin a status review of the Oregon chub (72 FR 10547). On March 9, 2007, the Institute for Wildlife

Protection (IWP) filed suit in Federal district court, alleging that the Service and the Secretary of the Interior violated their statutory duties as mandated by the Act when they failed to designate critical habitat for the Oregon chub and failed to perform a 5–year status review (*Institute for Wildlife Protection* v. *U.S. Fish and Wildlife Service*). We completed the Oregon chub 5-Year Review on February 11, 2008. In a settlement agreement with the Plaintiff, we agreed to submit a proposed critical habitat rule for Oregon chub to the **Federal Register** by March 1, 2009, and to submit a final critical habitat determination to the **Federal Register** by March 1, 2010.

On March 10, 2009, we published a proposed rule in the **Federal Register** to designate critical habitat for the Oregon chub (74 FR 10412), and accepted public comments for 60 days (March 10–May 10, 2009). On September 22, 2009, we announced the reopening of the public comment period for 30 days (September 22–October 22, 2009); the availability of a draft economic analysis (DEA) and amended required determinations section of the proposal; and a public hearing to be held on October 5, 2009, in Corvallis, Oregon. The public was invited to review and comment on any of the above actions associated with the proposed critical habitat designation at the scheduled public hearing or in writing (74 FR 48211). For more information on previous Federal actions concerning the Oregon chub, refer to the Determination of Endangered Status for the Oregon Chub published in the **Federal Register** on October 18, 1993 (58 FR 53800), the Recovery Plan, or the May 15, 2009, proposed rule to reclassify the Oregon chub from endangered to threatened status based on a thorough review of the best available scientific data, which indicated that the species' status has improved such that it is not currently in danger of extinction throughout all or a significant portion of its range (74 FR 22870).

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for the Oregon chub during the March 10–May 10, 2009, comment period. We also contacted appropriate Federal, State, and local agencies, scientific organizations, and other interested parties and invited them to comment on the proposed rule and the draft economic analysis. During the March 10–May 10, 2009, comment period, we received a request for a public hearing from the IWP. Section 4(b)(5)(E) of the Act requires that one public hearing be held on a proposed regulation if any person files a request for such a hearing within 45–days after the date of publication of a proposed rule. We held a public hearing in Corvallis, Oregon on October 5, 2009; however, no one attended. During the September 22–October 22, 2009, comment period, the IWP resubmitted their earlier comments and requested another public hearing, however, since we held a public hearing on October 5, 2009, a second public hearing was not required. Furthermore, given the lack of attendance at the October 5, 2009, hearing, we determined that a second hearing was not necessary.

We received six comments in response to the proposed rule. Four comment letters were received during the March 10–May 10, 2009, comment period from two peer reviewers, the Oregon Department of Fish and Wildlife (ODFW), and the IWP. Two comment letters were received during the September 22–October 22, 2009, comment period from one peer reviewer and the IWP. No comments were received regarding the DEA. All substantive comments have been either incorporated into the final determination or are addressed below.

Peer Review

In accordance with our policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we solicited expert opinions from three knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from each of the peer reviewers that we contacted. The peer reviewers generally agreed we relied on the best scientific information available, accurately described the species and its habitat requirements (primary constituent elements (PCEs)), accurately characterized the reasons for the species' decline and the threats to its habitat, and concurred with our critical habitat selection criteria and the use of the Recovery Plan as a foundation for the proposed designation. The peer reviewers provided additional information, clarifications, and suggestions to improve the final critical habitat rule. Recommended editorial revisions and clarifications have been incorporated into the final rule as appropriate. We respond to all substantive comments below.

Peer Reviewer Comments

Comment 1: One peer reviewer commented that there was no discussion in the Primary Constituent Elements section of connectivity corridors for the maintenance of gene flow between populations, or to allow natural recolonization of additional habitat.

Our Response: Connectivity corridors and periodic or seasonal connections were historically part of the Oregon chub's life history and were certainly the mechanism to provide for gene flow and natural colonization of new habitats. Now that most of the tributaries in the Willamette River basin have been impacted by dams and diversions, the Oregon chub's naturally connected habitat has been altered. Given the very serious risk of predation and competition from nonnative fish, connectivity now represents a threat to the Oregon chub in many locations. The Recovery Plan opts for a combination of approaches to recover the Oregon chub—from isolated, intensively managed ponds to more natural restored floodplain habitats. It is likely that populations will fall along this spectrum, and that Oregon chub recovery will be achieved through a variety of strategies (USFWS 1998, pp. 86–87). Establishing connectivity corridors may not be an optimal recovery strategy for many populations, given the nonnative species predation and competition threat. The species currently thrives in locations that are isolated and protected from that threat.

Endangered Species Permit TE–818627–9 authorizes the ODFW to conduct Oregon chub population estimates, distribution surveys, collect life-history data, and conduct translocations or reintroductions following the guidelines presented in the Recovery Plan. Recovery Task 2.3 in the Recovery Plan states that reintroduction stock should be taken from within the sub-basin that contains the new site, and that successive introductions within a sub-basin should come from a variety of source populations to ensure a diverse genetic makeup to the metapopulation within a sub-basin (USFWS 1998, p. 41). ODFW's authorized activities under the translocation and reintroduction guidelines are intended to address some of the concerns related to gene flow maintenance. The Recovery Plan acknowledges the need for a combination of approaches to recover Oregon chub, from isolated, intensively managed ponds to more natural restored floodplain habitats (USFWS 1998, pp. 85–86).

Comment 2: One peer reviewer commented that PCE 3 (late spring and summer subsurface water temperatures between 15 and 25 C) is incomplete, stating that they would have included other water quality factors such as the absence or low level of contaminants.

Our Response: In determining the PCEs for Oregon chub, we relied on the best scientific data available. Research has identified definitive temperature thresholds for the species for reproductive activity and other life-history needs, but has not explicitly defined characteristics of good water quality for the species beyond that attribute. We address several water quality characteristics in the Special Management Considerations or Protections section below, including protecting Oregon chub critical habitat areas from agricultural and forestry chemical runoff. Habitats that express the presence of PCE 2 (appropriate levels of aquatic vegetation that hosts abundant food for chub) would presumably be representative of habitats having good water quality characteristics.

Comment 3: One peer reviewer suggested that PCE 4 (no or negligible levels of nonnative aquatic predatory or competitive species) is rather unspecific and that the term 'negligible' may be difficult to characterize in practice.

Our Response: We are unaware of any scientific data that presents a definitive numerical threshold of competitive and predatory nonnative fish species that would be detrimental to a population of Oregon chub. We use the term 'negligible' to acknowledge the possibility that a population of Oregon chub may be able to persist in the presence of some level of nonnative competing species, which may depend on population ratios, the biology of the nonnative species involved, or other physical, biological, or hydrological factors. However, currently available scientific information indicates that Oregon chub and nonnative predators are not able to coexist at most sites, and where they do the Oregon chub populations remain at low levels.

Comments from States

We received several recommendations for minor corrections to the critical habitat unit descriptions from the ODFW, which have been incorporated into this final rule. Other substantive comments received from the ODFW are addressed below.

Comment 4: The context and importance of the population threshold of 500 adults was not explained in the Physical and Biological Features–Flow Velocities and Depth section of the proposed rule. The ODFW recommended that the final rule explain that this population threshold was based on delisting criteria identified in the Recovery Plan.

Our Response: We have revised the section accordingly.

Comment 5: Several sites with abundance levels of fewer than 500 fish are capable of supporting large populations and are essential to the recovery of the species. The ODFW identified three sites that they believe contain all of the PCEs, and recommended that they be designated as critical habitat: (1) Pioneer Park backwater, Santiam sub-basin; (2) Sprick Pond, Coast Fork Willamette sub-basin; and (3) Haws Pond, Elijah Bristow South Slough and sites RM198.6 and RM199.5, Middle Fork Willamette sub-basin. The ODFW commented that several areas proposed as critical habitat for Oregon chub were at very low population levels for many years before increasing rapidly in abundance, including Unit 3J Buckhead Creek and Unit 3K Wicopee Pond.

Our Response: In the critical habitat selection criteria of the proposed rule, we described the rule set used to identify proposed critical habitat areas. This critical habitat designation focuses on sites where we have the most confidence that the Oregon chub populations can achieve recovery criteria, based on the best available scientific information. The 2007 survey results for the Pioneer Park backwater site documented 420 fish; Sprick Pond is a new site that had 19 Oregon chub introduced in 2008; and Oregon chub surveys in Hawes Pond documented 382 fish in 2007 and 277 in 2008. Each of the sites being designated as critical habitat in this final rule has been surveyed annually over several years, with the initial survey data for some critical habitat units conducted in the early 1990s (e.g., Shady Dell Pond (Unit 3I), Elijah Bristow State Park, Berry Slough (Unit 3B)) (Sheerer 2007a, p. 2). However, there is insufficient annual survey data to demonstrate whether the population trend is stable or increasing in any of the additional locations suggested by the ODFW. We have no survey data from the Elijah Bristow South Slough and RM 196.8 and 199.5 sites, and are uncertain as to their specific location. However, based on the Recovery Plan, we have determined that designating critical habitat in 25 sites will be sufficient to meet recovery goals (see below discussion). Although the additional sites suggested by the ODFW may have an important role in Oregon chub conservation, they are not essential to the conservation of the species. Each of the sites designated in this final rule meet the definition of critical habitat under section 3(5)(a) of the Act, and is consistent with the criteria described in the Criteria Used to Identify Critical Habitat section below. Although the Recovery Plan calls for establishing and maintaining a minimum of 20 populations, we are designating critical habitat for 25 populations, to mitigate the potential that some units may become unable to support the species or primary constituent elements over time because of predation issues or other factors. Importantly, the designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of the Oregon chub. Federal activities undertaken in areas outside of critical habitat are subject to review under section 7 of the Act to ensure that they are not likely to jeopardize the continued existence of the Oregon chub. The prohibitions of section 9 against the take of listed species also apply, regardless of critical habitat designation.

Comment 6: The ODFW suggested more unoccupied off-channel habitat in the Jasper to Dexter reach of the Middle Fork Willamette sub-basin should be designated as critical habitat. The ODFW commented that these habitats are essential for the conservation of the species and present the best opportunities to establish additional Oregon chub populations in connected habitats. They advised that habitats in this reach currently support several stable and abundant Oregon chub populations with minimal numbers of nonnative fishes, and that these habitats are necessary to recover the species.

Our Response: The critical habitat selection criteria in the proposed rule identified sites that currently support at least 500 adult Oregon chub, or those that currently express sufficient PCEs to support at least 500 adult Oregon chub and have done so in the past. We were not aware of the unoccupied off-channel habitat areas being suggested by ODFW when we developed the proposed rule, and did not have survey data for those locations. The ODFW has since clarified that the RM 196.8 and 199.5 sites and the Elijah Bristow South Slough sites referenced in their comments are within the Jasper to Dexter reach of the Middle Fork Willamette sub-basin. Although initially thought to be unoccupied, ODFW surveys conducted in 2008 documented one Oregon chub each in the RM 196.8 and RM 199.5 localities. Since the sites suggested are either unoccupied or currently support few Oregon chub, they would not satisfy the 500 adult fish or 5–year stability

thresholds identified in the critical habitat selection criteria. However, although these sites are inconsistent with the selection criteria, they may represent habitat that has potential conservation value. The fact that a particular area is not designated as critical habitat does not imply that it does not have an important role in the conservation of the Oregon chub.

Comment 7: Runoff of forestry chemicals is a threat to several sites, which should be acknowledged in the Special Management Considerations or Protections section discussion.

Our Response: The Special Management Considerations or Protections section has been revised accordingly.

Comment 8: The ODFW identified additional Special Management Considerations or Protections needs for several of the units, including: (1) Units 3G East Fork Minnow Creek Pond and 3K Wicopee Pond, which require special management to prevent the introduction or further introduction of nonnative fishes; (2) Unit 3A Fall Creek Spillway Ponds, which require special management to prevent or set back vegetative succession; and (3) Units 1A Santiam I–5 Side Channels, 2B(5) Finley Gray Creek Swamp and 3G East Fork Minnow Creek Road, which require special management to maintain water quality and reduce the incursion of potentially hazardous agricultural and forestry chemicals into Oregon chub critical habitat areas.

Our Response: We have revised the Special Management Considerations or Protections discussion accordingly.

Public Comments

Comment 9: Relying on absolute population size rather than effective population size to establish the criteria for selecting critical habitat is inadequate; relying on the Recovery Plan to develop the critical habitat selection criteria is invalid for the same reason.

Our Response: We agree that using effective population size would be an optimal approach for monitoring the status of Oregon chub populations in the designated critical habitat units. Effective population size (the average number of individuals in a population that are assumed to contribute genes equally to the next generation) is a genetic concept used in conservation planning, and is generally a smaller number than the total number of individuals in the population. The sampling protocol used to count and estimate Oregon chub population size employs an adult fish mark-recapture approach using seines, baited minnow traps, dip nets, or gill net panels depending on specific habitat conditions. Sampling is conducted over a percentage of the surface area at each site and within each of the habitat types present (Sheerer 2002, p. 1071). However, based on the best scientific and commercial data available, we are unable to determine the effective population size for any of the Oregon chub populations for which we are designating critical habitat in this final rule.

Each area designated as critical habitat in this final rule:

(1) Is based on the best scientific information available;

(2) has been informed by more than 20 years of research (including population monitoring);

(3) contains the essential physical and biological features essential to the conservation of the species;

(4) is consistent with the Recovery Plan, which was peer reviewed and developed with help from knowledgeable individuals with scientific expertise and familiarity with the species; and

(5) is consistent with the methodology used to identify critical habitat units. Using the Recovery Plan as the standard against which to measure Oregon chub recovery is appropriate and consistent with the best scientific data available standard we are required to apply under section 4(b)(2) of the Act.

Comment 10: Global warming and climate change are certain to significantly degrade Oregon chub habitat in the future, but the proposal provided no analysis in this regard.

Our Response: We agree that predicted global climate change appears likely to pose additional threats to the Oregon chub. In the proposed rule, we acknowledged that the designation of critical habitat may not include all areas that we may eventually determine are necessary for Oregon chub recovery. However, we currently do not have scientific data specific to the Oregon chub or its habitat that suggest what, if any, additional areas may be essential to the conservation of the species in light of climate change. The units being designated as critical habitat occur over a range of elevations and encompass large sites that provide for habitat heterogeneity and redundancy. We believe that this approach provides a buffer against environmental effects that may result from changing climate conditions in the Willamette Basin. Critical habitat designations are made on the basis of the best available information at the time of designation, and do not control the direction and substance of future recovery efforts if new information becomes available. If new scientific information related to climate change and its relation to sensitive habitats in the Willamette Valley becomes available in the future, we will fully consider that information in our recovery efforts. In addition, section 4(B)(2) of the Act provides for making revisions to critical habitat, based on the best scientific data available if a revision is appropriate.

Comment 11: Several Clean Air Act nonattainment areas lie within or near the range of this species; the susceptibility of certain organisms such as lichens to acid precipitation is quite high; the susceptibility of oaks and ponderosa pine should be considered by the Service; use of herbicides, pesticides, and other chemical agents is known to have damaged animal populations, even though the phenomenon has been little studied; a variety of chemical herbicides have been used in habitat areas; pesticides have been used to kill various insects occurring in habitat areas; endocrine disrupters have been demonstrated in numerous species and are known to produce transgenerational effects.

Our Response: Based on the general nature of the comment, we were unable to establish any particular relevance to the proposed designation of critical habitat for the Oregon chub. See the response to comment 2 for a discussion of water quality considerations.

Comment 12: The critical habitat being designated is not adequate for recovery of the species.

Our Response: We disagree. The proposed designation is consistent with the delisting criteria identified in the Recovery Plan, which was peer reviewed and developed with help from knowledgeable individuals with scientific expertise and familiarity with the species. Moreover, the commenter did not identify any additional areas that might be essential for the recovery of the species.

Comment 13: The **Federal Register** notice failed to adequately inform the public by not providing information on: (1) occupied habitat that was not proposed as critical habitat; (2) unoccupied but suitable habitat that was not proposed as critical habitat; (3) previously occupied or likely to have been occupied habitat that is currently unoccupied and not proposed as critical habitat; (4) whether the amount or quality of occupied habitat is increased by the designation of critical habitat; and (5), whether occupied habitat that has been adversely affected was not proposed as critical habitat for that reason.

Our Response: We disagree that the above information was required to be included in the proposed rule. However, in the proposed rule we identified a point of contact for additional information in the **FOR FURTHER INFORMATION CONTACT** section. We also provided an opportunity for interested parties to obtain additional information during the informal session before the public hearing that was held in Corvallis, Oregon on October 5, 2009. In the Criteria Used to Identify Critical Habitat section of the proposed rule, we described the rule set we used to identify proposed critical habitat areas. Each of the sites designated in this final rule meets the definition of critical habitat under section 3(5)(a) of the Act, after applying the criterion described in the Criteria used to Identify Critical Habitat section below. The final designation does not increase the quantity or quality of any occupied habitat, but does specify those areas that are essential for the conservation of the species.

Summary of Changes from the Proposed Rule

1. In response to a comment from the ODFW, we clarified the context and importance of the population threshold of 500 adults as discussed in the Recovery Plan in the Physical and Biological Features–Space for Individual and Population Growth and Normal Behavior, and in the Criteria Used to Identify Critical Habitat sections of the final rule.

2. In response to a comment from the ODFW, we added forestry chemicals to the discussion of the threat of agricultural chemical runoff in the Special Management Considerations or Protections section of the final rule.

3. In response to a comment from the ODFW, we revised the Special Management Considerations or Protections section of the final rule by adding the following information:

- Units 3G East Fork Minnow Creek Pond and 3K Wicopee Pond require special management to prevent the introduction or further introduction of nonnative fishes.
- Unit 3A Fall Creek Spillway Ponds requires special management to prevent or set back vegetative succession.
- Units 1A Santiam I–5 Side Channels, 2B(5) Finley Gray Creek Swamp, and 3G East Fork Minnow Creek Road require special management to reduce the incursion of potentially hazardous agricultural and forestry chemicals into Oregon chub habitats and to maintain water quality.

4. We made the following revisions to the Critical Habitat Designation section:

- In Unit 3E Dexter Reservoir RV Alcove (DEX 3) we clarified that the connection to Dexter Reservoir is through a culvert.
- In Unit 3H Hospital Pond we clarified that the site is spring fed, rather than fed by Hospital Creek.
- In Unit 3K Wicopee Pond we clarified that although the site currently has no nonnative predatory or competitive species, a potential threat from the introduction of nonnative species exists.

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

1. The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

a. Essential to the conservation of the species, and

b. Which may require special management considerations or protection; and

2. Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided under the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7(a)(2) of the Act requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner seeks or requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, Federal action agency's and the applicant's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time it was listed must contain the physical and biological features essential to the conservation of the species, and may be included only if those features may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life-cycle needs of the species (areas on which are found the physical and biological features laid out in the appropriate quantity and spatial arrangement for the conservation of the species). Under the Act and regulations at 50 CFR 424.12, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed only when we determine that those areas are essential for the conservation of the species and that designation limited to those areas occupied at the time of listing would be inadequate to ensure the conservation of the species. When the best available scientific data do not demonstrate that the conservation needs of the species require such additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species at the time of listing. An area currently occupied by the species but that was not occupied at the time of listing may, however, be essential to the conservation of the species and may be included in the critical habitat designation.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for

Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge. Substantive comments received in response to proposed critical habitat designations are also considered.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be required for recovery of the species.

Areas that support populations, but are outside the critical habitat designation, may continue to be subject to conservation actions we implement under section 7(a)(1) of the Act. Areas that support populations are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Methods

As required by section 4(b)(2) of the Act, we used the best scientific data available in determining areas that contain the features that are essential to the conservation of the Oregon chub. Data sources include research published in peer-reviewed articles; previous Service documents on the species, including the final listing determination (58 FR 53800; October 18, 1993), the Recovery Plan (USFWS 1998), and annual surveys conducted by the ODFW from 1992 through 2008 (summarized in Scheerer *et al.* 2007 and Scheerer 2008a). Additionally we utilized regional Geographic Information System (GIS) shape files for area calculations and mapping.

Physical and Biological Features

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas occupied at the time of listing to propose as critical habitat, we considered the physical and biological features that are essential to the conservation of the species and that may require special management considerations or protection. These features are the primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement essential for the conservation of the species. These include, but are not limited to:

1. Space for individual and population growth and for normal behavior;

2. Food, water, air, light, minerals, or other nutritional or physiological requirements;

3. Cover or shelter;

4. Sites for breeding, reproduction, and rearing (or development) of offspring; and

5. Habitats that are protected from disturbance or are representative of the historical geographical and ecological distributions of a species.

We derived the specific PCEs required for the Oregon chub from the biological needs of the species as described in the Background section of this rule and the following information:

Space for Individual and Population Growth and Normal Behavior

Oregon chub habitats are typically slack-water off-channel water bodies with little or no flow, such as beaver ponds, oxbows, side channels, backwater sloughs, low-gradient tributaries (less than 2.5 percent gradient) and flooded marshes (Pearsons 1989, pp. 30–31; Markle *et al.* 1991, pp. 288–289; Scheerer *et al.* 2007, p. 3; Scheerer 2008e). The species' swimming ability has been described as poor, and it is believed that no- or low-flow velocity water optimizes the energy expenditure of these slow-moving fish (Pearsons 1989, pp. 30–31). Although Oregon chub habitat may contain water of somewhat greater depth, the species mainly occupies water depths between approximately 0.5–2.0 m (1.6–6.6 ft). In order for a habitat to provide enough space to allow normal behavior for a population of 500 or more individuals, the water body needs to include approximately 500 square meters (0.12 ac) or more of aquatic surface area between 0.5–2.0 m (1.6–6.6 ft) deep (Scheerer 2008b). Adequate aquatic surface area for 500 or more individuals is significant because the Recovery Plan identifies populations at or above the 500 adult threshold as one of the delisting criteria for the species (USFWS 1998, p. 28).

Food, Water, Air, Light, Minerals, or Other Requirements

Known as obligatory sight feeders (Davis and Miller 1967, p. 32), Oregon chub feed throughout the day and stop feeding after dusk (Pearsons 1989, p. 23). The fish feed mostly on water column fauna, especially invertebrates that live in dense aquatic vegetation. Markle *et al.* (1991, p. 288) found that the diet of Oregon chub adults consisted primarily of minute crustaceans including copepods, cladocerans, and chironomid larvae. The diet of juveniles also consists of minute organisms such as rotifers, copepods, and cladocerans (Pearsons 1989, pp. 41–42).

With respect to water quality, the temperature regime at a site may determine the productivity of Oregon chub at that location. Spawning activity for the species has been observed from May through early August when F)C (61 F) or 16 C (59 subsurface water temperatures exceed 15 (Scheerer and Apke 1997, p. 22; Markle *et al.* 1991, p. 288; Scheerer and MacDonald 2003, p. 78). The species will display normal life-history behavior at F).C (59 and 77 temperatures between approximately 15 and 25 The upper lethal temperature for the fish F) in laboratory studies (Scheerer and ApkeC (88 was determined to be 31 1997, p. 22).

Optimal Oregon chub habitat contains water with dissolved oxygen levels greater than 3 parts per million (ppm) and an absence of contaminants such as copper, arsenic, mercury, and cadmium; human and animal waste products; pesticides; nitrogen and phosphorous fertilizers; and gasoline or diesel fuels. However, the species habitat is also characterized by high primary

productivity and frequent algal blooms that might cause natural variability in water quality, especially dissolved oxygen levels (Scheerer and Apke 1997, p. 15). Optimal Oregon chub habitat includes water dominated by fine substrates, but protected from excessive sedimentation. When excessive sediment is deposited, surface area can be lost as the sediment begins to displace open water. The resulting succession of open water habitat to wet meadow is detrimental to Oregon chub populations (Scheerer 2008c).

The water quality in the habitats of many known Oregon chub populations is threatened due to their proximity to areas of human activity. Many of the known populations occur near rail, highway, and power transmission corridors and within public park and campground facilities. These populations may be threatened by chemical spills from overturned truck or rail tankers; runoff or accidental spills of herbicides; overflow from chemical toilets in campgrounds; sedimentation of shallow habitats from construction activities; and changes in water level or flow conditions from construction, diversions, or natural desiccation. Oregon chub populations near agricultural areas are subject to poor water quality as a result of runoff laden with sediment, pesticides, and nutrients. Logging in the watershed can result in increased sedimentation and herbicide runoff (USFWS 1998, p. 14).

Cover or Shelter

The species' habitat preference varies depending on lifestage and season, but all Oregon chub require considerable aquatic vegetation for hiding and spawning activities (Pearsons 1989, p. 22; Markle *et al.* 1991, p. 290; Scheerer and Jones 1997, p. 5; Scheerer *et al.* 2007, p. 3). Oregon chub in similar size classes school together. A minimum of 250 square meters (0.06 ac) (or between approximately 25 and 100 percent of the total surface area of the habitat) covered with aquatic vegetation is needed to provide for the life-history requirements for a population of 500 Oregon chub (Scheerer 2008e). Aquatic plant communities within Oregon chub habitat include, but are not limited to, both native and nonnative species, including:

1. Emergent vegetation: *Carex* spp. (sedge), *Eleocharis* spp. (spikerush), *Scirpus* spp. (bulrush), *Juncus* spp. (rush), *Alisma* spp. (water plantain), *Polygyonum* spp. (knotweed), *Ludwigia* spp. (primrose-willow), *Salix* spp. (willow), *Sparganium* spp. (bur-reed), and *Typha* spp. (cattail).

2. Partly submerged/emergent vegetation: *Ranunculus* spp. (buttercup).

3. Floating/submerged vegetation: *Azolla* spp. (mosquitofern), *Callitriche* sp. (water-starwort), *Ceratophyllum* sp. (hornwort), *Elodea* spp. (water weed), *Fontinalis* spp. (fontinalis moss), *Lemna* spp. (duckweed), *Myriophyllum* spp. (parrot feather), *Nuphar* spp. (pondlily), and *Potamogeton* spp. (pondweed) (Scheerer 2008c).

Larval Oregon chub congregate in the upper layers of the water column, especially in shallow, near-shore areas. Juvenile Oregon chub venture farther from shore into deeper areas of the water column. Adult Oregon chub seek dense vegetation for cover and frequently travel in the mid-water column in beaver channels or along the margins of aquatic plant beds. In the early spring, Oregon chub are most active in the warmer, shallow areas of the ponds (Pearsons 1989, pp. 16–17; USFWS 1998, p. 10). Because Oregon chub habitat is characterized by little or no water flow, resulting substrates are typically composed of silty and organic material. In winter months, Oregon chub of various life stages can be found buried in the detritus or concealed in aquatic vegetation (Pearsons 1989, p. 16).

Sites for Breeding, Reproduction, and Rearing (or Development) of Offspring

Although most mature Oregon chub are found to be greater than or equal to 2 years old, maturity appears to be mainly size- rather than age-dependent (Scheerer and McDonald 2003, p. 78). Males over 35 mm (1.4 in) have been observed exhibiting spawning behavior. Oregon C (59chub spawn from April through September, when temperatures exceed 15 F), with peak activity in July. Approximately 150 to 650 eggs will be released per spawning event, hatching within 10 to 14 days. Females prefer a highly organic, vegetative substrate for spawning and will lay their adhesive eggs directly on the submerged vegetation (Pearsons 1989, pp. 17, 23; Markle *et al.* 1992, p. 290; Scheerer 2007b, p. 494). Larvae and juveniles seek dense cover in shallow, warmer regions of off-channel habitats (Pearsons 1989, p. 17; Scheerer 2007b, p. 494).

Habitats (Those protected from anthropogenic disturbance or that are representative of the historical and ecological distribution of a species.)

Many species of nonnative fish that compete with or prey upon Oregon chub have been introduced and are common throughout the Willamette Valley, including largemouth bass (*Micropterus salmoides*), smallmouth bass (*Micropterus dolomieui*), crappie (*Pomoxis* sp.), bluegill (*Lepomis macrochirus*), and western mosquitofish (*Gambusia affinis*). Of the 747 Willamette Valley sites sampled for Oregon chub by ODFW since the beginning of annual survey efforts by the agency in 1991, 42 percent contained nonnative fish. Most of the surveyed habitats that supported large populations of Oregon chub had no evidence of nonnative fish presence (Scheerer 2002, p. 1078; Scheerer 2007a, p. 96; Scheerer *et al.* 2007, p. 14). The presence of nonnative fish in the Willamette Valley, especially centrarchids (e.g., basses and crappie) and ictalurids (catfishes) is suspected to be a major factor in the decline of Oregon chub and the biggest threat to the species' recovery (Markle *et al.* 1991, p. 291; Scheerer 2002, p. 1078; Scheerer *et al.* 2007, p. 18).

Specific interactions responsible for the exclusion of Oregon chub from habitats dominated by nonnative fish are not clear in all cases. While information confirming the presence of Oregon chub in stomach contents of predatory fish is lacking, many nonnative fish, particularly adult centrarchids and ictalurids, are documented piscivores (fish eaters) (Moyle 2002, pp. 397, 399, 403; Wydoski and Whitney 2003, pp. 125, 128, 130; Li *et al.* 1987, pp. 198–201). These fish are frequently the dominant inhabitants of ponds and sloughs within the Willamette River drainage and may constitute a major obstacle to Oregon chub recolonization efforts. Nonnative fish may also serve as sources of parasites and diseases; however, disease and parasite problems have not been studied in the Oregon chub.

Observed feeding strategies and diet of introduced fish, particularly juvenile centrarchids and adult mosquitofish (Li *et al.* 1987, pp. 198–201), often overlap with diet and feeding strategies described for Oregon chub (Pearsons 1989, pp. 34–35). This suggests that direct competition for food between Oregon chub and introduced species may further impede species survival as well as recovery efforts. The rarity of finding Oregon chub in waters also inhabited by mosquitofish may reflect many negative interactions, including but not limited to food-based competition, aggressive spatial exclusion, and predation on eggs and larvae (Meffe 1983, pp. 316, 319; Meffe 1984, pp. 1,530–1,531). Because many remaining population sites are easily accessible, there continues to be a potential for unauthorized introductions of nonnative fish, particularly

mosquitofish and game fish such as bass and walleye (*Stizostedion vitreurn*).

The bullfrog (*Rana catesbiana*), a nonnative amphibian, also occurs in the valley and breeds in habitats preferred by the Oregon chub (Bury and Whelan 1984, pp. 2–3; Scheerer 1999, p. 7). Adult bullfrogs prefer habitat similar in characteristics (i.e., little to no water velocity, abundant aquatic and emergent vegetation) to the preferred habitat for Oregon chub, and are known to consume small fish as part of their diet (Cohen and Howard 1958, p. 225; Bury and Whelan 1984, p. 3), but it is unclear if they have a negative impact on Oregon chub populations, as several sites that have large numbers of bullfrogs also maintain robust Oregon chub populations (Scheerer 2008d).

Flood Control

Major alteration of the Willamette River for flood control and navigation improvements has eliminated most of the river's historical floodplain, impairing or eliminating the environmental conditions in which the Oregon chub evolved. The decline of Oregon chub has been correlated with the construction of these projects based on the date of last capture at a site (58 FR 53801; October 18, 1993). Pearsons (1989, pp. 32–33) estimated that the most severe decline occurred during the 1950s and 1960s when 8 of 11 flood control projects in the Willamette River drainage were completed (USACE 1970, pp. 219–237). Other structural changes along the Willamette River corridor such as revetment and channelization, dike construction and drainage, and the removal of floodplain vegetation have eliminated or altered the slack water habitats of the Oregon chub (Willamette Basin Task Force 1969, pp. I9, II22–II24; Hjort *et al.* 1984, pp. 67–68, 73; Sedell and Froggatt 1984, pp. 1,832–1,833; Li *et al.* 1987, p. 201). Management of water bodies (such as reservoirs) adjacent to occupied Oregon chub habitat continues to impact the species by causing fluctuations in the water levels of their habitat such that it may exceed or drop below optimal water depths.

Primary Constituent Elements (PCEs) for the Oregon Chub

Pursuant to our regulations, we are required to identify the known physical and biological features essential to the conservation of the Oregon chub and which may require special management considerations or protection. These features are the primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement essential for the conservation of the species. The PCEs are listed below. All areas designated as critical habitat for Oregon chub are either occupied or within the species' historical geographic range.

Based on the above needs and our current knowledge of the life history, biology, and ecology of the species and the characteristics of the habitat necessary to sustain the essential life-history functions of the species, we have identified four PCEs for Oregon chub critical habitat:

1. Off-channel water bodies such as beaver ponds, oxbows, side-channels, stable backwater sloughs, low-gradient tributaries, and flooded marshes, including at least 500 continuous square meters (0.12 ac) of aquatic surface area at depths between approximately 0.5 and 2.0 m (1.6 and 6.6 ft).

2. Aquatic vegetation covering a minimum of 250 square meters (0.06 ac) (or between approximately 25 and 100 percent) of the total surface area of the habitat. This vegetation is primarily submergent for purposes of spawning, but also includes emergent and floating vegetation and algae, which are important for cover throughout the year. Areas with sufficient vegetation are likely to also have the following characteristics:

- Gradient less than 2.5 percent;
- No or very low water velocity in late spring and summer;
- Silty, organic substrate; and
- Abundant minute organisms such as rotifers, copepods, cladocerans, and chironomid larvae.

3. Late spring and summer subsurface water F), with natural diurnal andC (59 and 78 temperatures between 15 and 25 seasonal variation.

4. No or negligible levels of nonnative aquatic predatory or competitive species. Negligible is defined for the purpose of this rule as a minimal level of nonnative species that will still allow the Oregon chub to continue to survive and recover.

The need for space for individual and population growth and normal behavior is met by PCE (1); areas for reproduction, shelter, food, and habitat for prey are provided by PCE (2); optimal physiological processes for spawning and survival are ensured by PCE (3); habitat free from disturbance and, therefore, sufficient reproduction and survival opportunities are provided by PCE (4).

This final critical habitat designation is designed for the conservation of PCEs necessary to support the life-history functions that were the basis for the proposal. Each of the areas designated in this rule has been determined to contain sufficient PCEs to provide for one or more of the life-history functions of the Oregon chub. Specifically, these areas fall into two groups: areas occupied at time of listing containing PCEs sufficient for one or more life-history functions, and areas not occupied at time of listing but essential to the conservation of the species and that also contain PCEs for one or more life-history functions.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(1)(A) of the Act, we used the best scientific data available in determining areas that contain the features that are essential to the conservation of the Oregon chub. We only designated areas outside the geographical area occupied by the species when a designation limited to its present range would be inadequate to ensure the conservation of the species (50 CFR 424.12(e)). The steps we followed in identifying critical habitat were:

1. Our initial step in identifying critical habitat was to determine, in accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, the physical and biological habitat features (PCEs) that are essential to the conservation of the species as explained in the previous section.

2. We then identified areas occupied by the Oregon chub at the time of listing. Of the 5 occupied sites known at the time of the 1993 listing (58 FR 53801), and the 12 additional sites confirmed by post-listing survey data to be occupied with one or more Oregon chub at the time of listing, 10 still support Oregon chub (Scheerer *et al.* 2007, p. 2; Scheerer 2008a, p. 2) and contain at least one PCE.

3. Because we found that areas occupied at time of listing were not sufficient to conserve the species, we then identified any additional sites that were not occupied at the time of listing but are currently occupied and contain PCEs, and which may be essential for the conservation of the species. Surveys conducted in 2007 and 2008 indicate that 15 additional sites are currently occupied with one or more Oregon chub (Scheerer *et al.* 2007, p. 2; Scheerer 2008a, p. 2).

4. Next we identified sites that support introduced populations of Oregon chub that also contain the PCEs, and which may be essential for the conservation of the species, which resulted in 11 additional sites being identified (Scheerer *et al.* 2007, p. 2; Scheerer 2008a, p. 2). Collectively, the above efforts resulted in the identification of 36 occupied sites.

5. Our final step was to evaluate the 36 occupied sites within the context of the Recovery Plan, to determine which areas contained the physical and biological features in the amount and spatial configuration essential to the conservation of the species. This step involved the application of the following selection criteria:

A. Sites that support large, stable populations.

From the list of occupied sites that contain PCEs, we selected sites that support populations meeting the delisting population criteria outlined in the 1998 Recovery Plan (i.e., establishing 20 populations of at least 500 adults with a stable or increasing trend over 7 years (USFWS 1998, p. 28)), and also sites that were likely to meet the delisting criteria in the near future. Eighteen sites had at least 500 adults and were likely to have a stable or increasing trend over 7 years in the near future. Of the 18 sites meeting this selection criterion, 9 sites were occupied at the time of listing:

- Unit 2B(5), Finley Gray Creek Swamp
- Unit 3B, Elijah Bristow State Park—Berry Slough
- Unit 3E, Dexter Reservoir RV Alcove—DEX3
- Unit 3F, Dexter Reservoir Alcove PIT 1
- Unit 3G, East Fork Minnow Creek Pond Unit
- Unit 3H, Hospital Pond
- Unit 3I, Shady Dell Pond
- Unit 3J, Buckhead Creek, and
- Unit 3K, Wicopee Pond.

Three other sites supported naturally occurring populations but were not occupied at the time of listing:

- Unit 1B(1), Geren Island North Channel
- Unit 1B(4), Gray Slough, and
- Unit 3D, Elijah Bristow State Park Island Pond.

In addition, six sites supported introduced populations:

- Unit 1C, Foster Pullout Pond
- Unit 2A(1), Russell Pond
- Unit 2B(1), Ankeny Willow Marsh
- Unit 2B(2), Dunn Wetland
- Unit 2B(4), Finley Cheadle Pond, and
- Unit 3A, Fall Creek Spillway Ponds.

B. Sites that are capable of supporting large populations.

Because the Recovery Plan calls for establishing and maintaining a minimum of 20 populations that meet the recovery criteria, we identified seven currently occupied sites that did not meet the first criterion (above) but have the greatest potential to contribute to the long-term conservation and recovery of the species. Sites meeting this selection criterion include five sites that support naturally occurring populations:

- Unit 1A, Santiam I–5 Side Channels
- Unit 1B(2), Stayton Public Works Pond
- Unit 2A(2), Shetzline Pond
- Unit 2A(3), Big Island, and
- Unit 3C, Elijah Bristow State Park Northeast Slough.

In addition two sites that support introduced populations met this criterion:

- Unit 1B(3), South Stayton Pond, and
- Unit 2B(3), Finley Display Pond.

Each of these sites either currently, or in the past, has supported populations of over 500 adults.

C. Sites representative of the geographic distribution of Oregon chub.

The delisting criteria outlined in the Recovery Plan require that at least four populations be located in each of three sub-basins. We determined that the 25 sites selected under the preceding critical habitat criteria also met this objective (USFWS 1998, p. 28). Six units are being designated as critical habitat in the Santiam River watershed, 8 sites are being designated as critical habitat in the Mainstem Willamette River watershed, and 11 sites are being designated as critical habitat in the Middle Fork Willamette River watershed. By protecting a variety of habitats throughout the species' historical range, we increase the probability that the species can adjust in the future to various limiting factors that may affect the population, such as predators, disease, and flood events exceeding annual high water levels. Based on this analysis, we are designating 25 units as critical habitat. Although the Recovery Plan calls for establishing and maintaining a minimum of 20 populations, we believe that establishing additional populations will allow the Service to mitigate the potential that some units may become unable to support the species or primary constituent elements over time because of predation pressures or other factors.

After applying the above criteria, we mapped the critical habitat unit boundaries at each of the 25 sites. Mapping was completed using GIS shape files, which involved several steps. Critical habitat unit boundaries were delineated to encompass the extent of habitat containing the physical and biological features essential to the conservation of the species that may require special management considerations or protection. Polygon vertices (points where two lines meet) were collected along the annual high-water mark at least every 30 m (98 ft) around the perimeter of the site, and at a greater frequency in areas of complexity or where higher resolution was necessary. The full extent of each pond or slough was mapped; islands were mapped with the same method as the perimeter of the site. At sites where tributaries or channels entered or exited a site, only the extent of suitable Oregon chub habitat was mapped. The extent of Oregon chub use in open systems was defined by habitat features and by previous experience sampling in those areas. Habitat features that defined the limit of Oregon chub use in a channel included increased gradient, the absence of aquatic vegetation, and areas where gravel, cobble, or other large substrate was present. We combined the polygon data with information from aerial photos to determine the designated critical habitat unit boundaries of each site.

Special Management Considerations or Protections

The term critical habitat is defined in section 3(5)(A) of the Act, in part, as geographic areas on which are found those physical or biological features essential to the conservation of the species and "which may require special management considerations or protections." Accordingly, in identifying critical habitat in occupied areas, we assess whether the primary constituent elements within the areas determined to be occupied at the time of listing may require any special management considerations or protections. Although the determination that special management may be required is not a prerequisite to designating critical habitat in areas essential to the conservation of the species that were unoccupied at the time of listing, all areas being designated as critical habitat require some level of management to address current and future threats to the Oregon chub, to maintain or enhance the physical and biological features essential to its conservation, and to ensure the recovery and survival of the species.

The primary threats impacting the physical and biological features essential to the conservation of the Oregon chub that may require special management considerations within the designated critical habitat units include: competition and predation by nonnative fish; the potential for initial or further introduction of nonnative fish; vegetative succession of shallow aquatic habitats; possible agricultural or forestry chemical runoff; possible excessive siltation from logging in the watershed; other threats to water quality (including threat of toxic spills, low dissolved oxygen); and fluctuations in water level due to regulated flow management at flood control dams, as well as low summer water levels.

Some additional threats to the continued survival and recovery of the Oregon chub, such as the potential for reduced genetic diversity due to the low level of mixing between populations, will likely be addressed by direct management of populations (e.g., translocation of individuals) rather than by management of the physical and biological features of the habitat. Such threats, therefore, are not addressed in this section specific to the special management required of the physical and biological features of the designated critical habitat areas.

Special management considerations or protections are needed in most of the units to address the impacts of competition and predation by nonnative fishes in Oregon chub habitat or to avoid the potential introduction of nonnative fishes into areas occupied by Oregon chub. Predatory nonnative fishes are considered the greatest current threat to the recovery of the Oregon chub. Management for the Oregon chub has focused on establishing secure, isolated habitats free of nonnative fishes. Nonnative fishes are abundant and ubiquitous in the Willamette River Basin. Monitoring and management are required to remove nonnative fishes from Oregon chub habitat when possible and to protect Oregon chub populations that have not yet been affected by nonnative fishes from invasion. Table 1 identifies units that may require special management to reduce or eradicate the threat posed by nonnative fishes already present and units that may require special management to prevent the introduction of nonnative fish.

Although Oregon chub require a mixture of submergent, emergent, and floating aquatic vegetation (including algae) for cover and spawning (see PCE 2), some areas of Oregon chub habitat are threatened by succession to wet meadow systems due to a lack of natural disturbance (such as floods) or excessive siltation. If vegetation completely fills in the open water areas of Oregon chub habitat, these areas are no longer suitable for the Oregon chub. Table 1 identifies units that may require special management to prevent or set back vegetative succession before that habitat is no longer suitable for Oregon chub.

Some units require special management to avoid the degradation of water quality in Oregon chub habitats due to agricultural and forestry chemical runoff, and their close proximity to roads and railroads. Elevated levels of nutrients and pesticides have been found in some Oregon chub habitats (Materna and Buck 2007, p. 67). The source of the contamination is likely agricultural runoff from adjacent farm fields (Materna and Buck 2007, p. 68). Table 1 identifies units that may require special management to reduce the incursion of potentially hazardous agricultural and forestry chemicals into Oregon chub habitats and to maintain water quality.

Although Oregon chub utilize fine silty substrates, excessive siltation resulting from activities such as logging poses a threat to Oregon chub habitat by filling in the shallow aquatic areas utilized by the species. Excessive sedimentation can also lead to the succession of open water habitats to wet meadow, as has been discussed above. Table 1 identifies units that may require special management to alleviate the threat posed by excess watershed siltation due to logging and other activities.

Special management is required in several of the designated critical habitat units to maintain the water quality required by Oregon chub and protect against the impacts of several potential water quality threats. Many Oregon chub populations occur near rail, highway, and power transmission corridors, agricultural fields, and within public park and campground facilities, and there is concern that these populations could be threatened by chemical spills, runoff, or changes in water level or flow conditions caused by construction, diversions, or natural desiccation (58 FR 53800; USFWS 1998, p. 14). Water quality investigations at sites in the Middle Fork and mainstem Willamette sub-basins have found some adverse effects to Oregon chub habitats caused by changes in nutrient levels. Elevated nutrient levels at some Oregon chub locations, particularly increased nitrogen and phosphorus, may result in eutrophication and associated anoxic (absence of oxygen) conditions unsuitable for chub, or increased plant and algal growth that severely reduce habitat availability because of succession. Table 1 identifies units that may require monitoring and special management to ameliorate the effects of excessive nutrient levels in Oregon chub habitats, and to provide protection against accidental sources of contamination.

Although the Oregon chub evolved in a dynamic environment in which frequent flooding continually created and reconnected habitat for the species, currently most populations of Oregon chub are isolated from each other due to the reduced frequency and magnitude of flood events and the presence of migration barriers such as impassable culverts and beaver dams (Scheerer *et al.* 2007, p. 9). Historically, regulated flow management of flood control dams eliminated many of the slough and side channel habitats utilized by Oregon chub by reducing the magnitude, extent, and frequency of flood events in the Willamette River Basin. Currently, flow management activities impact Oregon chub in many of their remaining habitats by inadvertently raising or lowering the depth of water bodies to levels above or below the optimum for the species. Water depths in the summer may be reduced to levels that threaten the survival of Oregon chub due to flow management in adjacent reservoirs or rivers, or from natural drought cycles. Table 1 identifies units that may require special management to ameliorate the effects of fluctuating or reduced water levels for the Oregon chub.

In summary, we find that each of the areas we are designating as critical habitat contains features essential to the conservation of the Oregon chub, and that these features may require special management considerations or protection. These special management considerations and protections are required to eliminate, or reduce to a negligible level, the threats affecting each unit and to preserve and maintain the essential features that the designated critical habitat units provide to the Oregon chub. A more comprehensive discussion of threats facing individual sites is in the individual unit descriptions.

Table 1—Special management needs or considerations in critical habitat units for the Oregon chub.

Unit	Manage to Reduce or Eradicate Nonnative Fish	Manage to Prevent Nonnative Fish Introduction	Manage to Prevent Excessive Sedimentation	Manage to Maintain Water Quality	Manage to Maintain Appropriate Water Levels
1A Santiam I-5 Side Channels	X	X		X	X

Table 1—Special management needs or considerations in critical habitat units for the Oregon chub.—Continued

Unit	Manage to Reduce or Eradicate Nonnative Fish	Manage to Prevent Nonnative Fish Introduction	Manage to Prevent Excessive Sedimentation	Manage to Maintain Water Quality	Manage to Maintain Appropriate Water Levels
1B(1) Geren Island North Channel	X		X		X
1B(2) Stayton Public Works Pond	X	X			X
1B(3) South Stayton Pond		X			
1B(4) Gray Slough	X	X			X
1C Foster Pullout Pond		X			
2A(1) Russell Pond			X		
2A(2) Shetzline Pond		X			
2A(3) Big Island		X			X
2B(1) Ankeny Willow Marsh		X			
2B(2) Dunn Wetland				X	
2B(3) Finley Display Pond		X			
2B(4) Finley Cheadle Pond		X			
2B(5) Finley Gray Creek Swamp		X	X	X	X
3A Fall Creek Spillway Ponds		X	X		X
3B Elijah Bristow SP Barry Slough		X			
3C Elijah Bristow SP Northeast Slough	X	X			X
3D Elijah Bristow SP Island Pond	X	X			X
3E Dexter Reservoir RV Alcove (DEX 3)		X		X	X
3F Dexter Reservoir Alcove (PIT 1)	X	X		X	X
3G East Fork Minnow Creek Pond		X	X	X	
3H Hospital Pond		X		X	X
3I Shady Dell Pond		X		X	
3J Buckhead Creek		X	X	X	
3K Wicopee Pond		X	X		

The designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of the Oregon chub. Federal activities that may affect those unprotected areas outside of critical habitat are still subject to review under section 7 of the Act if they may affect Oregon chub. The prohibitions of section 9 against the take of listed species also continue to apply both inside and outside of designated critical habitat. Take is broadly defined in the Act as to harass, harm, wound, kill, trap, capture, or collect a listed species, or to attempt to engage in any such conduct.

Final Critical Habitat Designation

We are designating 25 units totaling approximately 53 ha (132 acres), including land under State, Federal, other government, and private ownership. The areas we describe below constitute our best assessment at this time of areas that meet the definition of critical habitat for the Oregon chub. The units are those areas most likely to substantially contribute to conservation of the Oregon chub, and when combined with future management of certain habitats suitable for restoration efforts, will contribute to the long-term survival and recovery of the species.

Table 2 shows the occupied unit, land ownership, and approximate area.

Table 2—Critical habitat units designated for the Oregon chub (Totals in table and in unit descriptions may not sum due to rounding; area estimates reflect all land within critical habitat unit boundaries.).

Critical Habitat Unit	Land Ownership	Hectares	Acres
1A	State of Oregon, ODOT	1.4	3.3
1B(1)	City of Salem	0.8	1.9
1B(2)	City of Stayton	0.4	1.0
1B(3)	State Of Oregon, ODFW	0.1	0.2
1B(4)	Private	2.5	6.2
1C	USACE	0.4	1.0
2A(1)	Private	0.1	0.1
2A(2)	Private	0.1	0.3
2A(3)	Private	3.3	8.2
2B(1)	USFWS	14.0	34.5
2B(2)	Private	6.1	15.2
2B(3)	USFWS	1.0	2.4
2B(4)	USFWS	0.9	2.3
2B(5)	USFWS & Private	3.0	7.4
3A	USACE	1.5	3.8
3B	State of Oregon, OPRD	5.2	12.7
3C	State of Oregon, OPRD	2.2	5.4
3D	State of Oregon, OPRD	2.1	5.2
3E	USACE	0.4	0.9
3F	USACE	0.1	0.3
3G	State of Oregon, ODOT	1.3	3.3
3H	USACE	0.5	1.1
3I	USFS	1.1	2.8
3J	USFS	3.8	9.3
3K	USFS	1.4	3.3
Total		53.5	132.1

Each of the critical habitat units below takes into account the results of population abundance estimates reported in the Oregon Department of Fish and Wildlife (ODFW) Oregon Chub Investigations Progress Reports (Sheerer 2007 a, p. 2; 2008a). The ODFW initiated Oregon chub population abundance surveys in the early 1990's, and each of the units being designated has abundance and trend data reflecting capability of achieving the recovery criteria in the Recovery Plan. We present a brief description of each unit, and reasons why it meets the definition of critical habitat for the Oregon chub, below:

Area 1: Santiam River Basin—Linn and Marion Counties, Oregon

A. Mainstem Santiam River

Unit 1A, the Santiam I–5 Side Channels: This site consists of three ponds totaling 1.4 ha (3.3 ac), located on a 27 ha (66 ac) property on the south side of the Santiam River upstream of the Interstate Highway 5 bridge crossing in Linn County, Oregon. The areas containing Oregon chub include a small backwater pool, a gravel pit, and a side channel pond. This unit is owned by the Oregon Department of Transportation (ODOT) and Oregon chub were first observed here in 1997. Although only 22 Oregon chub were counted at the site in 2007, the habitat contains 3 of the 4 PCEs and has exhibited capability of supporting a substantial population of the species based on past survey population estimates of over 500 individuals. The substrate is composed

of 80 percent silt and organic material, and there is a variety of emergent and submergent vegetation covering 65 percent of the surface area. The maximum water depth is approximately 3 m (9.8 ft), averaging 1.5 m (4.9 ft), and the temperature was recorded at F) on July 30, 2008.C (60 and 67 between 19.5 and 21 Beaver have been observed at this location. This site is at risk of vegetative cover reaching levels detrimental to Oregon chub habitat through succession. The site is periodically connected to the Santiam River, and its water levels can be affected by hydrologic changes in the river, particularly the low summer levels common in the drainage. Competing and predatory nonnative species have been observed; nonnative predators are suspected to be a major factor in the drop in Oregon chub population estimates at this site between the 2006 and 2007 surveys (Scheerer 2008d).

B. North Santiam River

Unit 1B(1), Geren Island North Channel: This site totals approximately 0.8 ha (1.9 ac) and is located on the grounds of a water treatment facility owned by the City of Salem in Marion County, Oregon. The species was first observed at this site in 1996. Although only 207 Oregon chub were counted at the site in 2008, the habitat contains 3 of the 4 PCEs and has exhibited capability of supporting a substantial population of the species based on past survey population estimates of over 500 individuals. The substrate is composed of 90 percent silt and organic material, and there is a variety of emergent and submergent vegetation covering 65 percent of the surface area. The maximum water depth is 2.2 m (7.2 Cft), averaging 1.8 m (5.9 ft), and the temperature was recorded at 26 F) on July 10, 2008.(79 Beaver have been observed at this location. The site is screened and isolated from other water bodies, but water levels are influenced through water releases at Detroit and Big Cliff Dams. Competing and predatory nonnative species have been observed at the site. There is also a risk of excessive sedimentation due to logging in the watershed.

Unit 1B(2), Stayton Public Works Pond: This site totals approximately 0.4 ha (1.0 ac) and is located in and owned by the City of Stayton, in Marion County, Oregon. The species was first observed at this location in 1998. Although only 68 Oregon chub were counted at the site in 2008, the habitat contains 3 of the 4 PCEs and has exhibited capability of supporting a substantial population of the species based on past survey population estimates of over 500 individuals. The substrate is composed of 90 percent silt and organic material, and there is a variety of emergent and submergent vegetation covering 100 percent of the surface area. The maximum water depth is 2 m (6.6 ft) deep, C (77.9averaging 1.2 m (3.9 ft), and the temperature was recorded at 25.5 F) on July 9, 2008. Beaver have also been observed at this location. The site is periodically connected to the North Santiam River and is therefore at risk of low summer water levels and nonnative fish introduction. Competing and predatory nonnative species have been observed at this site.

Unit 1B(3), South Stayton Pond: This site totals approximately 0.1 ha (0.2 ac), is located in Linn County, Oregon, and is owned by the Oregon Department of Fish and Wildlife (ODFW). This site was the location of a 2006 introduction of 54 Oregon chub and a supplemental 2007 introduction of 67 additional individuals. The population is currently estimated at 1,700 individuals and appears to be stable or increasing. The habitat contains all of the PCEs. The substrate is composed of 90 percent silt and organic material, and there is a variety of emergent and submergent vegetation covering 100 percent of the surface area. The maximum water depth is 1.6 m (5.3 C (76.1ft), averaging 0.9 m (3 ft), and the temperature was recorded at 24.5 F) on July 9, 2008. The site is isolated from other water bodies and currently has no competing or predatory nonnative species. Because of the easy public access to the site, it may be at risk of illegal introduction of nonnative fish.

Unit 1B(4), Gray Slough: This privately owned site totals approximately 2.5 ha (6.2 ac) and is in Marion County, Oregon. The species was first observed at this site in 1995. The population is currently estimated at 655 individuals, has been stable for 5 years, and the habitat contains 3 of the 4 PCEs. The substrate is composed of 100 percent silt and organic material, and there is a variety of emergent and submergent vegetation covering 55 percent of the surface area. The maximum water depth is 2.5 m (8.2 ft), averaging 1.2 m (3.9 ft), and the F) on July 31, 2008.C (74.3 temperature was recorded at 23.5 Beaver, and also competing or predatory nonnative fish species, have been observed at this location. The site is periodically connected to the North Santiam River and is therefore at risk of low summer water levels and additional nonnative fish invasion. The site's location on a property with agricultural activity places it at risk of chemical runoff.

C. South Santiam River

Unit 1C, Foster Pullout Pond: This site totals 0.4 ha (1.0 ac), and is owned by the United States Army Corps of Engineers (USACE). The pond is located in Linn County, Oregon, on the north shore of Foster Reservoir in the South Santiam River drainage. The pond is perched several meters above the reservoir full pool level, is spring-fed, and the water level is maintained by a beaver dam at the outflow. This site was the location of a 1999 introduction of 85 Oregon chub, and the population is currently estimated at 2,600 individuals. The population has been stable for 5 years, and the habitat contains all of the PCEs. The substrate is composed of 100 percent silt and organic material, and there is a variety of emergent and submergent vegetation covering 100 percent of the surface area. The maximum water depth is 2.0 m (6.6 ft), averaging 1.2 m (3.9 ft), and the F) on July 23, 2008.C (70 temperature was recorded at 21 Beaver have been observed at this location. The site is isolated from other water bodies and has no competing or predatory nonnative species, but the site's accessibility to the public raises the risk of illegal introduction of nonnative fish.

Area 2: Mainstem Willamette River Basin—Benton, Lane and Marion Counties, Oregon

A. McKenzie River

Unit 2A(1), Russell Pond: This privately owned site totals approximately 0.1 ha (0.1 ac) and is located in the Mohawk River drainage, Lane County, Oregon. In 2001, 350 Oregon chub were introduced into the pond, followed by an additional introduction of 150 individuals in 2002 as part of a Safe Harbor Agreement with the Service. The population is currently estimated at 651 individuals, has been stable for 5 years, and the habitat contains all of the PCEs. The substrate is composed of 100 percent silt and organic material, and there is a variety of emergent and submergent aquatic vegetation covering 40 percent of the surface area. The maximum water depth is 2 m (6.6 ft), averaging 1.5 m (4.9 ft), and the temperature was recorded F) on July 23, 2008.C (65.3 at 18.5 The site is isolated from other water bodies, and has no competing or predatory nonnative species. Threats to the site include possible excessive sedimentation resulting from logging in the watershed.

Unit 2A(2), Shetzline Pond: This privately owned site totals approximately 0.1 ha (0.3 ac), and is in the Mohawk River drainage, Lane County, Oregon. The species was first observed at this site in 2002. The site originally consisted of three manmade ponds, one of which (the south pond) contained Oregon chub. A restoration project was conducted in 2006 in the north and middle ponds to connect the ponds and create a more natural wetland. Nonnative fish in these ponds were removed with a rotenone treatment. To date the restored wetland has not been connected to the Oregon chub pond, although the site has a small inflow channel connecting it to Drury Creek (a tributary of the Mohawk River). Although only 130 Oregon chub were counted at the site in 2008, the habitat contains all of the PCEs and has exhibited capability of supporting a substantial population of the species, based on past survey population estimates of over 500 individuals. The substrate is composed of 100 percent silt and organic material, and there is a variety of emergent, submergent, and floating aquatic vegetation covering 100 percent of the surface area. The maximum water depth is 2.5 m (8.2 F)C (68 ft), averaging 2 m (6.6 ft), and the temperature was recorded at 20 on July 23, 2008. The site currently has no competing or predatory nonnative species but, because of previous fishing for nonnative species that was allowed in the ponds, the site is at risk of illegal introduction of nonnative fish.

Unit 2A(3), Big Island: This site totals 3.3 ha (8.2 ac), is owned by the McKenzie River Trust, and is located along the McKenzie River in Lane County, Oregon. The species was first observed at this location in 2002. Although only 200 Oregon chub were counted at the site in 2008, the habitat contains all of the PCEs and has exhibited capability of supporting a substantial population of Oregon chub based on past survey population estimates of over 500 individuals. The substrate is composed of 90 percent silt and organic material, and there is a variety of emergent, submergent, and floating aquatic vegetation covering 72 percent of the surface area. The maximum depth is 1.5 m (4.9 ft) deep, F)C (66 averaging 0.6 m (2.0 ft), and the temperature was recorded at 19 on July 23, 2008. Beaver have been observed at this location. Because the site has annual connectivity to the McKenzie River, its water levels can be affected by hydrologic changes in the river and it is at risk of the introduction of nonnative fish. No competing or predatory nonnative species have been observed to date.

B. Willamette River Mainstem

Unit 2B(1), Ankeny Willow Marsh: This site totals 14.0 ha (34.5 ac), and is located in Marion County, Oregon, at the Ankeny National Wildlife Refuge where an introduction of 500 Oregon chub took place in 2004. The population is currently estimated at 36,500 individuals and has been increasing. The habitat also contains all of the PCEs. The substrate is composed of 100 percent silt and organic material, and there is a variety of aquatic vegetation including emergent, submergent, floating and algae covering 100 percent of the surface area. The maximum depth is 2 m (6.6 ft), averaging 0.7 m (2.3 ft), and the temperature at the site was recorded at 25 F) on July 8, 2008.C (77 Beaver and turtles have been observed at this location. Water is supplied to the pond from Sidney Ditch, which contains nonnative fish. The pump is screened, and the site currently has no competing or predatory nonnative species, although a high-water event could facilitate the introduction of nonnative fish.

Unit 2B(2), Dunn Wetland: This privately owned site in Benton County, Oregon, totals 6.1 ha (15.2 ac). In 1997, 200 Oregon chub were introduced to the site, followed by the introduction of 373 additional individuals in 1998 as part of a Safe Harbor Agreement with the Service. The owners restored the wetland in 1994 when a permanent (year-round) spring-fed pond was constructed. Two additional permanent ponds were constructed in 1997 and 1999. The entire wetland floods during the winter, and the ponds are interconnected. The population is currently estimated at 34,500 individuals and has been stable for 5 years. The habitat contains all of the PCEs. The substrate is composed of 100 percent silt and organic material, and there is a variety of emergent and submergent aquatic vegetation covering 100 percent of the surface area. The maximum depth is 1 m (3.3 ft), F)C (73 averaging 0.6 m (2.0 ft), and the temperature was recorded at 23 on July 28, 2008. Beaver have been observed at this location. The site is isolated from other water bodies and has no competing or predatory nonnative species, but it is at risk of chemical runoff from agricultural activities.

Unit 2B(3), Finley Display Pond: This site totals 1.0 ha (2.4 ac) and is located in Benton County, Oregon, on the William L. Finley National Wildlife Refuge. This unit was the subject of several introductions of Oregon chub: 60 in 1998, 45 in 1999, 49 in 2001, and 75 in 2007. The current population estimate of 832 individuals along with past survey population estimates of over 500 individuals establish the site's capability of supporting a substantial population of the species. The habitat contains all of the PCEs. The substrate is composed of 100 percent silt and organic material, and there is a variety of emergent and submergent aquatic vegetation covering 75 percent of the surface area. The maximum depth is 2.5 m (8.2 ft), averaging 1.5 m (4.9 ft), and the temperature was recorded F) on June 20, 2008.C (66 at 19 While this pond currently has no competing or predatory nonnative species, easy public access makes it vulnerable to illegal introductions of nonnative fish. Beaver have been observed at this location.

Unit 2B(4), Finley Cheadle Pond: This site totals 0.9 ha (2.3 ac) and is located in Benton County, Oregon, on the William L. Finley National Wildlife Refuge. In 2002, 50 Oregon chub were introduced to this unit, followed by the introduction of 53 additional individuals in 2007. The population is currently estimated at 3,519 individuals, has been stable or increasing for 5 years, and the habitat contains all of the PCEs. The substrate is composed of 100 percent silt and organic material, and there is a variety of emergent and submergent aquatic vegetation covering 86 percent of the surface area. The maximum depth is 3.3 m (10.8 ft), averaging 1.5 m (4.9 ft), and F) on June 20, 2008.C (65.3 the temperature was recorded at 18.5 The site is isolated from other water bodies and has no competing or predatory nonnative species. Beaver have been observed at this location. The pond's proximity to agricultural areas puts it at risk of chemical runoff and easy public access makes it vulnerable to illegal introductions of nonnative fish.

Unit 2B(5), Finley Gray Creek Swamp: This site totals 3.0 ha (7.4 ac) and is located in Benton County, Oregon. Most of the unit is located on the southwest corner of the William L. Finley National Wildlife Refuge, however, a small portion of the unit is located on private property. The site was occupied by Oregon chub at the time of listing and the population is currently estimated at 2,141 individuals and has been stable for 5 years. The habitat contains 3 of the 4 PCEs. The substrate is composed of 100 percent silt and organic material, and there is a variety of emergent and submergent aquatic vegetation covering 100 percent of the surface area. The maximum depth is 2.2 m (7.2 ft), F)C (72 averaging 1 m (3.3 ft), and the temperature was recorded at 22 on July

28, 2008. Beaver have also been observed at this location.

The site is periodically connected to other water bodies, and competing and predatory nonnative species have been observed. Gray Creek originates on the slopes west of Bellfountain Road, an area owned by private timber companies. The creek flows under Bellfountain Road onto Finley NWR where three dikes have been constructed to form Beaver Pond, Cattail Pond, and Cabell Marsh. The waters of Gray Creek empty into Muddy Creek, which drains into the Willamette River south of Corvallis. Extensive damming by beavers occurs between Bellfountain Road and the first dike at Beaver Pond, creating a narrow band of marsh habitat less than 1 mile in length, with a silty, detritus-laden substrate. The refuge boundary in this area is irregular, and portions of the marsh are within the refuge boundary while other portions are located on private land. Steep, forested slopes rise up on either side of the marsh; the north slope is refuge land, while a large portion of the southern slope is private land. The creek's location put the habitat at risk of excess sedimentation from logging activities and other water quality issues, including threat of spills and low dissolved oxygen.

Area 3: Middle Fork Willamette River Basin—Lane County, Oregon

Unit 3A, Fall Creek Spillway Ponds: This site totals 1.5 ha (3.8 ac), is owned by the USACE, and is the location of a 1996 introduction of 500 Oregon chub. The ponds, located in the overflow channel below Fall Creek Dam, were formed by beaver dams that blocked the spillway overflow channel. The current Oregon chub population estimate of 3,052 individuals along with past survey population estimates of over 500 individuals establish the site's capability of supporting a substantial population of the species. The habitat contains all of the PCEs. The substrate is composed of 100 percent silt and organic material, and there is a variety of emergent and submergent aquatic vegetation covering 89 percent of the surface area. The maximum water depth is 1.8 m (5.9 Cft), averaging 0.7 m (2.3 ft), and the temperature was recorded at 23.5 F) on July 2, 2008.(74.3 Because the site is supplied with water from seepage out of Fall Creek Reservoir spillway and flows into Fall Creek, it is at risk of impacts from flow management for flood control and low summer water levels. Although the site currently has no competing or predatory nonnative species, it is at risk of nonnative fish introduction if flood control measures at the Dam cause reservoir water to infiltrate the ponds.

Unit 3B, Elijah Bristow State Park Berry Slough: This site totals 5.2 ha (12.7 ac) measured at the annual high-water elevation, is owned by the Oregon Parks and Recreation Department (OPRD), and was occupied by Oregon chub at the time of listing. Berry Slough appears to be an abandoned river channel consisting of a chain of shallow ponds connected by a spring-fed flow of several cubic feet per second, entering the Middle Fork Willamette River about 4.0 kilometers (km) (2.5 mi)) below Dexter Dam. Almost the entire 1.6-km (1mi) length of the slough lies within Elijah Bristow State Park. The population is currently estimated at 5,459 individuals, and has been stable for 5 years, and the habitat contains all of the PCEs. The substrate is composed of 100 percent silt and organic material, and there is a variety of emergent and submergent aquatic vegetation covering 100 percent of the surface area. The maximum water depth is 2.5 m (8.2 ft), averaging 1.2 m (3.9 ft), and the temperature was recorded at between F) on July 16, 17, and 29, 2008.C (68 and 77 20 and 25 The upper portion (beaver pond) at the site is isolated from other water bodies during most high-water events by a beaver dam and has no competing or predatory nonnative species. The site's connection to the Middle Fork Willamette River creates the risk of nonnative fish introduction and fluctuations in the site's water level due to hydrologic changes in the river.

Unit 3C, Elijah Bristow State Park Northeast Slough: This site totals 2.2 ha (5.4 ac), is owned by the OPRD, and Oregon chub were first observed here in 1999. Although only 230 Oregon chub were counted at the site in 2008, the habitat contains 3 of the 4 PCEs and has exhibited capability of supporting a substantial population of the species based on past survey population estimates of over 500 individuals. The substrate is composed of 10 percent silt and organic material, and there is a variety of emergent, submergent, and floating aquatic vegetation covering 100 percent of the surface area. The maximum depth is 2 m (6.6 ft), averaging F) on JulyC (72 0.8 m (2.6 ft), and the temperature was recorded at 22 22, 2008. Beaver have also been observed at this location. Competing and predatory nonnative species have also been observed. Because of its connection to the Middle Fork Willamette River, the water levels at this site can be affected by hydrologic changes in the river and the site is at risk of infiltration by additional nonnative fish.

Unit 3D, Elijah Bristow State Park Island Pond: This site totals 2.1 ha (5.2 ac), is owned by the OPRD, and Oregon chub were first observed here in 2003. The population is currently estimated at 1,619 individuals and has been stable for 5 years. The habitat contains 3 of the 4 PCEs. The substrate is composed of 96 percent silt and organic material, and there is a variety of emergent and submergent aquatic vegetation covering 92 percent of the surface area. The maximum depth is 2 m (6.6 ft), averaging 1.2 m (3.9 ft), and the temperature was F) at various locations within theC (64 and 77 recorded at 18 and 25 site on July 17, 2008. Competing and predatory nonnative species have been observed at this location. Because of its connection to the Middle Fork Willamette River, the water levels at this site can be affected by hydrologic changes in the river and the site is at risk of infiltration by additional nonnative fish.

Unit 3E, Dexter Reservoir RV Alcove (DEX 3): This site totals 0.4 ha (0.9 ac) and is owned by the USACE. The site is located on the south side of Highway 58 off Dexter Reservoir next to a recreational vehicle (RV) park, and was occupied by Oregon chub at the time of listing. The population is currently estimated at 4,024 individuals, and has been stable for 5 years, and the habitat contains 3 of the 4 PCEs. The substrate is composed of 100 percent silt and organic material, and there is a variety of emergent, submergent and floating aquatic vegetation covering 87 percent of the surface area. The maximum depth is 1 m (3.3 ft), averaging 0.7 m (2.3 ft), and the temperature was recorded F) on July 1, 2008.C (72.5 at 22.5 Competing and predatory nonnative species have been observed at this location. The site is connected to Dexter Reservoir via a culvert and is therefore subject to impacts from regulated flow management, as well as low summer water levels, and the risk of infiltration by additional nonnative fish. Because of the site's close proximity to both the RV park and the highway, the water quality is at risk of contamination by spills and garbage.

Unit 3F, Dexter Reservoir Alcove (PIT1): This site totals 0.1 ha (0.3 ac) measured at the annual high-water elevation and is owned by the USACE. The site is located on the south side of Highway 58 off Dexter Reservoir, and was occupied by Oregon chub at the time of listing. PIT1 is an embayment adjacent to the south shoulder of State Hwy 58 and connected by culvert beneath the highway to Dexter Reservoir. The area is owned by the State of Oregon but under USACE

jurisdiction via a flowage easement. The site has gradually sloping banks, woody debris, and supports shrubs, emergent and submergent vegetation. There is also a large boulder riprap revetment on the highway side. A small, intermittent stream enters from the south. The population is currently estimated at 684 individuals and has been stable for 5 years. The habitat contains 3 of the 4 PCEs. The substrate is composed of 100 percent silt and organic material, and there is a variety of aquatic vegetation including emergent, submergent, and algae covering 100 percent of the surface area. The maximum water depth is 1 m (3.3 ft), averaging 0.5 m (1.6 ft), and the temperature was F) on July 2, 2008.C (64 recorded at 18 Competing and predatory nonnative species have been observed at this location. Because of its connection to Dexter Reservoir, the site is subject to impacts from regulated flow management, as well as low summer water levels, and the risk of infiltration by additional nonnative fish. Because of the site's close proximity to the highway, the water quality is at risk of contamination by spills.

Unit 3G, East Fork Minnow Creek Pond: This site totals 1.3 ha (3.3 ac), is owned by the ODOT, and was occupied by Oregon chub at the time of listing. East Minnow Creek Pond is a large beaver pond on a small tributary to Minnow Creek that drains into Lookout Point Reservoir. The pond enters Minnow Creek just south of Highway 58, after which the creek flows under the highway through a large box culvert. The population is currently estimated at 2,156 individuals and has been stable for 5 years. The habitat contains all of the PCEs. The substrate is composed of 100 percent silt and organic material, and there is a variety of emergent, submergent, and floating aquatic vegetation covering 100 percent of the surface area. The maximum depth is 1.2 m (3.9 ft), F)C (66 averaging 0.5 m (1.6 ft), and the temperature was recorded at 19 on July 2, 2008. The site is isolated from other water bodies and has no competing or predatory nonnative species but is vulnerable to excessive sedimentation resulting from timber harvest in the watershed, resultant vegetative succession of open water habitat, and contamination-related water quality threats due to the site's proximity to the highway. The ODOT is in the process of implementing a conservation bank for Oregon chub at this site; the bank includes the restoration, construction, and enhancement of Oregon chub habitat and other regionally significant habitats.

Unit 3H, Hospital Pond: This site totals 0.5 ha (1.1 ac), is owned by the USACE, and was occupied by Oregon chub at the time of listing. The pond is located on the north side of the gravel road on the north shore of Lookout Point Reservoir and fed by a spring that flows into the east end of the pond. The population is currently estimated at 3,682 individuals and has been stable for 5 years. The habitat contains all of the PCEs. The substrate is composed of 100 percent silt and organic material, and there is a variety of emergent, submergent, and floating aquatic vegetation covering 100 percent of the surface area. The maximum water depth is 3 m (9.8 ft), averaging 2 m (6.6 ft), and the temperature on the flooded terrace was F) on July 1, 2008.C (59 recorded at 15 Although the site currently has no competing or predatory nonnative species, its connection to the reservoir puts it at risk of nonnative fish introduction. Beaver activity is evident in the pond. A culvert and gate at the outflow culvert maintains the high water level of the pond, but water levels in the pond can fluctuate due to its connection with the reservoir. Contamination-related water quality issues are also of concern due to the site's close proximity to the road.

Unit 3I, Shady Dell Pond: This site totals 1.1 ha (2.8 ac), is owned by the United States Forest Service (USFS), and was occupied by Oregon chub at the time of listing. Shady Dell Pond is located in the far southeast end of Lookout Point Reservoir along the south side of State Highway 58 in a USFS campground. The pond was a former slough that was partially isolated from the Middle Fork Willamette River during highway construction. The site has gradually sloping banks, slightly turbid water, moderately abundant aquatic vegetation, and a substrate mix of detritus, silt, and boulders. The pond was fed only by rainfall and seepage, with no obvious outlet, but the USFS installed a diversion pipe from Dell Creek to Shady Dell Pond to maintain adequate summer water levels and counteract the surface area shrinkage caused by evaporation, leakage, or both. The population is currently estimated at 7,249 individuals, has been stable for 5 years, and the habitat contains all of the PCEs. The substrate is 100 percent silt and organic material, and there is a variety of emergent, submergent, and floating aquatic vegetation covering 82 percent of the surface area. The maximum depth is 1.1 m (3.6 ft), averaging 0.5 m (1.6 ft), and the temperature F) on July 22, 2008.C (70 was recorded at 21 The site is isolated from other water bodies and has no competing or predatory nonnative species. Beaver have been observed at this location. Because of its proximity to the campground and its connection to Dell Creek, the site is at risk from nonnative fish introduction and contamination-related water quality issues.

Unit 3J, Buckhead Creek: This site totals 3.8 ha (9.3 ac), is owned by the USFS, and was occupied by Oregon chub at the time of listing. Buckhead Creek is a tributary flowing into the Middle Fork Willamette River at the northeast end of Lookout Point Reservoir. Access to the site is via a Lane County gravel road and USFS Road 5821 that skirts the east side of the river. The channel varies from a few to over 16 m (50 ft) wide with both sloping and undercut banks, a bottom composed of silt, boulders, gravel and detritus, with some woody debris and aquatic vegetation. The lower 2.4 km (1.5 mi) of the creek flows through a slough-like, abandoned channel of the Middle Fork Willamette River and is wide, shallow, slightly turbid and low gradient, with marshy habitat. The population is currently estimated at 1,258 individuals and has been stable for 5 years. The habitat contains all of the PCEs. The substrate is composed of 98 percent silt and organic material, and there is a variety of emergent, submergent, and floating aquatic vegetation covering 80 percent of the surface area. The maximum depth is 1.5 m (4.9 ft), averaging 0.8 m (2.6 ft), and the temperature was recorded at between 18 F) on July 15 and July 21, 2008.C (64 and 75 and 24 Beaver frequent the area and Oregon chub are often found in beaver ponds on the lower 2.4 km (1.5 mi) of the creek. Although the site currently has no competing or predatory nonnative species, its connection to the river puts it at risk of nonnative fish introduction. Other threats include excessive sedimentation from logging in the watershed as well as contamination-related water quality issues due to the site's close proximity to the railroad.

Unit 3K, Wicopee Pond: This site totals 1.4 ha (3.3 ac), is owned by the USFS, and was occupied at the time of listing as a result of a 1988 introduction of 50 Oregon chub. The pond, a former borrow pit adjacent to Salt Creek in the upper Middle Fork Willamette River drainage, was created when a bridge crossing was constructed on a small logging road that crosses Salt Creek, along Highway 58. The population is currently estimated at 5,431 individuals and has been stable for 5 years. The habitat contains all of the PCEs. The substrate is 100 percent silt and organic material, and there is a variety of emergent, submergent, and floating

aquatic vegetation and algae covering 100 percent of the surface area. The maximum depth is 2 m (6.6 ft), averaging 1.2 m (3.9 ft), and the temperature F) on June 30, 2008.C (63 was recorded at 17 Beaver have been observed at this location and the site has no competing or predatory nonnative species, although the site remains at risk of the introduction of nonnative fishes. The site is at risk of excessive sedimentation resulting from logging in the watershed.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the Fifth and Ninth Circuits Court of Appeals have invalidated our definition of destruction or adverse modification (50 CFR 402.02) (see *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service, 378 F.3d 1059 (9th Cir. 2004*) and *Sierra Club v. U.S. Fish and Wildlife Service et al., 245 F.3d 434, 442 (5th Cir. 2001*)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain those physical and biological features that relate to the ability of the area to periodically support the species) to serve its intended conservation role for the species.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

1. A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

2. A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define reasonable and prudent alternatives at 50 CFR 402.02 as alternative actions identified during consultation that:

1. Can be implemented in a manner consistent with the intended purpose of the action;

2. Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction;

3.Are economically and technologically feasible; and

4.Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect the Oregon chub or its designated critical habitat require section 7 consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the USACE under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10 of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not Federally funded, authorized, or permitted, do not require section 7 consultations.

Application of the Jeopardy and Adverse Modification Standards

Jeopardy Standard

Currently, the Service applies an analytical framework for Oregon chub jeopardy analyses that relies heavily on the importance of known populations to the species' survival and recovery. The analysis required by section 7(a)(2) of the Act is focused not only on these populations but also on the habitat conditions necessary to support them.

The jeopardy analysis usually expresses the survival and recovery needs of the Oregon chub in a qualitative fashion without making distinctions between what is necessary for survival and what is necessary for recovery. Generally, the jeopardy analysis focuses on the range-wide status of the Oregon chub, the factors responsible for that condition, and what is necessary for this species to survive and recover. An emphasis is also placed on characterizing the condition of the Oregon chub in the area affected by the proposed Federal action and the role of affected populations in the survival and recovery of the Oregon chub. That context is then used to determine the significance of adverse and beneficial effects of the proposed Federal action and any cumulative effects for purposes of making the jeopardy determination.

Adverse Modification Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or retain those PCEs that relate to the ability of the area to periodically support the species. Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that appreciably reduces the conservation value of critical habitat for the Oregon chub. As discussed above, the role of critical habitat is to support the life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore result in

consultation for the Oregon chub include, but are not limited to:

1. Actions that would adversely affect the Oregon chub's space for individual and population growth and normal behavior. These include altering the flow, gradient, or depth of the water channel by way of activities such as channelization, impoundment, road and bridge construction, mining, dredging, and destruction of riparian vegetation. These activities may lead to changes in water flows and levels that would degrade, reduce, or eliminate the habitat necessary for the growth and reproduction of Oregon chub.

2. Actions that would significantly alter areas for reproduction, shelter, and food (habitat for prey). These include:

- Reducing or eliminating vegetative cover of the water column by activities such as release of contaminants into the surface water or connected groundwater at a point source or by dispersed release (non-point source). These activities can result in loss of the vegetative cover that is vital to the Oregon chub's ability to spawn and hide from predators.
- Altering the substrate within the critical habitat unit through sediment deposition from livestock grazing, road construction, channel alteration, timber harvest, off-road vehicle use, and other watershed and floodplain disturbances. When these activities increase the sediment deposition to levels that begin to change open-water habitat to emergent wetland, the habitat necessary for the growth and reproduction of these fish is reduced or eliminated.
- Significantly decreasing the populations of minute organisms in the water channel that make up the food base of the Oregon chub through activities that negatively affect flows, water temperature, water quality, or other requirements.

3. Actions that would significantly alter water temperature, thereby negatively affecting the Oregon chub's physiological processes for normal spawning and survival. Such activities could include, but are not limited to, release of chemicals, biological pollutants, or heated effluents into the surface water or connected groundwater at a point source or by dispersed release (non-point source). These activities could alter water quality to conditions that are beyond the tolerances of Oregon chub and result in direct or cumulative adverse effects to these individuals and their life cycles.

4. Actions that would disturb the habitat of Oregon chub by introducing, spreading, or augmenting nonnative competitive or predatory aquatic species into any of the designated units. Such activities may include, but are not limited to, stocking for sport, aesthetics, biological control, or other purposes; the illegal use of live bait fish, aquaculture, or dumping of aquarium fish or other species; and connection of a designated critical habitat unit to another water body known to contain nonnative aquatic species. These activities could cause Oregon chub fatalities, displace Oregon chub from their habitat, and/or cause Oregon chub to spend a disproportionate amount of time hiding at the expense of foraging.

We consider all of the units designated as critical habitat to contain features essential to the conservation of the Oregon chub and which require special management. All of the units are within the geographic range of the species, and they are currently occupied. To ensure that their actions do not jeopardize the continued existence of the Oregon chub, Federal agencies already consult with us on activities in areas currently occupied by the Oregon chub, or in unoccupied areas if the species may be affected by the action.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resource management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

- An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- A statement of goals and priorities;
- A detailed description of management actions to be implemented to provide for these ecological needs; and
- A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

There are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation. Therefore, we are not exempting lands from this final designation of critical habitat for the Oregon chub pursuant to section 4(a)(3)(B)(i) of the Act.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If based on this analysis, we make this determination,

we can exclude the area only if such exclusion would not result in the extinction of the species.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared a draft economic analysis (DEA), which we made available for public review on September 22, 2009 (74 FR 48211), based on the March 10, 2009, proposed rule (74 FR 10412). We opened a comment period on the DEA until October 22, 2009; however, we received no comments. Following the close of the comment period, a final analysis of the potential economic effects of the designation was developed, taking into consideration any new information.

The intent of the final economic analysis (FEA) is to quantify the economic impacts of all potential conservation efforts for the Oregon chub. Some of these costs will likely be incurred regardless of whether we designate critical habitat (baseline). The economic impact of the final critical habitat designation is analyzed by comparing scenarios both "with critical habitat" and "without critical habitat." The "without critical habitat" scenario represents the baseline for the analysis, considering protections already in place for the species (e.g., under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The "with critical habitat" scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely to occur with the designation of critical habitat.

The FEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on government agencies, private businesses, and individuals. The FEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, the FEA looks retrospectively at costs that have been incurred since 1993, when the Oregon chub was listed under the Act (58 FR 53800), and considers those costs that may occur in the 20 years following the designation of critical habitat, which was determined to be the appropriate period for analysis because limited planning information was available for most activities to forecast activity levels for projects beyond a 20–year timeframe. The FEA quantifies economic impacts of Oregon chub conservation efforts associated with the following categories of activity: water management, activities that impact water quality, dredging activities and other impacts (e.g., bridge replacement, management plans, and natural gas pipelines).

Total baseline impacts are estimated to be $3.33 million to $13.2 million, and incremental impacts are estimated to be $108,000 between 2010 and 2029, assuming a 7 percent discount rate. The majority of estimated baseline costs arise from anticipated mitigation for future transportation projects, impacts to recreational activities and hydropower generation resulting from changes in flows, and ongoing habitat management efforts, which account for over 95 percent of the high-end costs estimated in the analysis. Incremental impacts are forecast to be entirely administrative costs of section 7 consultations.

Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary has determined not to exert his discretion to exclude any areas from this designation of critical habitat for the Oregon chub based on economic impacts. A copy of the FEA with supporting documents may be obtained by contacting the Oregon Fish and Wildlife Field Office (see **ADDRESSES**) or for downloading from the Internet at *http://www.regulations.gov*.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense (DOD) where the designation of critical habitat might present an impact to national security. In preparing this final rule, we have determined that the lands within the designation of critical habitat for the Oregon chub are not owned or managed by the DOD, and, therefore, we anticipate no impact to national security. The Secretary has determined not to exert his discretion to exclude any areas from this final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether landowners have developed any habitat conservation plans (HCPs) or other resource management plans for the areas proposed for designation, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any Tribal issues, and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this final rule, we have determined that there are currently no HCPs for the Oregon chub. In 2001 and 2007, two Safe Harbor Agreements (SHAs) for the Oregon chub were finalized in Lane County, Oregon, to establish new populations of Oregon chub in artificial ponds as refugia for natural populations. These SHAs will contribute to the conservation of the species by reducing the risk of the complete loss of donor populations and any of their unique genetic material. We are unaware of any relevant impacts that would result from designating critical habitat in the areas subject to the SHAs and are including them in the final designation. The final designation does not include any Tribal lands or trust resources. Accordingly, the Secretary has determined not to exercise his discretion to exclude any areas under section 4(B)(2) of the Act based on other relevant impacts.

Required Determinations

Regulatory Planning and Review—Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

1. Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

2. Whether the rule will create inconsistencies with other Federal agencies' actions.

3. Whether the rule will materially affect entitlements, grants, user fees, loan programs or the rights and obligations of their recipients.

4. Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 801 *et seq.*), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities. In this final rule, we are certifying that the critical habitat designation for the Oregon chub will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; as well as small businesses. Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule, as well as the types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the rule could significantly affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (e.g., water management, water quality, dredging, and other activities). We apply the substantial number test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define substantial number or significant economic impact. Consequently, to assess whether a substantial number of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the species is present, Federal agencies already are required to consult with us under section 7 of the Act on activities they authorize, fund, or carry out that may affect the Oregon chub. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see *Application of the Adverse Modification Standard* section).

In our final economic analysis of the critical habitat designation, we evaluated the potential economic effects on small business entities resulting from implementation of conservation actions related to the proposed designation of critical habitat for the Oregon chub. The analysis is based on the estimated impacts associated with the rulemaking as described in sections 3 through 7 of the analysis, and evaluated the potential for economic impacts related to activity categories including water management, agriculture, forestry, transportation, and habitat management.

As discussed in Appendix A of the economic analysis, of the activities addressed in the analysis, only forestry activities are expected to experience incremental, administrative consultation costs that may be borne by small businesses. These costs may arise when the U.S. Forest Service consults on Federal timber sales, with small logging and timber tract companies as third parties. In Lane and Benton Counties, there are 178 logging operations and 98 timber tract operations that are considered small, representing between 98 and 100 percent of all businesses in the affected industry sector within these two counties. Conservatively, assuming a single business is associated with all of the forecasted impacts to forestry activities, the present value, 20–year impact of $1,440 to a single small business is approximately 0.02 percent of annual sales. The annualized impacts to timber tract operations is estimated at $136, or approximately 0.002 percent of annual sales. Therefore, while assuming that each small business has annual sales just under its SBA industry small business threshold ($7.0 million in annual revenues for timber tract operations; 500 employees for logging operations) may underestimate impacts as a percentage of annual sales, forecast impacts still are likely to be relatively small in comparison to annual revenues. Please refer to our economic analysis of the critical habitat designation for a more detailed discussion of potential economic impacts.

In summary, we have considered whether the designation would result in a significant economic impact on a substantial number of small entities. Based on the above reasoning and currently available information, we concluded that this rule will not have a significant economic impact on a substantial number of small business entities. Therefore, we are certifying that the designation of critical habitat for the Oregon chub will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Under Executive Order 13211 (E.O. 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use), Federal agencies must prepare Statements of Energy

Effects when undertaking certain actions. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute a significant adverse effect when compared to not taking the regulatory action under consideration. The economic analysis finds that none of these criteria are relevant to this analysis. Thus, based on information in the economic analysis, energy-related impacts associated with the Oregon chub conservation activities within critical habitat are not expected. As such, the designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

1. This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or [T]ribal governments," with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance, or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

2. We do not believe that this rule will significantly or uniquely affect small governments, because it will not produce a Federal mandate of $100 million or greater in any year; that is, it is not a significant regulatory action under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. As such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Oregon chub in a takings implications assessment. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this designation of critical habitat for the Oregon chub does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this critical habitat designation with, appropriate State resource agencies in Oregon. We received comments from the State of Oregon and the Oregon Department of Fish and Wildlife, which have been addressed in the Summary of Comments and Recommendations section of the rule. The designation of critical habitat in areas currently occupied by the Oregon chub may impose nominal additional regulatory restrictions to those currently in place and, therefore, may have little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments, in that the areas that contain the physical and biological features essential to the conservation of the species are more clearly defined, and the PCEs of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. This final rule uses standard property descriptions and identifies the physical and biological features essential to the conservation of the subspecies within the designated areas to assist the public in understanding the habitat needs of the Oregon chub.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or

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

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)*).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We determined that there are no Tribal lands occupied at the time of listing that contain the features essential for the conservation of the Oregon chub, and no unoccupied Tribal lands that are essential for the conservation of the Oregon chub. Therefore, we are not designating critical habitat for the Oregon chub on Tribal lands.

References Cited

A complete list of all references cited is available upon request from the Oregon Fish and Wildlife Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Author(s)

The primary authors of this package are the staff members of the Oregon Fish and Wildlife Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17–[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(h) by revising the entry for "Chub, Oregon" under "Fishes" in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
FISHES							
*	*	*	*	*	*	*	
Chub, Oregon	*Oregonichthys crameri*	U.S.A. (OR)	Entire	E	520	§17.95(e)	NA
*	*	*	*	*	*	*	

■ 3. In § 17.95, amend paragraph (e) by adding an entry for "Oregon Chub (*Oregonichthys crameri*)" in the same order that the species appears in the table at § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes.*

* * * * *

Oregon Chub (*Oregonichthys crameri*)

(1) Critical habitat units are depicted for Benton, Lane, Linn, and Marion Counties, Oregon, on the maps below.

(2) The primary constituent elements of critical habitat for the Oregon chub are the habitat components that provide:

(i) Off-channel water bodies such as beaver ponds, oxbows, side-channels, stable backwater sloughs, low-gradient tributaries, and flooded marshes, including at least 500 continuous square meters (0.12 ac) of aquatic surface area at depths between approximately 0.5–2.0 m (1.6–6.6 ft).

(ii) Aquatic vegetation covering a minimum of 250 square meters (.06 ac) (or between approximately 25 and 100 percent of the total surface area of the habitat). This vegetation is primarily submergent for purposes of spawning, but also includes emergent and floating vegetation and algae, which are important for cover throughout the year. Areas with sufficient vegetation are likely to also have the following characteristics:

(A) Gradient less than 2.5 percent;

(B) No or very low water velocity in late spring and summer;

(C) Silty, organic substrate; and

(D) Abundant minute organisms such as rotifers, copepods, cladocerans, and chironomid larvae.

(iii) Late spring and summer F), withC (59 and 78 subsurface water temperatures between 15 and 25 natural diurnal and seasonal variation.

(iv) No or negligible levels of nonnative aquatic predatory or competitive species. Negligible is defined for the purpose of this rule as

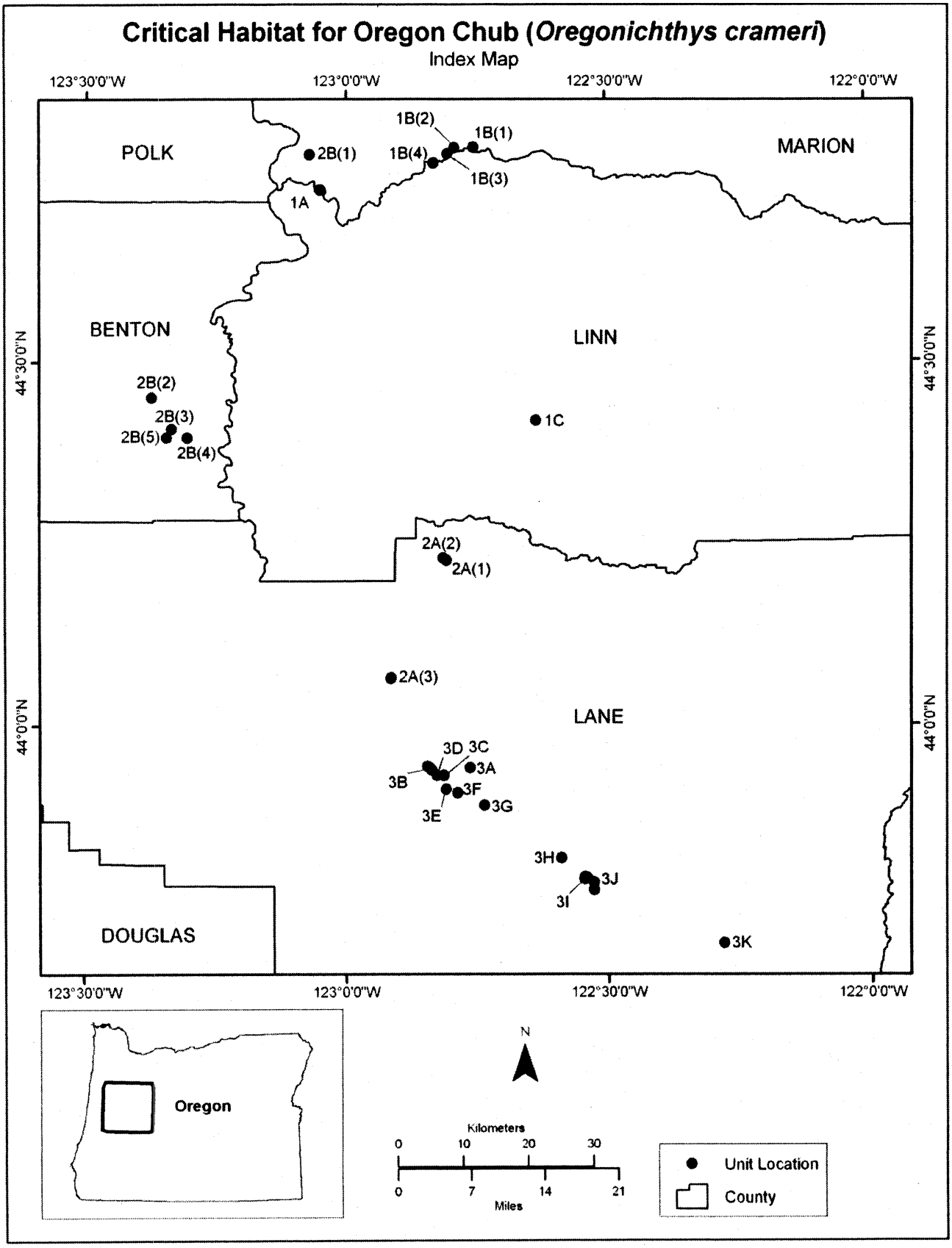
a minimal level of nonnative species that will still allow the Oregon chub to continue to survive and recover.

(3) Critical habitat does not include manmade structures (including, but not limited to, docks, seawalls, pipelines, runways, or other structures or paved areas) and the land or waterway on which they are located that exist within the legal boundaries on the effective date of this rule.

(4) Critical Habitat Map Units. The data layer defining critical habitat was created using a Trimble GeoXT GPS unit. These critical habitat units were mapped using Universal Transverse Mercator, Zone 10, North American Datum 1983 (UTM NAD 83) coordinates. These coordinates establish the vertices and endpoints of the boundaries of the units. From USGS 1:24,000 scale quadrangle Albany.

(5) *Note*: Index map for critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

(6) Unit 1A: Santiam I–5 Side Channels, Linn County, Oregon.

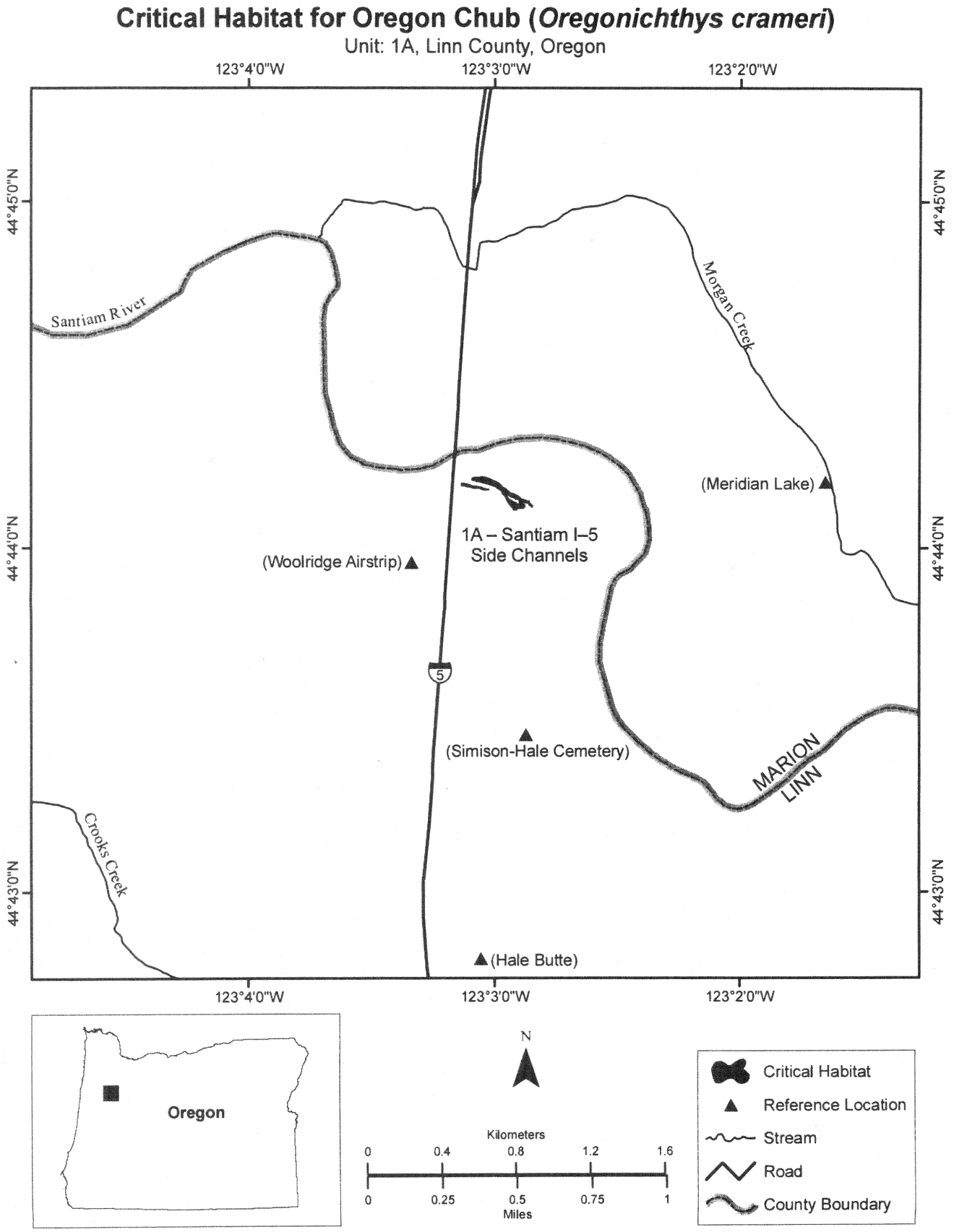
(i) This unit consists of three ponds totaling 1.4 ha (3.3 ac), located on a 27-ha (66-ac) property on the south side of the Santiam River, upstream of the Interstate Highway 5 bridge crossing in Linn County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 495981, 4953649; 495990, 4953647; 496000, 4953645; 496010, 4953645; 496012, 4953644; 496012, 4953642; 496010, 4953640; 496001, 4953639; 495992, 4953638; 495980, 4953640; 495975, 4953641; 495966, 4953644; 495959, 4953647; 495954, 4953648; 495941, 4953649; 495933, 4953648; 495926, 4953649; 495907, 4953654; 495897, 4953656; 495888, 4953658; 495879, 4953660; 495862, 4953661; 495864, 4953676; 495876, 4953675; 495889, 4953673; 495900, 4953671; 495912, 4953667; 495922, 4953664; 495930, 4953660; 495941, 4953660; 495945, 4953659; 495955, 4953658; 495962, 4953656; 495973, 4953653; 495981, 4953649;

Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 496146, 4953619; 496158, 4953612; 496173, 4953605; 496182, 4953598; 496191, 4953592; 496202, 4953587; 496212, 4953583; 496220, 4953581; 496225, 4953579; 496229, 4953582; 496232, 4953576; 496229, 4953573; 496231, 4953570; 496238, 4953564; 496242, 4953559; 496247, 4953555; 496249, 4953550; 496246, 4953547; 496243, 4953547; 496237, 4953552; 496230, 4953556; 496225, 4953562; 496221, 4953567; 496216, 4953569; 496214, 4953571; 496209, 4953568; 496202, 4953570; 496196, 4953573; 496186, 4953578; 496182, 4953575; 496190, 4953567; 496199, 4953563; 496206, 4953558; 496205, 4953547; 496193, 4953540; 496179, 4953540; 496168, 4953539; 496161, 4953529; 496147, 4953530; 496139, 4953538; 496131, 4953549; 496120, 4953561; 496114, 4953571; 496109, 4953580; 496108, 4953587; 496106, 4953594; 496098, 4953604; 496090, 4953611; 496082, 4953619; 496084, 4953627; 496077, 4953635; 496068, 4953641; 496056, 4953649; 496045, 4953656; 496030, 4953662; 496017, 4953668; 496002, 4953671; 495979, 4953676; 495969, 4953678; 495957, 4953681; 495947, 4953683; 495935, 4953687; 495925, 4953688; 495917, 4953692; 495917, 4953699; 495925, 4953705; 495932, 4953707; 495947, 4953708; 495960, 4953708; 495978, 4953710; 495993, 4953707; 496009, 4953700; 496024, 4953694; 496038, 4953690; 496051, 4953685; 496061, 4953678; 496070, 4953672; 496078, 4953665; 496089, 4953655; 496100, 4953646; 496117, 4953634; 496126, 4953627; 496136, 4953624; 496146, 4953619; and excluding land bound by 496163, 4953570; 496160, 4953566; 496153, 4953567; 496151, 4953564; 496151, 4953561; 496156, 4953559; 496162, 4953562; 496167, 4953565; 496172, 4953564; 496176, 4953564; 496181, 4953566; 496176, 4953573; 496173, 4953582; 496167, 4953587; 496161, 4953586; 496156, 4953588; 496153, 4953592; 496146, 4953596; 496137, 4953599; 496131, 4953601; 496123, 4953606; 496115, 4953611; 496109, 4953615; 496104, 4953619; 496109, 4953611; 496110, 4953603; 496117, 4953598; 496121, 4953592; 496129, 4953587; 496136, 4953580; 496143, 4953577; 496150, 4953576; 496163, 4953570; and excluding land bound by 496137, 4953566; 496135, 4953569; 496131, 4953569; 496131, 4953565; 496134, 4953562; 496136, 4953564; 496137, 4953566;

(iii) Map of Unit 1A of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

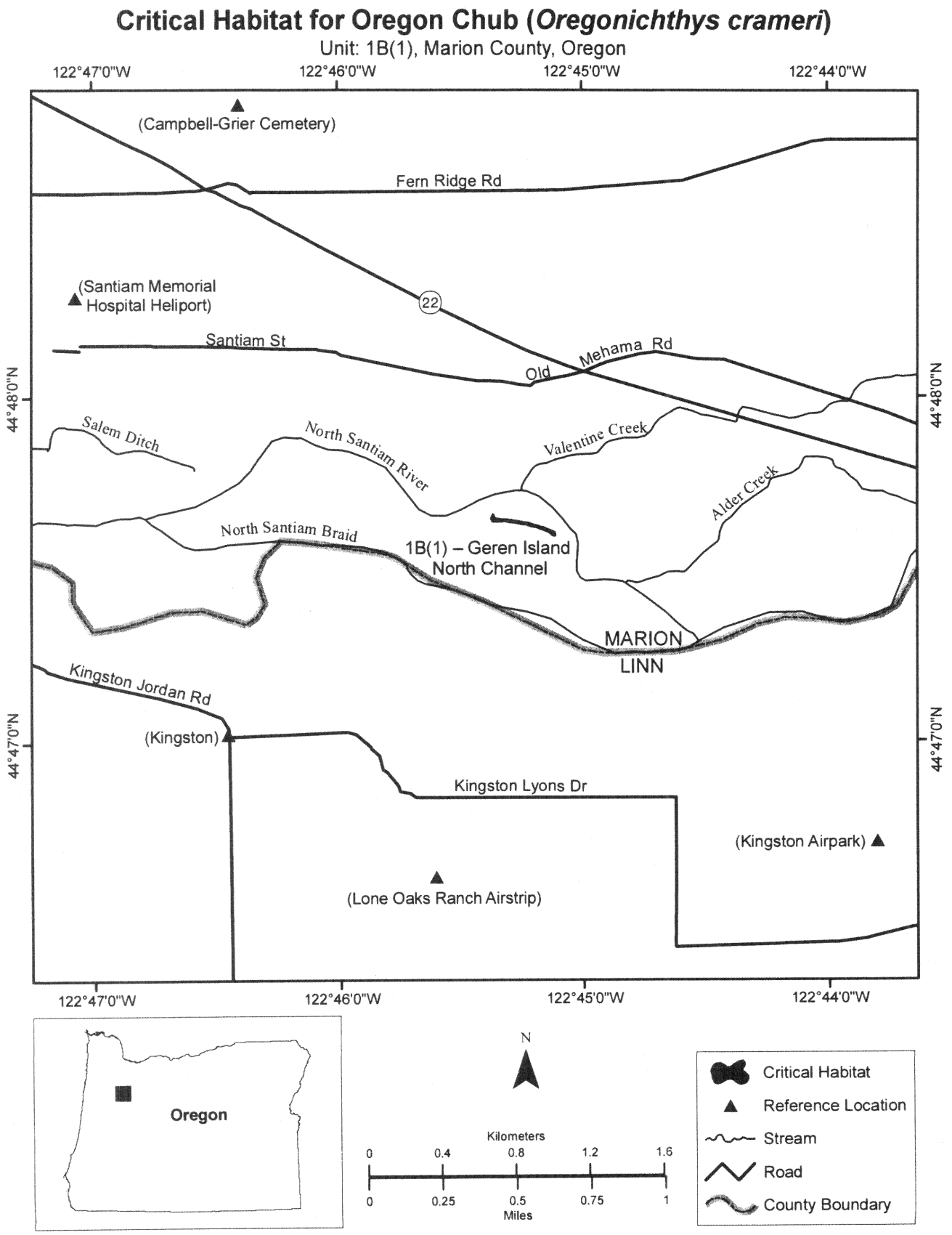
(7) Unit 1B(1): Geren Island North Channel, Marion County, Oregon.

(i) This unit totals approximately 0.8 ha (1.9 ac) and is located on the grounds of a water treatment facility owned by the City of Salem in Marion County, Oregon.

(ii) Land bound by the following coordinates (EN): 519305, 4960118; 519312, 4960112; 519322, 4960112; 519338, 4960110; 519360, 4960109; 519367, 4960111; 519380, 4960106; 519387, 4960105; 519405, 4960103; 519427, 4960100; 519439, 4960098; 519446, 4960097; 519461, 4960094; 519468, 4960092; 519490, 4960089; 519511, 4960081; 519526, 4960079; 519540, 4960073; 519553, 4960069; 519560, 4960068; 519564, 4960067; 519576, 4960062; 519593, 4960056; 519616, 4960047; 519628, 4960039; 519633, 4960033; 519634, 4960019; 519627, 4960014; 519615, 4960018; 519606, 4960023; 519595, 4960031; 519590, 4960035; 519581, 4960040; 519568, 4960045; 519547, 4960053; 519533, 4960057; 519520, 4960062; 519497, 4960065; 519474, 4960073; 519464, 4960074; 519442, 4960077; 519413, 4960083; 519381, 4960088; 519366, 4960091; 519355, 4960093; 519340, 4960091; 519322, 4960089; 519311, 4960089; 519298, 4960090; 519290, 4960091; 519281, 4960105; 519278, 4960114; 519289, 4960131; 519293, 4960137; 519299, 4960134; 519301, 4960124; 519305, 4960118;

(iii) Map of Unit 1B(1) of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

(8) Unit 1B(2): Stayton Public Works Pond, Marion County, Oregon.

(i) This unit totals approximately 0.4 ha (1.0 ac) and is located in and owned by the City of Stayton, in Marion County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 516606, 4960109; 516603, 4960102; 516607, 4960099; 516611, 4960101; 516614, 4960101; 516622, 4960100; 516623, 4960098; 516622, 4960095; 516614, 4960093; 516608, 4960091; 516606, 4960088; 516603, 4960084; 516605, 4960079; 516607, 4960077; 516610, 4960080; 516614, 4960084; 516616, 4960085; 516618, 4960083; 516616, 4960078; 516613, 4960074; 516610, 4960074; 516608, 4960073; 516605, 4960072; 516605, 4960067; 516604, 4960064; 516603, 4960058; 516600, 4960051; 516593, 4960046; 516592, 4960043; 516595, 4960040; 516598, 4960033; 516594, 4960027; 516590, 4960023; 516583, 4960023; 516574, 4960020; 516568, 4960017; 516560, 4960012; 516555, 4960010; 516549, 4960011; 516546, 4960011; 516543, 4960013; 516540, 4960018; 516535, 4960020; 516534, 4960021; 516533, 4960028; 516535, 4960038; 516540, 4960043; 516544, 4960055; 516547, 4960061; 516547, 4960066; 516547, 4960077; 516550, 4960087; 516552, 4960092; 516552, 4960100; 516552, 4960101; 516554, 4960100; 516555, 4960097; 516554, 4960092; 516553, 4960082; 516550, 4960071; 516551, 4960067; 516554, 4960067; 516559, 4960070; 516563, 4960072; 516568, 4960070; 516569, 4960071; 516572, 4960071; 516575, 4960068; 516578, 4960064; 516583, 4960064; 516589, 4960066; 516589, 4960068; 516590, 4960072; 516590, 4960080; 516588, 4960086; 516587, 4960086; 516585, 4960088; 516583, 4960092; 516584, 4960095; 516589, 4960096; 516594, 4960099; 516598, 4960102; 516599, 4960104; 516602, 4960104; 516604, 4960110; 516604, 4960114; 516607, 4960114; 516606, 4960109; and excluding land bound by 516585, 4960037; 516586, 4960036; 516587, 4960038; 516586, 4960040; 516585, 4960041; 516583, 4960040; 516584, 4960039; 516585, 4960037; and excluding land bound by 516558, 4960022; 516561, 4960022; 516562, 4960023; 516562, 4960025; 516559, 4960025; 516557, 4960024; 516558, 4960022;

(iii) See paragraph (10)(iii) for a map showing critical habitat unit 1B(2).

(9) Unit 1B(3): South Stayton Pond, Linn County, Oregon.

(i) This unit totals approximately 0.1 ha (0.2 ac), is located in Linn County, Oregon, and is owned by the Oregon Department of Fish and Wildlife (ODFW).

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 515540, 4959144; 515536, 4959144; 515529, 4959146; 515522, 4959149; 515513, 4959153; 515509, 4959158; 515507, 4959161; 515511, 4959166; 515515, 4959169; 515522, 4959173; 515530, 4959177; 515536, 4959180; 515540, 4959182; 515545, 4959180; 515546, 4959173; 515544, 4959162; 515543, 4959153; 515543, 4959149; 515542, 4959147; 515540, 4959144;

(iii) See paragraph (10)(iii) for a map showing critical habitat unit 1B(3).

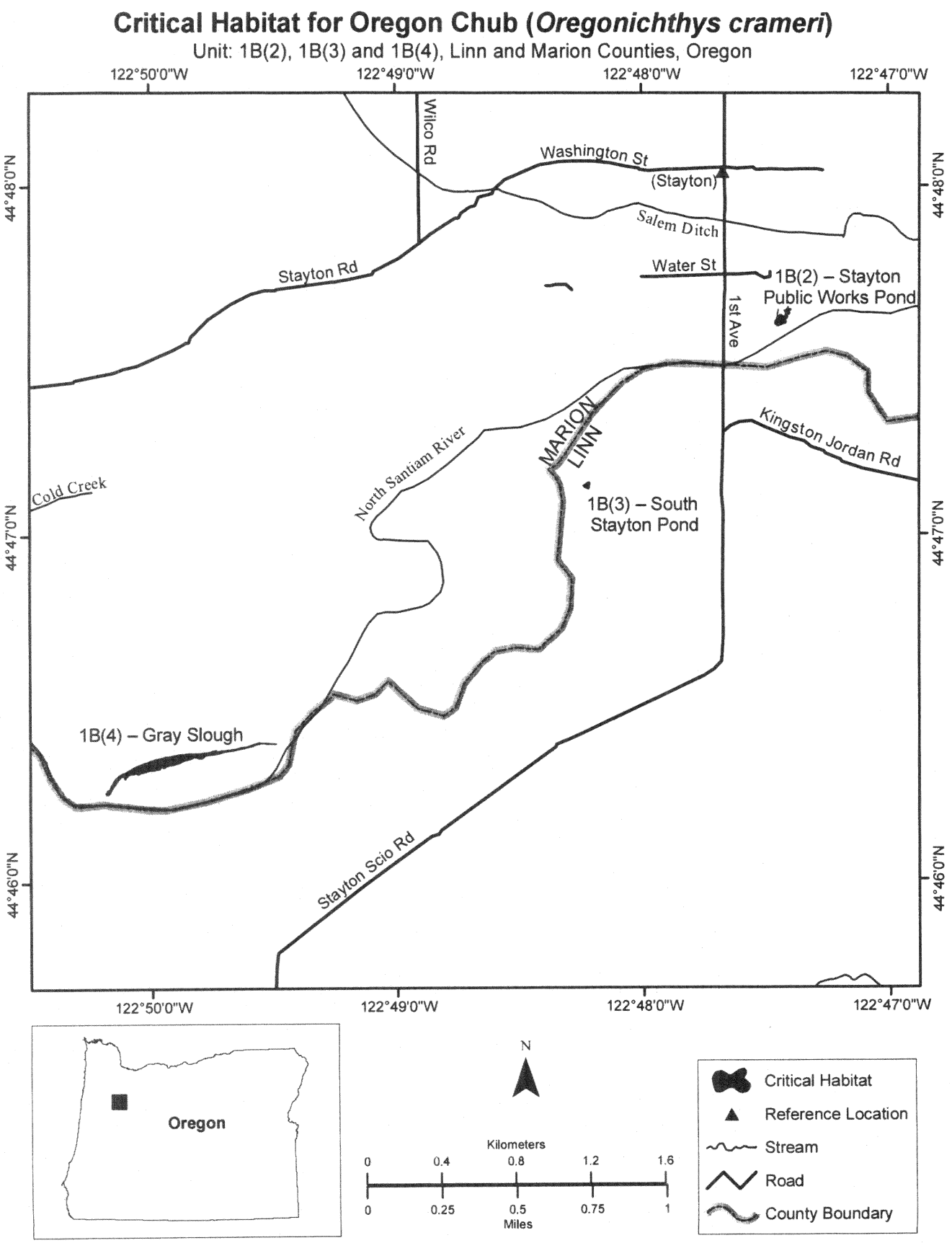
(10) Unit 1B(4): Gray Slough, Marion County, Oregon.

(i) This unit totals approximately 2.5 ha (6.2 ac), is privately owned, and is located in Marion County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 513857, 4957787; 513859, 4957785; 513856, 4957783; 513839, 4957783; 513822, 4957784; 513807, 4957784; 513791, 4957786; 513775, 4957786; 513772, 4957784; 513764, 4957785; 513748, 4957780; 513731, 4957773; 513711, 4957767; 513689, 4957761; 513654, 4957755; 513630, 4957749; 513605, 4957746; 513585, 4957742; 513558, 4957736; 513532, 4957730; 513503, 4957727; 513480, 4957723; 513473, 4957717; 513468, 4957712; 513460, 4957708; 513455, 4957707; 513443, 4957708; 513435, 4957711; 513424, 4957713; 513415, 4957713; 513406, 4957709; 513397, 4957703; 513378, 4957700; 513362, 4957696; 513353, 4957691; 513342, 4957684; 513333, 4957683; 513324, 4957680; 513312, 4957678; 513300, 4957674; 513286, 4957674; 513279, 4957671; 513270, 4957666; 513264, 4957660; 513255, 4957658; 513247, 4957663; 513241, 4957662; 513237, 4957651; 513229, 4957650; 513214, 4957648; 513202, 4957645; 513195, 4957644; 513188, 4957644; 513181, 4957643; 513172, 4957640; 513161, 4957637; 513152, 4957634; 513141, 4957631; 513132, 4957630; 513127, 4957626; 513119, 4957623; 513111, 4957629; 513102, 4957630; 513094, 4957626; 513084, 4957625; 513074, 4957622; 513066, 4957621; 513062, 4957613; 513059, 4957610; 513053, 4957605; 513048, 4957598; 513044, 4957601; 513043, 4957608; 513039, 4957613; 513035, 4957613; 513029, 4957613; 513025, 4957609; 513021, 4957603; 513016, 4957599; 513011, 4957591; 513004, 4957580; 512996, 4957571; 512989, 4957558; 512980, 4957550; 512976, 4957539; 512972, 4957529; 512962, 4957517; 512955, 4957514; 512948, 4957516; 512944, 4957524; 512948, 4957533; 512954, 4957540; 512966, 4957547; 512969, 4957553; 512972, 4957564; 512977, 4957573; 512980, 4957580; 512983, 4957587; 512991, 4957598; 513002, 4957608; 513011, 4957616; 513022, 4957624; 513036, 4957633; 513045, 4957636; 513052, 4957639; 513059, 4957645; 513067, 4957648; 513081, 4957655; 513097, 4957664; 513108, 4957669; 513118, 4957673; 513133, 4957679; 513148, 4957685; 513161, 4957690; 513178, 4957697; 513184, 4957699; 513197, 4957703; 513214, 4957707; 513220, 4957709; 513233, 4957712; 513247, 4957714; 513259, 4957717; 513268, 4957719; 513282, 4957722; 513298, 4957725; 513310, 4957727; 513319, 4957727; 513332, 4957730; 513350, 4957734; 513366, 4957734; 513379, 4957735; 513389, 4957735; 513400, 4957735; 513418, 4957736; 513436, 4957737; 513449, 4957738; 513461, 4957739; 513468, 4957739; 513497, 4957743; 513519, 4957748; 513531, 4957752; 513539, 4957753; 513541, 4957752; 513540, 4957750; 513533, 4957749; 513524, 4957746; 513508, 4957742; 513503, 4957741; 513501, 4957738; 513505, 4957738; 513513, 4957740; 513522, 4957742; 513531, 4957744; 513544, 4957748; 513556, 4957750; 513569, 4957751; 513585, 4957754; 513599, 4957757; 513611, 4957757; 513627, 4957759; 513639, 4957760; 513668, 4957768; 513700, 4957773; 513727, 4957780; 513747, 4957787; 513769, 4957793; 513788, 4957791; 513801, 4957791; 513814, 4957789; 513839, 4957788; 513857, 4957787;

(iii) Map of Units 1B(2), 1B(3), and 1B(4) of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

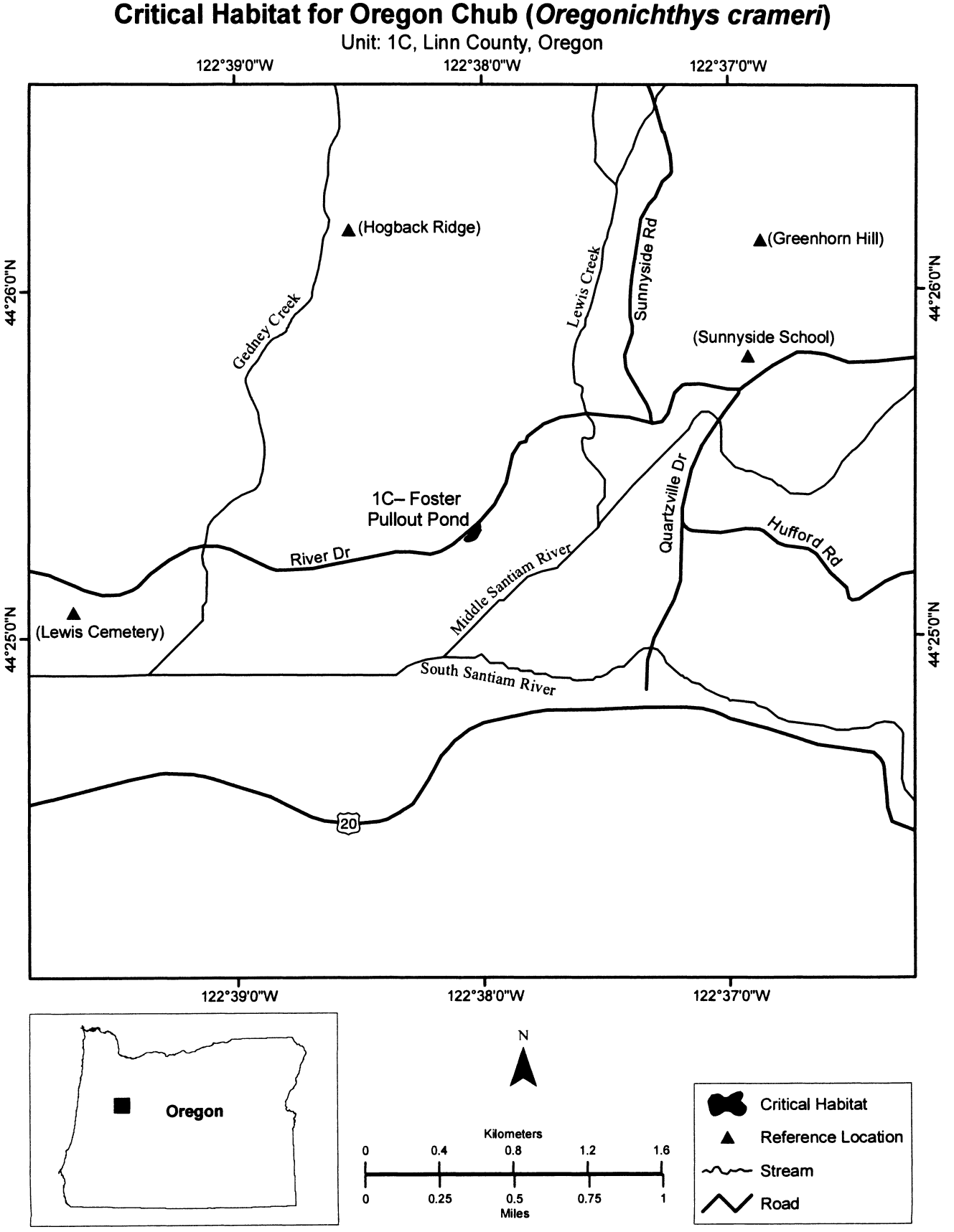
(11) Unit 1C: Foster Pullout Pond, Linn County, Oregon.

(i) This unit totals 0.4 ha (1.0 ac), and is owned by the United States Army Corps of Engineers (USACE). The pond is located in Linn County, Oregon, on the north shore of Foster Reservoir in the South Santiam River drainage.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 529130, 4918726; 529115, 4918723; 529101, 4918725; 529089, 4918735; 529094, 4918745; 529106, 4918755; 529122, 4918771; 529142, 4918788; 529159, 4918805; 529175, 4918821; 529175, 4918820; 529179, 4918819; 529180, 4918805; 529177, 4918789; 529183, 4918787; 529183, 4918784; 529177, 4918778; 529172, 4918767; 529168, 4918759; 529162, 4918746; 529153, 4918738; 529145, 4918734; 529130, 4918726;

(iii) Map of Unit 1C of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

(12) Unit 2A(1): Russell Pond, Lane County, Oregon.

(i) This unit totals approximately 0.1 ha (0.1 ac), is privately owned, and is located in the Mohawk River drainage, Lane County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 514905, 4897668; 514916, 4897667; 514929, 4897668; 514939, 4897667; 514952, 4897667; 514956, 4897667; 514959, 4897666; 514961, 4897662; 514964, 4897661; 514969, 4897661; 514975, 4897662; 514976, 4897659; 514970, 4897657; 514963, 4897656; 514960, 4897654; 514960, 4897651; 514955, 4897650; 514945, 4897650; 514932, 4897650; 514917, 4897650; 514908, 4897651; 514900, 4897651; 514898, 4897651; 514897, 4897653; 514896, 4897656; 514895, 4897663; 514891, 4897663; 514884, 4897662; 514878, 4897659; 514877, 4897660; 514883, 4897664; 514891, 4897665; 514895, 4897666; 514897, 4897666; 514905, 4897668;

(iii) See paragraph (13)(iii) for a map showing critical habitat unit 2A(1).

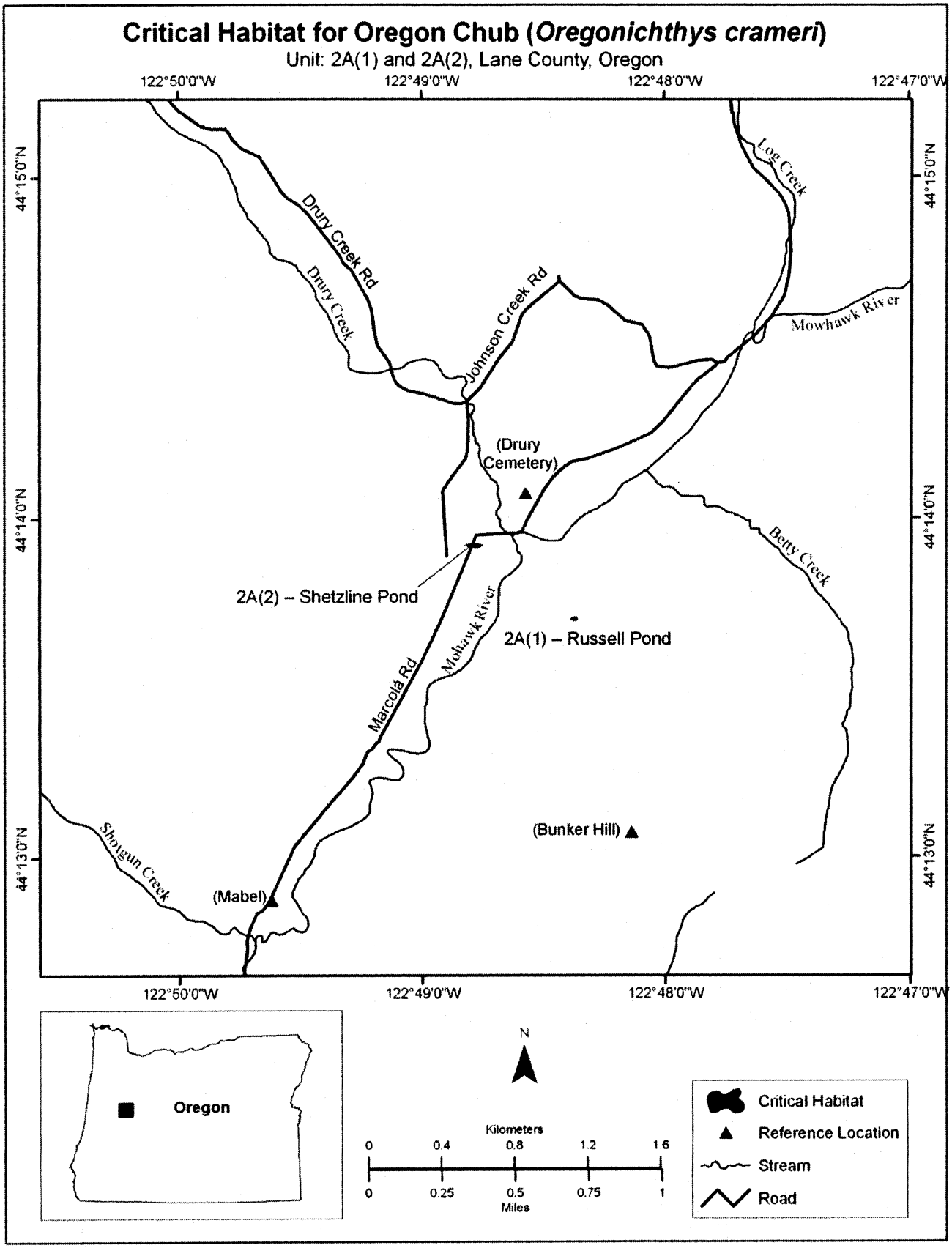
(13) Unit 2A(2): Shetzline Pond, Lane County, Oregon.

(i) This unit totals approximately 0.1 ha (0.3 ac), is privately owned, and is located in the Mohawk River drainage, Lane County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 515484, 4897250; 515477, 4897249; 515469, 4897250; 515464, 4897252; 515461, 4897254; 515460, 4897259; 515462, 4897263; 515466, 4897266; 515476, 4897267; 515485, 4897266; 515489, 4897265; 515493, 4897262; 515494, 4897258; 515492, 4897254; 515489, 4897251; 515484, 4897250;

(iii) Map of Units 2A(1) and 2A(2) of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

(14) Unit 2A(3): Big Island, Lane County, Oregon.

(i) This unit totals 3.3 ha (8.2 ac), is owned by the McKenzie River Trust, and is located along the McKenzie River in Lane County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 507093, 4879404; 507095, 4879401; 507097, 4879400; 507099, 4879398; 507099, 4879396; 507096, 4879397; 507091, 4879401; 507089, 4879403; 507079, 4879395; 507071, 4879390; 507077, 4879388; 507081, 4879386; 507085, 4879384; 507091, 4879381; 507097, 4879378; 507099, 4879376; 507104, 4879373; 507107, 4879371; 507112, 4879369; 507116, 4879368; 507121, 4879365; 507127, 4879363; 507131, 4879360; 507136, 4879357; 507131, 4879349; 507125, 4879353; 507120, 4879356; 507115, 4879358; 507110, 4879360; 507103, 4879362; 507098, 4879366; 507092, 4879370; 507087, 4879373; 507082, 4879375; 507078, 4879377; 507073, 4879380; 507069, 4879381; 507064, 4879383; 507047, 4879368; 507030, 4879355; 507010, 4879343; 507001, 4879338; 506986, 4879326; 506974, 4879317; 506961, 4879310; 506960, 4879307; 506963, 4879303; 506970, 4879300; 506974, 4879297; 506971, 4879293; 506965, 4879296; 506955, 4879303; 506946, 4879298; 506943, 4879287; 506945, 4879279; 506949, 4879278; 506953, 4879279; 506960, 4879276; 506961, 4879271; 506956, 4879265; 506944, 4879261; 506929, 4879258; 506913, 4879255; 506902, 4879248; 506892, 4879241; 506885, 4879236; 506891, 4879226; 506906, 4879239; 506922, 4879240; 506930, 4879245; 506944, 4879252; 506955, 4879254; 506966, 4879261; 506973, 4879275; 506982, 4879280; 506990, 4879284; 506999, 4879289; 507009, 4879288; 507026, 4879290; 507042, 4879291; 507061, 4879296; 507076, 4879295; 507081, 4879287; 507075, 4879279; 507053, 4879277; 507035, 4879269; 507020, 4879267; 507013, 4879268; 506997, 4879265; 506990, 4879259; 506998, 4879253; 507007, 4879251; 507015, 4879247; 507031, 4879250; 507046, 4879252; 507062, 4879251; 507070, 4879259; 507078, 4879257; 507084, 4879251; 507100, 4879247; 507111, 4879242; 507120, 4879245; 507133, 4879246; 507145, 4879245; 507156, 4879241; 507166, 4879239; 507171, 4879237; 507178, 4879231; 507184, 4879222; 507190, 4879215; 507202, 4879194; 507202, 4879185; 507208, 4879174; 507209, 4879156; 507212, 4879135; 507213, 4879127; 507211, 4879118; 507206, 4879125; 507206, 4879135; 507203, 4879147; 507202, 4879161; 507199, 4879175; 507193, 4879180; 507190, 4879172; 507189, 4879166; 507186, 4879148; 507181, 4879137; 507171, 4879126; 507160, 4879117; 507150, 4879110; 507138, 4879106; 507126, 4879110; 507125, 4879117; 507133, 4879122; 507140, 4879122; 507147, 4879125; 507151, 4879132; 507159, 4879140; 507166, 4879150; 507172, 4879157; 507173, 4879166; 507173, 4879183; 507168, 4879192; 507161, 4879206; 507157, 4879215; 507152, 4879226; 507145, 4879238; 507143, 4879242; 507136, 4879243; 507126, 4879242; 507117, 4879241; 507111, 4879239; 507108, 4879240; 507099, 4879244; 507094, 4879246; 507083, 4879248; 507081, 4879250; 507077, 4879251; 507073, 4879250; 507068, 4879251; 507065, 4879249; 507061, 4879247; 507049, 4879248; 507038, 4879247; 507025, 4879244; 507019, 4879243; 507010, 4879243; 507001, 4879244; 506992, 4879245; 506982, 4879245; 506983, 4879241; 506989, 4879241; 506999, 4879237; 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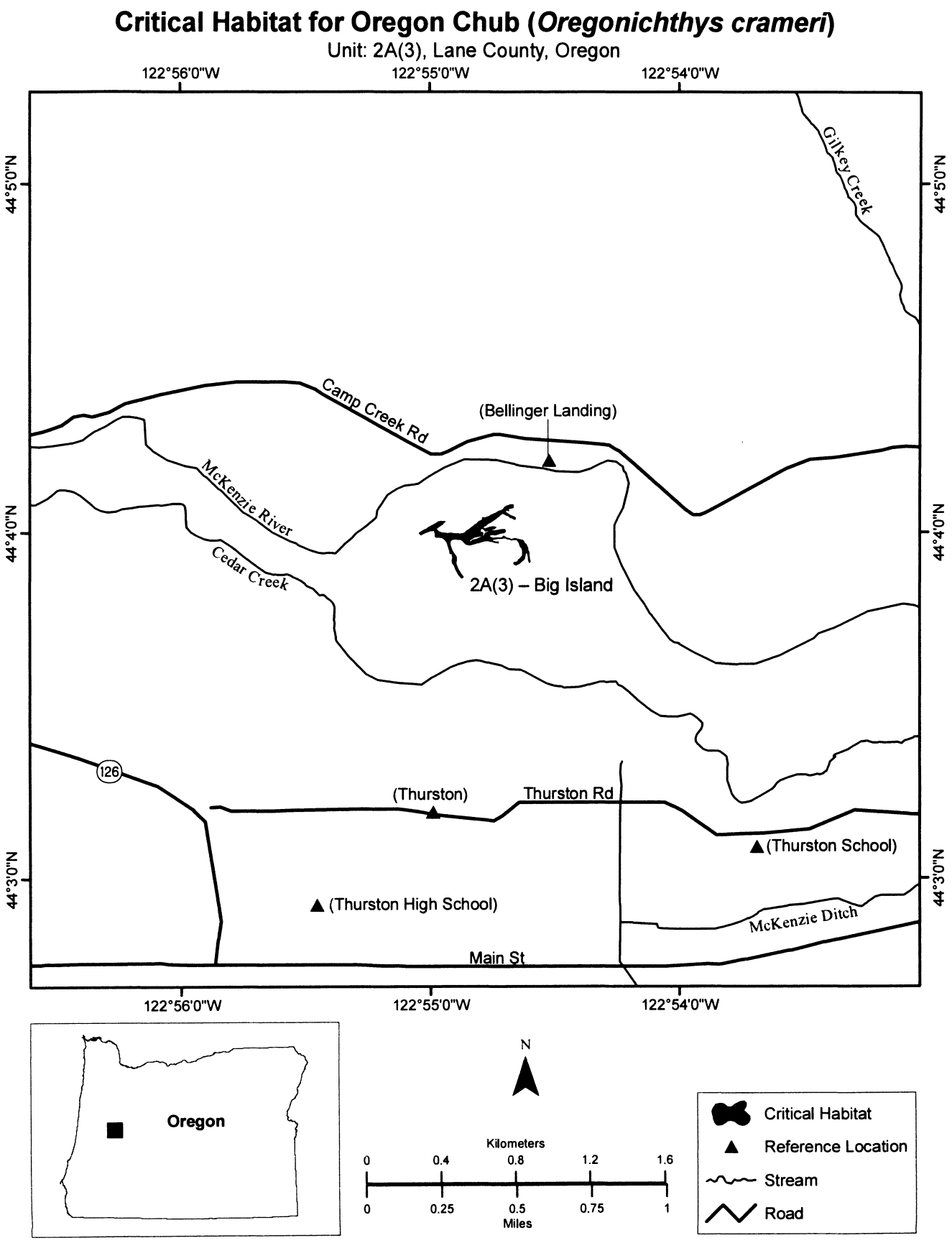
506766, 4879226; 506759, 4879234; 506750, 4879245; 506740, 4879250; 506722, 4879253; 506707, 4879253; 506703, 4879258; 506703, 4879264; 506704, 4879274; 506701, 4879282; 506699, 4879292; 506696, 4879293; 506688, 4879290; 506677, 4879287; 506662, 4879284; 506651, 4879278; 506639, 4879273; 506626, 4879266; 506618, 4879277; 506626, 4879282; 506637, 4879288; 506649, 4879296; 506658, 4879300; 506669, 4879307; 506681, 4879313; 506693, 4879320; 506707, 4879328; 506720, 4879335; 506731, 4879339; 506740, 4879339; 506745, 4879338; 506748, 4879338; 506751, 4879339; 506754, 4879341; 506756, 4879338; 506752, 4879336; 506749, 4879332; 506745, 4879325; 506736, 4879319; 506728, 4879315; 506722, 4879312; 506718, 4879307; 506710, 4879301; 506710, 4879296; 506719, 4879287; 506730, 4879279; 506744, 4879278; 506755, 4879276; 506767, 4879274; 506789, 4879276; 506804, 4879274; 506816, 4879274; 506826, 4879273; 506834, 4879271; 506845, 4879272; 506853, 4879274; 506859, 4879275; 506864, 4879279; 506869, 4879285; 506876, 4879290; 506884, 4879296; 506892, 4879301; 506900, 4879307; 506910, 4879315; 506917, 4879320; 506927, 4879328; 506936, 4879336; 506940, 4879340; 506946, 4879344; 506953, 4879347; 506959, 4879348; 506957, 4879352; 506956, 4879355; 506958, 4879357; 506961, 4879360; 506966, 4879360; 506970, 4879356; 506973, 4879357; 506982, 4879361; 506991, 4879366; 507004, 4879374; 507012, 4879378; 507020, 4879381; 507028, 4879385; 507044, 4879392; 507055, 4879398; 507066, 4879405; 507075, 4879413; 507087, 4879421; 507099, 4879426; 507107, 4879429; 507118, 4879430; 507122, 4879430; 507121, 4879412; 507119, 4879411; 507111, 4879411; 507102, 4879409; 507093, 4879406; 507093, 4879404; and excluding land bound by 506890, 4879274; 506883, 4879269; 506872, 4879263; 506861, 4879256; 506859, 4879253; 506869, 4879254; 506879, 4879260; 506890, 4879266; 506902, 4879272; 506907, 4879278; 506907, 4879278; 506900, 4879277; 506890, 4879274;

Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 507017, 4879310; 507023, 4879306; 507028, 4879308; 507030, 4879307; 507028, 4879305; 507015, 4879299; 507008, 4879297; 507002, 4879296; 506994, 4879293; 506981, 4879288; 506973, 4879286; 506968, 4879288; 506970, 4879292; 506971, 4879293; 506974, 4879297; 506974, 4879298; 506983, 4879301; 506991, 4879305; 506999, 4879310; 507009, 4879311; 507017, 4879310;

(iii) Map of Unit 2A(3) of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–C



BILLING CODE 4310–55–S

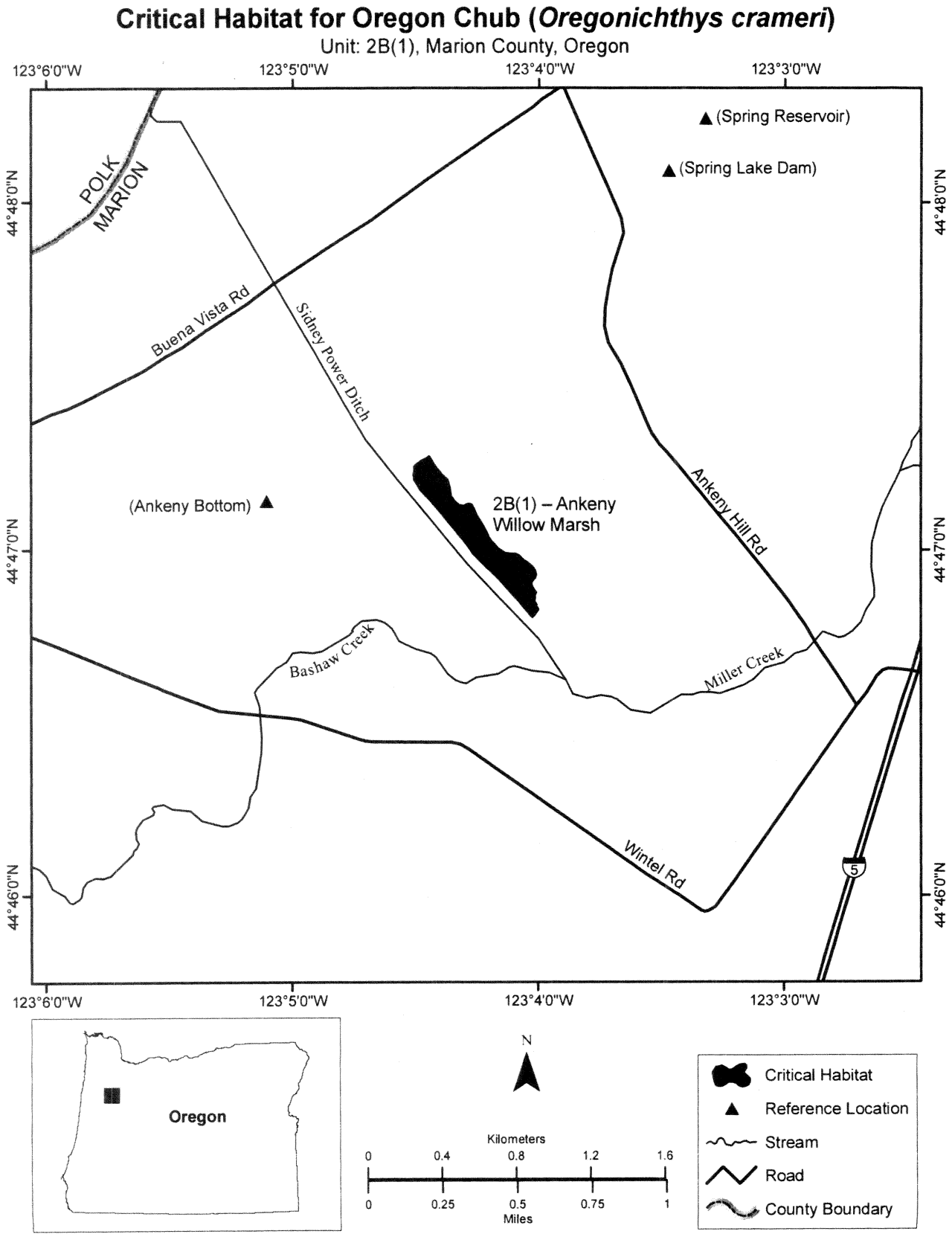
(15) Unit 2B(1): Ankeny Willow Marsh , Marion County, Oregon.

(i) This unit totals 14.0 ha (34.5 ac), and is located in Marion County, Oregon, at the Ankeny National Wildlife Refuge.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 494301, 4959127; 494318, 4959124; 494328, 4959126; 494338, 4959131; 494348, 4959134; 494359, 4959134; 494373, 4959127; 494386, 4959104; 494396, 4959076; 494413, 4959050; 494434, 4959017; 494451, 4958983; 494466, 4958953; 494479, 4958932; 494498, 4958911; 494512, 4958896; 494530, 4958884; 494528, 4958885; 494551, 4958869; 494585, 4958866; 494603, 4958867; 494618, 4958861; 494628, 4958854; 494642, 4958838; 494675, 4958818; 494703, 4958792; 494711, 4958776; 494719, 4958752; 494713, 4958732; 494698, 4958720; 494693, 4958709; 494693, 4958703; 494698, 4958689; 494705, 4958673; 494716, 4958660; 494718, 4958654; 494714, 4958642; 494711, 4958623; 494710, 4958612; 494711, 4958605; 494720, 4958591; 494718, 4958581; 494726, 4958576; 494732, 4958564; 494720, 4958547; 494708, 4958530; 494696, 4958519; 494684, 4958527; 494670, 4958544; 494652, 4958566; 494634, 4958589; 494619, 4958606; 494592, 4958636; 494565, 4958665; 494541, 4958693; 494518, 4958718; 494498, 4958738; 494465, 4958772; 494447, 4958788; 494420, 4958812; 494397, 4958835; 494377, 4958859; 494360, 4958882; 494347, 4958900; 494326, 4958927; 494310, 4958946; 494271, 4958996; 494234, 4959040; 494212, 4959066; 494168, 4959117; 494144, 4959145; 494127, 4959161; 494091, 4959202; 494073, 4959226; 494064, 4959244; 494056, 4959257; 494051, 4959284; 494056, 4959320; 494056, 4959331; 494066, 4959344; 494080, 4959353; 494094, 4959362; 494112, 4959373; 494123, 4959380; 494137, 4959388; 494144, 4959387; 494153, 4959369; 494169, 4959341; 494182, 4959326; 494200, 4959303; 494208, 4959293; 494242, 4959260; 494255, 4959217; 494262, 4959174; 494278, 4959150; 494283, 4959143; 494301, 4959127;

(iii) Map of Unit 2B(1) of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

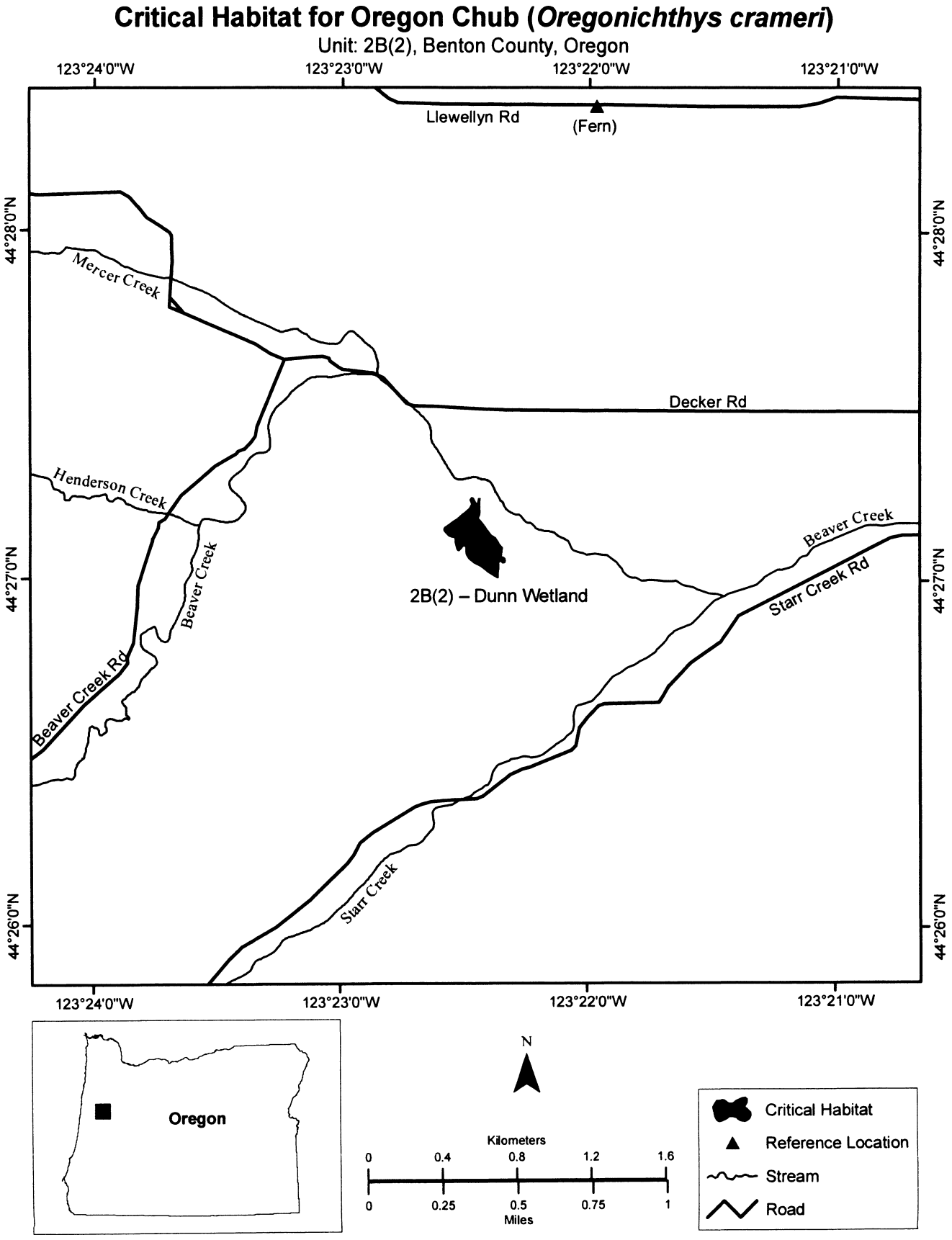
(16) Unit 2B(2): Dunn Wetland, Benton County, Oregon.

(i) This unit totals 6.1 ha (15.2 ac), is privately owned, and is located in Benton County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 470225, 4922333; 470235, 4922324; 470236, 4922329; 470238, 4922344; 470241, 4922357; 470250, 4922355; 470246, 4922340; 470247, 4922320; 470247, 4922297; 470249, 4922269; 470238, 4922250; 470261, 4922225; 470284, 4922196; 470294, 4922183; 470307, 4922160; 470331, 4922148; 470348, 4922122; 470353, 4922112; 470369, 4922092; 470366, 4922064; 470362, 4922042; 470372, 4922042; 470382, 4922035; 470385, 4922023; 470379, 4922013; 470370, 4922010; 470364, 4922017; 470358, 4922021; 470350, 4922017; 470349, 4921978; 470346, 4921960; 470347, 4921943; 470345, 4921932; 470341, 4921931; 470335, 4921934; 470297, 4921958; 470272, 4921977; 470247, 4921994; 470230, 4922005; 470217, 4922012; 470202, 4922022; 470188, 4922033; 470179, 4922048; 470170, 4922062; 470170, 4922073; 470171, 4922088; 470171, 4922100; 470164, 4922104; 470159, 4922102; 470145, 4922085; 470137, 4922078; 470132, 4922078; 470129, 4922081; 470125, 4922088; 470122, 4922098; 470115, 4922121; 470113, 4922135; 470115, 4922143; 470110, 4922148; 470095, 4922149; 470078, 4922157; 470065, 4922171; 470054, 4922186; 470056, 4922199; 470063, 4922207; 470082, 4922221; 470099, 4922232; 470123, 4922248; 470154, 4922273; 470166, 4922283; 470190, 4922305; 470205, 4922329; 470194, 4922349; 470204, 4922362; 470212, 4922360; 470225, 4922333;

(iii) Map of Unit 2B(2) of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

(17) Unit 2B(3): Finley Display Pond, Benton County, Oregon.

(i) This unit totals 1.0 ha (2.4 ac) and is located in Benton County, Oregon, on the William L. Finley National Wildlife Refuge.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 473297, 4917434; 473299, 4917431; 473303, 4917433; 473308, 4917433; 473313, 4917430; 473317, 4917425; 473322, 4917418; 473323, 4917413; 473320, 4917406; 473316, 4917390; 473310, 4917375; 473302, 4917356; 473297, 4917346; 473294, 4917333; 473287, 4917319; 473278, 4917310; 473273, 4917315; 473266, 4917321; 473262, 4917328; 473257, 4917337; 473252, 4917345; 473248, 4917354; 473244, 4917364; 473239, 4917372; 473237, 4917380; 473232, 4917389; 473228, 4917397; 473226, 4917404; 473225, 4917412; 473224, 4917424; 473223, 4917431; 473221, 4917445; 473222, 4917459; 473226, 4917469; 473234, 4917475; 473240, 4917478; 473244, 4917477; 473251, 4917474; 473260, 4917468; 473265, 4917467; 473274, 4917462; 473284, 4917451; 473291, 4917445; 473296, 4917440; 473296, 4917436; 473297, 4917434; and excluding land bound by 473238, 4917400; 473246, 4917395; 473249, 4917396; 473252, 4917394; 473255, 4917393; 473258, 4917392; 473260, 4917394; 473258, 4917397; 473258, 4917401; 473254, 4917409; 473252, 4917413; 473245, 4917423; 473245, 4917425; 473243, 4917428; 473242, 4917431; 473240, 4917433; 473238, 4917430; 473236, 4917425; 473234, 4917419; 473233, 4917413; 473234, 4917406; 473238, 4917400;

(iii) See paragraph (19)(iii) for a map showing critical habitat unit 2B(3).

(18) Unit 2B(4): Finley Cheadle Pond, Benton County, Oregon.

(i) This unit totals 0.9 ha (2.3 ac) and is located in Benton County, Oregon, on the William L. Finley National Wildlife Refuge.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 475672, 4916089; 475679, 4916070; 475684, 4916056; 475685, 4916053; 475690, 4916045; 475694, 4916035; 475699, 4916025; 475706, 4916017; 475714, 4916012; 475725, 4916006; 475730, 4916004; 475735, 4916003; 475741, 4916001; 475747, 4916003; 475752, 4916002; 475760, 4916003; 475765, 4916001; 475766, 4915998; 475769, 4915995; 475768, 4915987; 475768, 4915970; 475766, 4915960; 475763, 4915956; 475762, 4915951; 475764, 4915947; 475765, 4915940; 475766, 4915931; 475766, 4915917; 475761, 4915909; 475760, 4915904; 475757, 4915902; 475751, 4915905; 475747, 4915910; 475741, 4915915; 475732, 4915925; 475721, 4915937; 475708, 4915950; 475699, 4915960; 475699, 4915963; 475681, 4915977; 475681, 4915982; 475674, 4915989; 475670, 4915996; 475669, 4916001; 475666, 4916008; 475663, 4916019; 475661, 4916030; 475660, 4916035; 475658, 4916041; 475653, 4916051; 475649, 4916056; 475642, 4916055; 475638, 4916064; 475632, 4916075; 475636, 4916078; 475643, 4916078; 475649, 4916080; 475654, 4916080; 475658, 4916080; 475657, 4916087; 475654, 4916099; 475653, 4916104; 475661, 4916105; 475672, 4916089;

(iii) See paragraph (19)(iii) for a map showing critical habitat unit 2B(4).

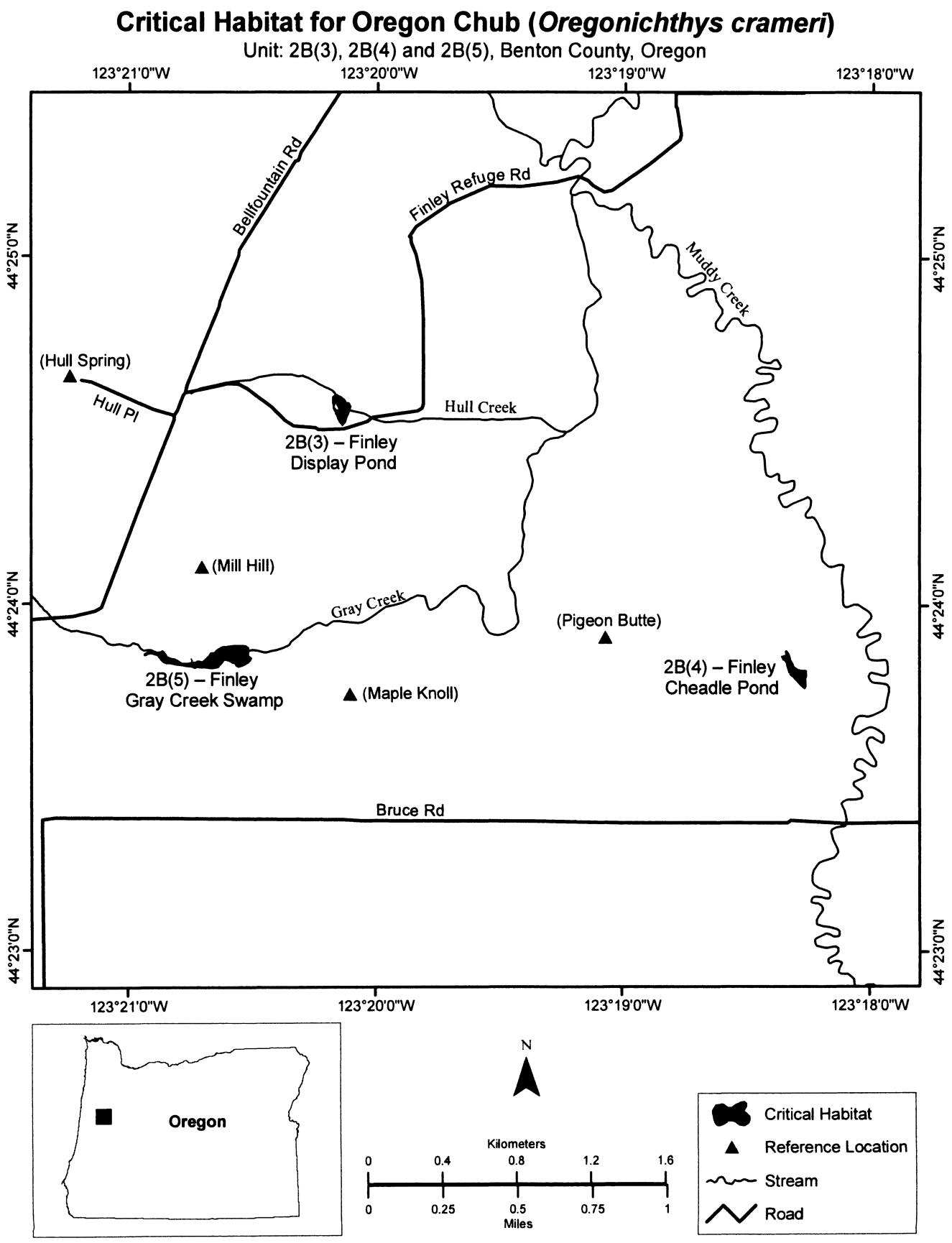
(19) Unit 2B(5): Finley Gray Creek Swamp, Benton County, Oregon.

(i) This unit totals 3.0 ha (7.4 ac) and is located in Benton County, Oregon. Most of the unit is located on the southwest corner of the William L. Finley National Wildlife Refuge; however, a small portion of the unit is located on private property.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 472786, 4916068; 472780, 4916056; 472772, 4916045; 472756, 4916036; 472735, 4916028; 472717, 4916022; 472704, 4916028; 472697, 4916038; 472685, 4916041; 472670, 4916051; 472659, 4916056; 472650, 4916059; 472641, 4916058; 472634, 4916052; 472627, 4916042; 472618, 4916033; 472614, 4916026; 472608, 4916021; 472598, 4916017; 472581, 4916015; 472564, 4916015; 472538, 4916017; 472514, 4916018; 472494, 4916020; 472487, 4916013; 472474, 4916021; 472450, 4916023; 472428, 4916026; 472408, 4916029; 472382, 4916034; 472353, 4916038; 472333, 4916040; 472314, 4916045; 472306, 4916054; 472300, 4916065; 472293, 4916072; 472282, 4916084; 472270, 4916086; 472259, 4916092; 472246, 4916094; 472233, 4916092; 472223, 4916085; 472213, 4916085; 472212, 4916094; 472218, 4916095; 472225, 4916100; 472232, 4916102; 472240, 4916104; 472250, 4916105; 472255, 4916109; 472261, 4916109; 472266, 4916105; 472266, 4916098; 472271, 4916096; 472277, 4916094; 472282, 4916100; 472289, 4916102; 472300, 4916102; 472302, 4916104; 472307, 4916108; 472312, 4916108; 472318, 4916104; 472323, 4916096; 472329, 4916086; 472336, 4916074; 472339, 4916071; 472352, 4916068; 472377, 4916065; 472388, 4916054; 472397, 4916050; 472408, 4916046; 472420, 4916044; 472430, 4916044; 472440, 4916043; 472447, 4916044; 472460, 4916046; 472467, 4916048; 472477, 4916050; 472489, 4916050; 472500, 4916054; 472508, 4916054; 472515, 4916051; 472523, 4916052; 472536, 4916060; 472545, 4916071; 472551, 4916078; 472559, 4916083; 472566, 4916096; 472575, 4916098; 472587, 4916100; 472596, 4916113; 472611, 4916123; 472631, 4916130; 472652, 4916133; 472670, 4916134; 472694, 4916139; 472717, 4916139; 472738, 4916138; 472759, 4916136; 472763, 4916133; 472770, 4916126; 472773, 4916124; 472772, 4916112; 472771, 4916099; 472772, 4916077; 472780, 4916073; 472786, 4916068;

(iii) Map of Units 2B(3), 2B(4), and 2B(5) of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

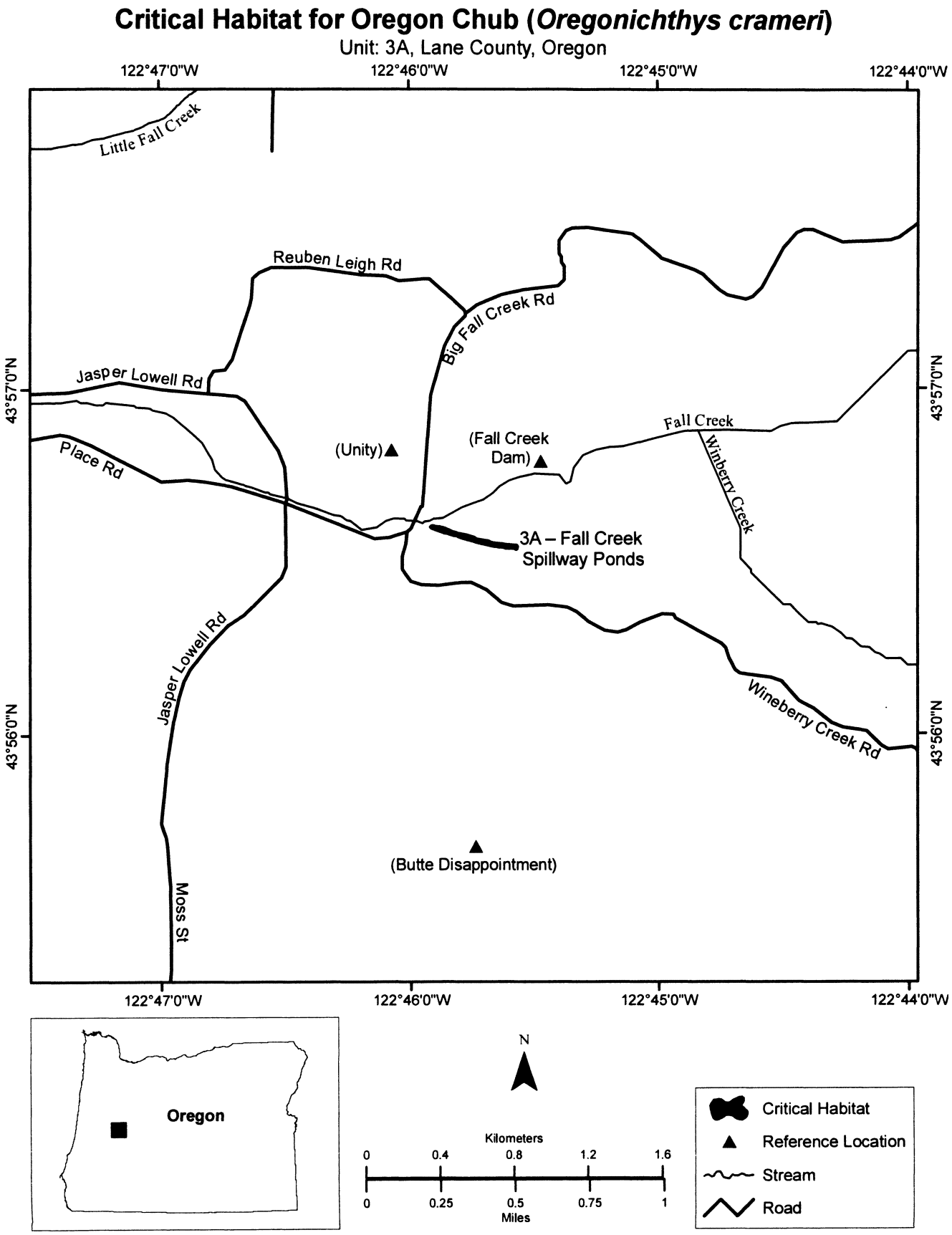
(20) Unit 3A: Fall Creek Spillway Ponds, Lane County, Oregon.

(i) This unit totals 1.5 ha (3.8 ac), is owned by the USACE, and is located in the overflow channel below Fall Creek Dam in Lane County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 519284, 4865517; 519298, 4865515; 519305, 4865515; 519311, 4865508; 519313, 4865502; 519312, 4865488; 519309, 4865483; 519302, 4865482; 519288, 4865486; 519270, 4865487; 519253, 4865487; 519243, 4865488; 519236, 4865490; 519225, 4865492; 519211, 4865494; 519193, 4865495; 519166, 4865501; 519142, 4865506; 519112, 4865514; 519084, 4865520; 519069, 4865524; 519057, 4865528; 519032, 4865534; 519009, 4865541; 518998, 4865545; 518977, 4865553; 518959, 4865557; 518950, 4865560; 518928, 4865565; 518911, 4865570; 518893, 4865575; 518875, 4865582; 518858, 4865588; 518840, 4865594; 518833, 4865601; 518832, 4865607; 518834, 4865612; 518841, 4865617; 518851, 4865619; 518874, 4865614; 518889, 4865613; 518920, 4865605; 518956, 4865589; 518985, 4865579; 519034, 4865569; 519074, 4865556; 519092, 4865547; 519129, 4865540; 519151, 4865538; 519170, 4865530; 519195, 4865526; 519231, 4865523; 519243, 4865519; 519284, 4865517;

(iii) Map of Unit 3A of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

(21) Unit 3B: Elijah Bristow State Park Berry Slough, Lane County, Oregon.

(i) This unit totals 5.2 ha (12.7 ac) measured at the annual high-water elevation, is owned by the Oregon Parks and Recreation Department (OPRD), and is located in Elijah Bristow State Park in Lane County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 513039, 4865406; 513039, 4865403; 513044, 4865400; 513049, 4865395; 513057, 4865390; 513064, 4865385; 513074, 4865379; 513081, 4865378; 513089, 4865378; 513099, 4865380; 513104, 4865383; 513105, 4865388; 513107, 4865393; 513109, 4865396; 513113, 4865398; 513117, 4865398; 513121, 4865396; 513123, 4865391; 513122, 4865387; 513117, 4865377; 513106, 4865366; 513088, 4865355; 513080, 4865345; 513075, 4865334; 513078, 4865315; 513080, 4865307; 513088, 4865290; 513090, 4865267; 513098, 4865252; 513110, 4865242; 513123, 4865230; 513132, 4865222; 513135, 4865219; 513146, 4865215; 513155, 4865213; 513155, 4865218; 513154, 4865224; 513155, 4865226; 513158, 4865225; 513160, 4865222; 513160, 4865215; 513159, 4865210; 513170, 4865206; 513190, 4865204; 513229, 4865204; 513260, 4865194; 513281, 4865200; 513297, 4865201; 513312, 4865204; 513329, 4865207; 513351, 4865210; 513363, 4865214; 513371, 4865211; 513370, 4865207; 513365, 4865205; 513357, 4865203; 513349, 4865201; 513337, 4865200; 513325, 4865199; 513312, 4865196; 513298, 4865194; 513282, 4865188; 513261, 4865186; 513236, 4865185; 513218, 4865181; 513193, 4865183; 513181, 4865190; 513163, 4865196; 513137, 4865203; 513120, 4865211; 513113, 4865220; 513107, 4865230; 513100, 4865225; 513100, 4865221; 513102, 4865215; 513109, 4865205; 513118, 4865197; 513137, 4865183; 513160, 4865165; 513171, 4865159; 513193, 4865152; 513205, 4865141; 513206, 4865125; 513210, 4865118; 513209, 4865113; 513208, 4865095; 513206, 4865089; 513201, 4865089; 513198, 4865102; 513196, 4865113; 513189, 4865123; 513182, 4865135; 513173, 4865143; 513157, 4865151; 513143, 4865154; 513129, 4865162; 513123, 4865168; 513106, 4865182; 513095, 4865192; 513088, 4865204; 513084, 4865213; 513081, 4865223; 513073, 4865246; 513065, 4865266; 513062, 4865273; 513055, 4865273; 513057, 4865265; 513057, 4865258; 513052, 4865241; 513054, 4865232; 513057, 4865225; 513062, 4865215; 513075, 4865198; 513083, 4865187; 513090, 4865177; 513091, 4865171; 513083, 4865175; 513079, 4865180; 513072, 4865189; 513066, 4865199; 513059, 4865209; 513051, 4865220; 513044, 4865231; 513037, 4865223; 513030, 4865209; 513024, 4865198; 513016, 4865188; 513007, 4865176; 513001, 4865169; 512994, 4865152; 512993, 4865124; 512993, 4865117; 512996, 4865111; 512998, 4865104; 512998, 4865078; 513003, 4865061; 513008, 4865048; 513001, 4865046; 512997, 4865056; 512989, 4865066; 512983, 4865081; 512979, 4865105; 512979, 4865129; 512982, 4865153; 512986, 4865165; 512995, 4865184; 513008, 4865202; 513023, 4865226; 513031, 4865236; 513034, 4865248; 513035, 4865255; 513037, 4865271; 513039, 4865286; 513042, 4865297; 513045, 4865307; 513049, 4865314; 513051, 4865319; 513049, 4865330; 513040, 4865336; 513029, 4865339; 513022, 4865342; 513015, 4865354; 513009, 4865367; 513000, 4865383; 513001, 4865389; 513010, 4865399; 513023, 4865406; 513030, 4865406; 513035, 4865405; 513035, 4865406; 513036, 4865408; 513037, 4865409; 513039, 4865409; 513039, 4865408; 513039, 4865406; and excluding land bound by 513049, 4865347; 513054, 4865346; 513058, 4865348; 513058, 4865353; 513058, 4865356; 513056, 4865362; 513051, 4865366; 513043, 4865376; 513035, 4865387; 513029, 4865391; 513022, 4865391; 513019, 4865386; 513022, 4865380; 513024, 4865375; 513030, 4865369; 513035, 4865364; 513040, 4865358; 513044, 4865349; 513049, 4865347;

Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 512811, 4865560; 512814, 4865555; 512827, 4865553; 512827, 4865554; 512837, 4865553; 512857, 4865551; 512875, 4865548; 512890, 4865545; 512908, 4865541; 512923, 4865533; 512932, 4865529; 512945, 4865526; 512952, 4865527; 512958, 4865527; 512961, 4865529; 512963, 4865532; 512966, 4865534; 512970, 4865533; 512970, 4865530; 512968, 4865527; 512960, 4865523; 512947, 4865522; 512938, 4865523; 512926, 4865525; 512929, 4865522; 512938, 4865520; 512949, 4865517; 512963, 4865512; 512976, 4865510; 512989, 4865513; 513003, 4865515; 513019, 4865518; 513034, 4865520; 513048, 4865524; 513060, 4865526; 513079, 4865532; 513089, 4865531; 513110, 4865536; 513124, 4865542; 513125, 4865536; 513119, 4865534; 513101, 4865528; 513087, 4865523; 513073, 4865520; 513057, 4865517; 513032, 4865515; 513009, 4865511; 512993, 4865508; 512982, 4865504; 512966, 4865503; 512956, 4865506; 512946, 4865510; 512940, 4865513; 512936, 4865512; 512945, 4865505; 512958, 4865496; 512977, 4865477; 512986, 4865467; 513007, 4865442; 513015, 4865429; 513016, 4865423; 513006, 4865412; 512998, 4865404; 512995, 4865407; 512997, 4865416; 512999, 4865422; 512984, 4865439; 512976, 4865453; 512958, 4865467; 512940, 4865487; 512923, 4865500; 512905, 4865513; 512889, 4865520; 512871, 4865522; 512851, 4865523; 512835, 4865523; 512817, 4865524; 512801, 4865527; 512774, 4865532; 512756, 4865536; 512741, 4865537; 512736, 4865537; 512730, 4865534; 512726, 4865534; 512725, 4865533; 512726, 4865528; 512723, 4865528; 512723, 4865532; 512722, 4865533; 512719, 4865534; 512718, 4865539; 512719, 4865543; 512717, 4865547; 512706, 4865552; 512697, 4865559; 512702, 4865563; 512706, 4865566; 512710, 4865565; 512715, 4865562; 512723, 4865559; 512730, 4865557; 512735, 4865555; 512737, 4865557; 512737, 4865559; 512733, 4865560; 512731, 4865565; 512735, 4865570; 512750, 4865573; 512764, 4865573; 512790, 4865567; 512798, 4865565; 512811, 4865560; and excluding land bound by 512752, 4865557; 512753, 4865553; 512772, 4865551; 512786, 4865548; 512793, 4865548; 512792, 4865553; 512782, 4865556; 512769, 4865557; 512762, 4865558; 512756, 4865559; 512752, 4865557;

Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 512517, 4866094; 512512, 4866079; 512511, 4866074; 512512, 4866071; 512513, 4866068; 512512, 4866067; 512510, 4866069; 512509, 4866072; 512506, 4866070; 512498, 4866067; 512489, 4866066; 512488, 4866055; 512495, 4866045; 512506, 4866032; 512515, 4866022; 512524, 4866009; 512534, 4865998; 512545, 4865989; 512553, 4865977; 512559, 4865964; 512562, 4865956; 512567, 4865938; 512567, 4865930; 512568, 4865921; 512572, 4865911; 512578, 4865902; 512580, 4865891; 512580, 4865878; 512580, 4865864; 512582, 4865850; 512583, 4865827; 512584, 4865806; 512593, 4865792; 512599, 4865783; 512602, 4865775; 512607, 4865764; 512610, 4865755; 512612, 4865748; 512623, 4865738; 512629, 4865727; 512635, 4865720; 512642, 4865712; 512645, 4865707; 512642, 4865701; 512635, 4865699; 512632, 4865696; 512633, 4865695; 512636, 4865696; 512641, 4865696; 512644, 4865694; 512651, 4865696; 512657, 4865703; 512667, 4865715; 512676, 4865727; 512681, 4865731; 512686, 4865732; 512683, 4865725; 512673, 4865713;

512661, 4865698; 512655, 4865689; 512641, 4865681; 512630, 4865677; 512622, 4865670; 512621, 4865666; 512623, 4865662; 512628, 4865661; 512635, 4865660; 512644, 4865658; 512647, 4865655; 512646, 4865652; 512638, 4865653; 512626, 4865655; 512621, 4865653; 512623, 4865645; 512629, 4865639; 512635, 4865630; 512642, 4865625; 512651, 4865619; 512659, 4865610; 512667, 4865602; 512674, 4865596; 512683, 4865590; 512692, 4865582; 512700, 4865574; 512701, 4865572; 512698, 4865570; 512693, 4865565; 512689, 4865568; 512678, 4865576; 512662, 4865586; 512653, 4865595; 512642, 4865606; 512636, 4865610; 512626, 4865616; 512618, 4865623; 512609, 4865635; 512600, 4865647; 512584, 4865649; 512571, 4865658; 512570, 4865673; 512580, 4865682; 512579, 4865690; 512572, 4865706; 512555, 4865727; 512543, 4865737; 512526, 4865749; 512512, 4865758; 512501, 4865768; 512500, 4865773; 512504, 4865772; 512515, 4865764; 512525, 4865756; 512539, 4865747; 512549, 4865739; 512550, 4865739; 512563, 4865733; 512579, 4865724; 512589, 4865721; 512594, 4865726; 512592, 4865735; 512589, 4865741; 512586, 4865748; 512579, 4865754; 512572, 4865760; 512565, 4865770; 512557, 4865784; 512553, 4865793; 512549, 4865816; 512550, 4865834; 512549, 4865851; 512550, 4865873; 512552, 4865895; 512554, 4865899; 512555, 4865907; 512555, 4865913; 512550, 4865924; 512541, 4865936; 512533, 4865951; 512527, 4865963; 512522, 4865972; 512517, 4865981; 512509, 4865989; 512501, 4866000; 512496, 4866005; 512490, 4866017; 512484, 4866027; 512475, 4866039; 512468, 4866052; 512465, 4866067; 512420, 4866107; 512388, 4866124; 512348, 4866132; 512319, 4866134; 512319, 4866146; 512345, 4866144; 512388, 4866135; 512419, 4866125; 512445, 4866104; 512465, 4866085; 512479, 4866085; 512496, 4866089; 512504, 4866099; 512513, 4866123; 512523, 4866135; 512535, 4866144; 512541, 4866154; 512541, 4866156; 512554, 4866153; 512551, 4866147; 512544, 4866138; 512536, 4866131; 512531, 4866126; 512525, 4866119; 512523, 4866115; 512518, 4866102; 512517, 4866094;

(iii) See paragraph (23)(iii) for a map showing critical habitat unit 3B.

(22) Unit 3C; Elijah Bristow State Park Northeast Slough, Lane County Oregon.

(i) This unit totals 2.2 ha (5.4 ac), is owned by the OPRD, and is located in Elijah Bristow State Park in Lane County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 514970, 4864567; 514987, 4864557; 514999, 4864551; 515023, 4864537; 515036, 4864528; 515054, 4864524; 515069, 4864515; 515092, 4864496; 515116, 4864475; 515137, 4864447; 515154, 4864412; 515168, 4864385; 515179, 4864364; 515191, 4864344; 515202, 4864316; 515216, 4864293; 515229, 4864277; 515239, 4864261; 515245, 4864248; 515244, 4864243; 515235, 4864243; 515219, 4864260; 515202, 4864285; 515185, 4864311; 515175, 4864338; 515160, 4864364; 515147, 4864389; 515138, 4864411; 515124, 4864438; 515108, 4864461; 515095, 4864474; 515081, 4864487; 515063, 4864492; 515064, 4864482; 515066, 4864470; 515074, 4864465; 515081, 4864461; 515088, 4864451; 515080, 4864455; 515069, 4864461; 515057, 4864472; 515049, 4864483; 515044, 4864499; 515035, 4864514; 515015, 4864525; 514990, 4864540; 514971, 4864551; 514955, 4864559; 514947, 4864566; 514943, 4864559; 514947, 4864546; 514953, 4864520; 514962, 4864502; 514983, 4864484; 514988, 4864475; 514997, 4864459; 515007, 4864442; 515015, 4864432; 515025, 4864416; 515038, 4864404; 515054, 4864391; 515064, 4864373; 515070, 4864353; 515075, 4864332; 515079, 4864311; 515093, 4864315; 515105, 4864318; 515120, 4864321; 515123, 4864317; 515116, 4864316; 515106, 4864314; 515098, 4864311; 515088, 4864303; 515081, 4864299; 515085, 4864290; 515093, 4864270; 515102, 4864250; 515108, 4864241; 515113, 4864232; 515119, 4864213; 515125, 4864200; 515142, 4864194; 515156, 4864181; 515153, 4864175; 515136, 4864189; 515126, 4864191; 515126, 4864188; 515129, 4864174; 515136, 4864158; 515130, 4864155; 515126, 4864159; 515125, 4864167; 515120, 4864181; 515113, 4864195; 515107, 4864211; 515099, 4864235; 515093, 4864241; 515084, 4864263; 515074, 4864285; 515063, 4864295; 515056, 4864314; 515054, 4864334; 515052, 4864338; 515046, 4864354; 515044, 4864369; 515028, 4864384; 515012, 4864394; 515002, 4864409; 514992, 4864422; 514986, 4864433; 514977, 4864442; 514967, 4864461; 514956, 4864471; 514959, 4864474; 514944, 4864493; 514939, 4864507; 514934, 4864522; 514927, 4864546; 514921, 4864559; 514909, 4864572; 514902, 4864582; 514884, 4864597; 514879, 4864607; 514859, 4864619; 514851, 4864630; 514837, 4864636; 514821, 4864648; 514813, 4864656; 514799, 4864660; 514797, 4864675; 514809, 4864672; 514821, 4864668; 514834, 4864666; 514845, 4864665; 514857, 4864664; 514873, 4864650; 514886, 4864641; 514898, 4864625; 514909, 4864612; 514924, 4864600; 514939, 4864590; 514959, 4864575; 514970, 4864567;

(iii) See paragraph (23)(iii) for a map showing critical habitat unit 3C.

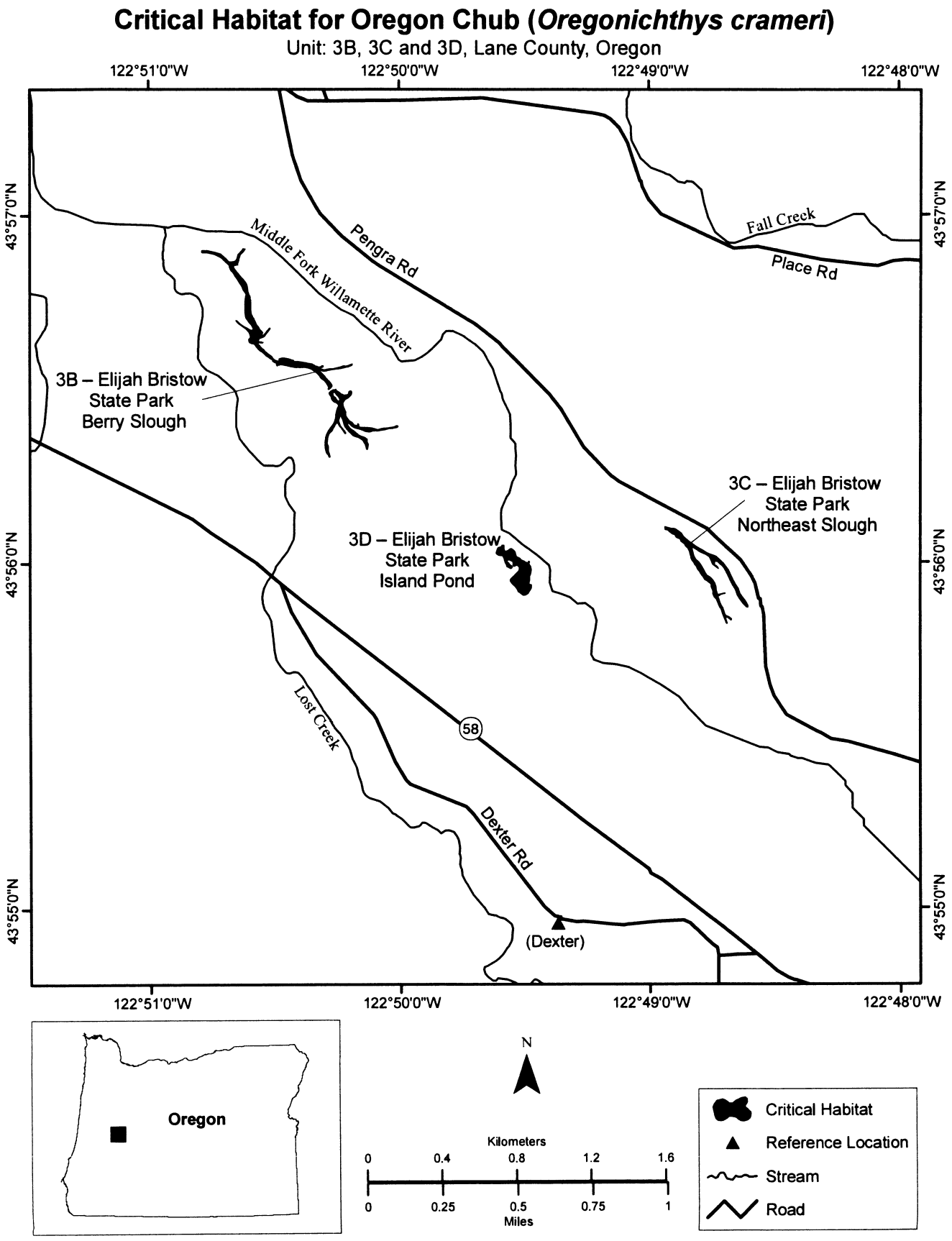
(23) Unit 3D: Elijah Bristow Island Pond, Lane County, Oregon.

(i) This unit totals 2.1 ha (5.2 ac), is owned by the OPRD, and is located in Elijah Bristow State Park in Lane County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 513941, 4864549; 513945, 4864542; 513958, 4864547; 513962, 4864552; 513966, 4864555; 513973, 4864557; 513978, 4864556; 513982, 4864554; 513989, 4864549; 513994, 4864543; 513996, 4864536; 513998, 4864532; 514001, 4864519; 514004, 4864514; 514006, 4864512; 514019, 4864508; 514030, 4864499; 514037, 4864494; 514047, 4864488; 514060, 4864481; 514065, 4864482; 514067, 4864486; 514069, 4864489; 514071, 4864491; 514075, 4864488; 514074, 4864485; 514072, 4864481; 514072, 4864477; 514075, 4864470; 514082, 4864459; 514083, 4864448; 514080, 4864429; 514075, 4864408; 514073, 4864391; 514072, 4864374; 514071, 4864364; 514083, 4864365; 514084, 4864361; 514083, 4864349; 514081, 4864341; 514072, 4864327; 514064, 4864318; 514055, 4864310; 514043, 4864307; 514036, 4864310; 514021, 4864322; 514013, 4864327; 514008, 4864340; 513999, 4864350; 513988, 4864362; 513979, 4864371; 513972, 4864380; 513970, 4864388; 513974, 4864396; 513982, 4864404; 513991, 4864414; 514006, 4864432; 514017, 4864442; 514020, 4864458; 514007, 4864468; 513999, 4864466; 513993, 4864461; 513985, 4864465; 513986, 4864475; 513985, 4864488; 513973, 4864496; 513963, 4864499; 513952, 4864495; 513954, 4864489; 513963, 4864481; 513968, 4864475; 513978, 4864466; 513982, 4864460; 513981, 4864455; 513976, 4864451; 513969, 4864452; 513957, 4864458; 513953, 4864460; 513950, 4864466; 513950, 4864473; 513945, 4864483; 513942, 4864493; 513937, 4864504; 513932, 4864517; 513929, 4864519; 513920, 4864519; 513913, 4864518; 513904, 4864523; 513892, 4864533; 513898, 4864552; 513907, 4864564; 513921, 4864566; 513929, 4864576; 513936, 4864578; 513938, 4864556; 513941, 4864549;

(iii) Map of Units 3B, 3C, and 3D of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

(24) Unit 3E: Dexter Reservoir RV Alcove DEX3, Lane County, Oregon.

(i) This unit totals 0.4 ha (0.9 ac) and is owned by the USACE. The unit is located on the south side of Highway 58 off Dexter Reservoir next to a recreational vehicle (RV) park, in Lane County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 515412, 4862223; 515408, 4862221; 515405, 4862216; 515404, 4862217; 515403, 4862220; 515402, 4862222; 515400, 4862223; 515392, 4862221; 515388, 4862222; 515378, 4862227; 515374, 4862237; 515364, 4862250; 515358, 4862257; 515352, 4862262; 515344, 4862272; 515334, 4862285; 515323, 4862300; 515314, 4862311; 515304, 4862315; 515297, 4862329; 515292, 4862335; 515285, 4862340; 515286, 4862342; 515293, 4862339; 515299, 4862333; 515303, 4862327; 515313, 4862322; 515320, 4862314; 515329, 4862311; 515335, 4862306; 515346, 4862295; 515353, 4862291; 515364, 4862282; 515376, 4862274; 515388, 4862267; 515399, 4862261; 515410, 4862255; 515420, 4862250; 515427, 4862248; 515434, 4862246; 515436, 4862243; 515433, 4862239; 515429, 4862235; 515425, 4862230; 515422, 4862226; 515419, 4862223; 515412, 4862223;

(iii) See paragraph (25)(iii) for a map showing critical habitat unit 3E.

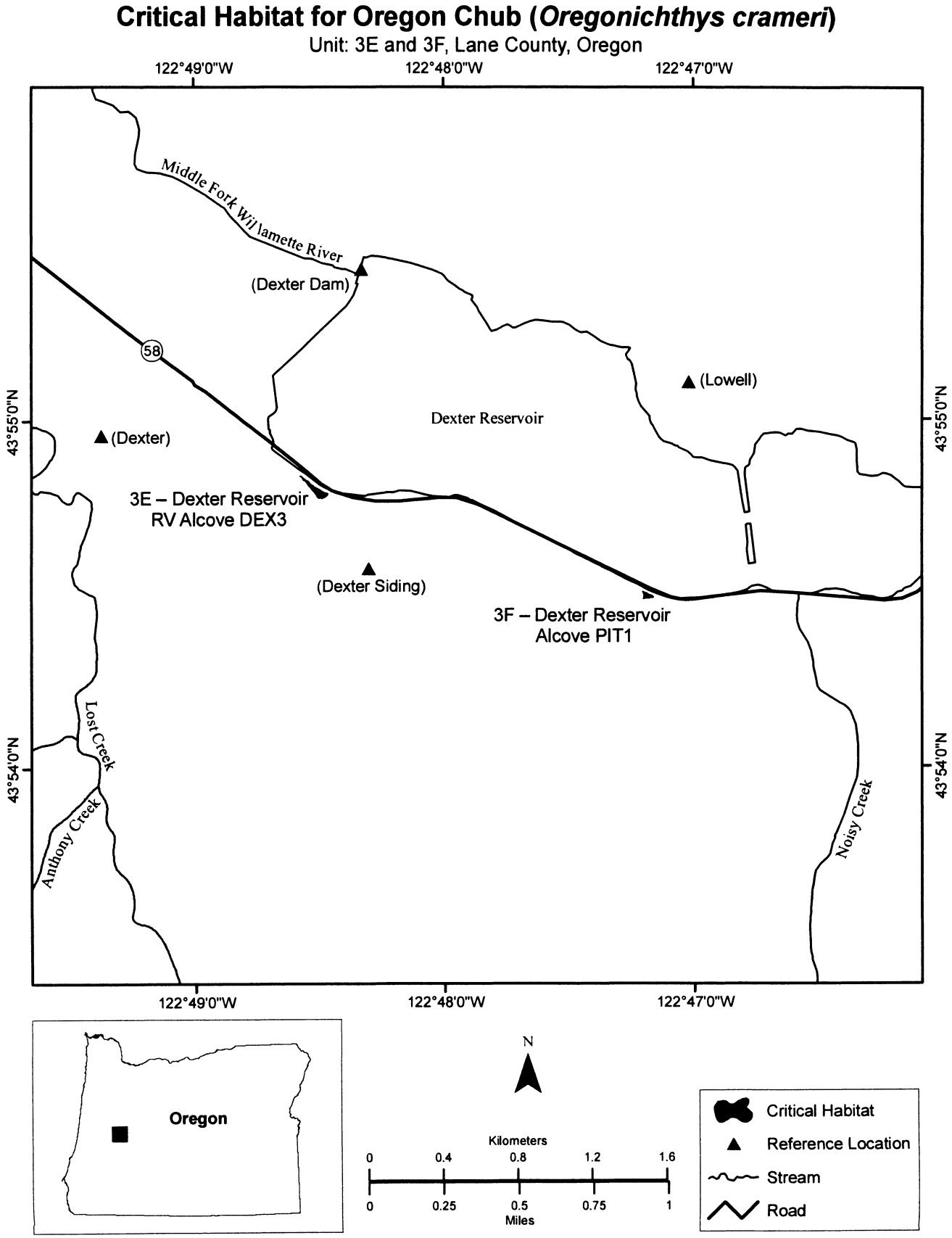
(25) Unit 3F: Dexter Reservoir Alcove PIT1, Lane County, Oregon.

(i) This unit totals 0.1 ha (0.3 ac) measured at the annual high-water elevation, and is owned by the USACE. The unit is located on the south side of Highway 58 off Dexter Reservoir, in Lane County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 517131, 4861681; 517127, 4861680; 517127, 4861680; 517128, 4861683; 517130, 4861693; 517128, 4861699; 517128, 4861703; 517127, 4861711; 517123, 4861719; 517123, 4861722; 517123, 4861722; 517126, 4861721; 517129, 4861719; 517135, 4861717; 517145, 4861712; 517153, 4861708; 517158, 4861705; 517164, 4861702; 517173, 4861699; 517179, 4861695; 517182, 4861692; 517182, 4861689; 517181, 4861689; 517171, 4861688; 517165, 4861686; 517159, 4861685; 517154, 4861684; 517138, 4861684; 517131, 4861681;

(iii) Map of Units 3E and 3F of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

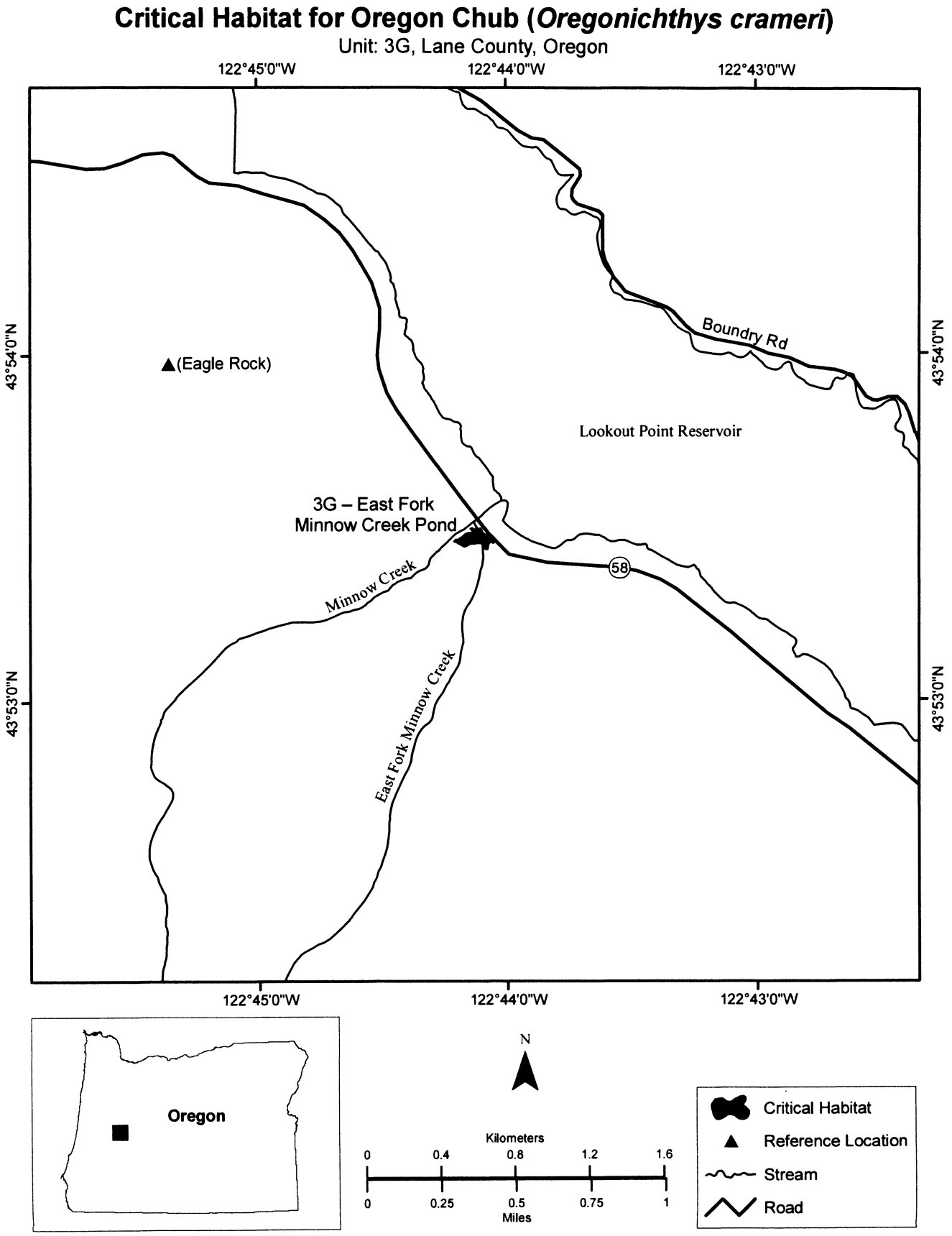
(26) Unit 3G: East Fork Minnow Creek Pond, Lane County, Oregon.

(i) This unit totals 1.3 ha (3.3 ac), is owned by the ODOT, and is a large beaver pond located on a small tributary to Minnow Creek that drains into Lookout Point Reservoir in Lane County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 521267, 4859872; 521270, 4859868; 521272, 4859872; 521279, 4859877; 521283, 4859872; 521287, 4859862; 521293, 4859852; 521305, 4859841; 521312, 4859841; 521329, 4859825; 521340, 4859819; 521345, 4859817; 521350, 4859811; 521354, 4859800; 521347, 4859790; 521337, 4859797; 521330, 4859794; 521326, 4859791; 521324, 4859781; 521320, 4859757; 521303, 4859756; 521296, 4859770; 521292, 4859784; 521283, 4859789; 521262, 4859789; 521243, 4859788; 521224, 4859785; 521210, 4859776; 521193, 4859770; 521181, 4859777; 521169, 4859784; 521152, 4859792; 521134, 4859800; 521139, 4859809; 521149, 4859814; 521161, 4859812; 521165, 4859821; 521173, 4859824; 521177, 4859826; 521189, 4859838; 521197, 4859843; 521208, 4859850; 521218, 4859851; 521225, 4859850; 521232, 4859850; 521234, 4859850; 521234, 4859855; 521231, 4859857; 521226, 4859864; 521223, 4859870; 521227, 4859875; 521237, 4859876; 521248, 4859866; 521254, 4859873; 521259, 4859874; 521253, 4859879; 521250, 4859887; 521246, 4859895; 521250, 4859899; 521254, 4859890; 521258, 4859888; 521260, 4859882; 521267, 4859872;

(iii) Map of Unit 3G of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

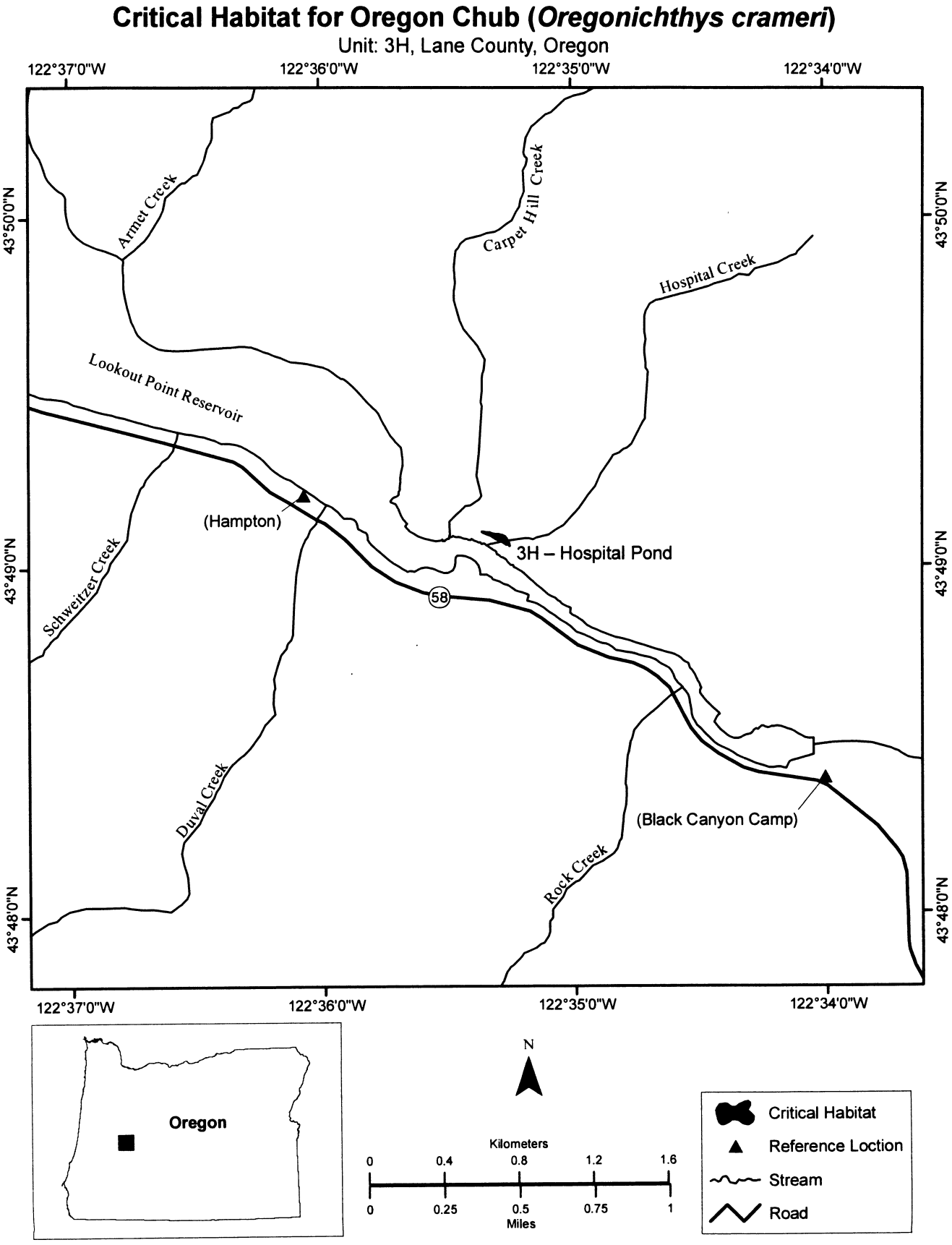
(27) Unit 3H: Hospital Pond, Lane County, Oregon.

(i) This unit totals 0.5 ha (1.1 ac), is owned by the USACE, and is located on the north side of the gravel road on the north shore of Lookout Point Reservoir in Lane County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 533030, 4851782; 533047, 4851779; 533065, 4851779; 533078, 4851772; 533093, 4851767; 533109, 4851767; 533120, 4851766; 533135, 4851762; 533147, 4851755; 533157, 4851743; 533164, 4851732; 533169, 4851722; 533173, 4851709; 533175, 4851702; 533174, 4851698; 533167, 4851699; 533163, 4851705; 533150, 4851705; 533139, 4851715; 533130, 4851720; 533117, 4851725; 533105, 4851732; 533096, 4851735; 533079, 4851748; 533067, 4851753; 533050, 4851760; 533027, 4851769; 533017, 4851777; 533022, 4851781; 533030, 4851782;

(iii) Map of Unit 3H of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

(28) Unit 3I: Shady Dell Pond, Lane County, Oregon.

(i) This unit totals 1.1 ha (2.8 ac), is owned by the United States Forest Service (USFS), and is located in a USFS campground at the far southeast end of Lookout Point Reservoir along the south side of State Highway 58 in Lane County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 536587, 4848720; 536593, 4848709; 536589, 4848707; 536583, 4848718; 536580, 4848713; 536581, 4848701; 536587, 4848687; 536597, 4848678; 536612, 4848659; 536628, 4848646; 536647, 4848637; 536649, 4848637; 536670, 4848619; 536685, 4848593; 536697, 4848576; 536699, 4848573; 536706, 4848563; 536716, 4848550; 536722, 4848532; 536730, 4848513; 536726, 4848496; 536727, 4848475; 536718, 4848472; 536725, 4848456; 536732, 4848443; 536746, 4848432; 536762, 4848423; 536778, 4848418; 536799, 4848397; 536797, 4848392; 536786, 4848395; 536766, 4848401; 536746, 4848410; 536732, 4848424; 536720, 4848433; 536706, 4848439; 536691, 4848455; 536687, 4848463; 536684, 4848474; 536680, 4848493; 536681, 4848515; 536684, 4848529; 536685, 4848543; 536683, 4848563; 536673, 4848570; 536653, 4848574; 536626, 4848570; 536612, 4848573; 536612, 4848580; 536618, 4848579; 536625, 4848578; 536632, 4848579; 536641, 4848580; 536638, 4848589; 536634, 4848601; 536630, 4848611; 536624, 4848619; 536607, 4848638; 536591, 4848651; 536573, 4848674; 536562, 4848694; 536560, 4848716; 536562, 4848735; 536563, 4848747; 536567, 4848753; 536572, 4848743; 536576, 4848736; 536587, 4848720; and excluding land bound by 536675, 4848580; 536681, 4848577; 536687, 4848573; 536685, 4848579; 536683, 4848582; 536679, 4848588; 536675, 4848593; 536672, 4848598; 536669, 4848602; 536666, 4848607; 536662, 4848614; 536658, 4848617; 536654, 4848622; 536650, 4848625; 536645, 4848628; 536640, 4848626; 536638, 4848623; 536640, 4848618; 536643, 4848613; 536647, 4848605; 536652, 4848596; 536655, 4848590; 536657, 4848586; 536663, 4848584; 536669, 4848582; 536675, 4848580;

(iii) See paragraph (29)(iii) for a map showing critical habitat unit 3I.

(29) Unit 3J: Buckhead Creek, Lane County, Oregon.

(i) This unit totals 3.8 ha (9.3 ac) and is owned by the USFS. Buckhead Creek is a tributary flowing into the Middle Fork Willamette River at the northeast end of Lookout Point Reservoir in Lane County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 538138, 4847044; 538137, 4847035; 538128, 4847039; 538122, 4847041; 538118, 4847040; 538109, 4847040; 538105, 4847038; 538106, 4847032; 538113, 4847031; 538119, 4847032; 538126, 4847029; 538129, 4847025; 538128, 4847013; 538123, 4847001; 538120, 4846985; 538113, 4846970; 538108, 4846947; 538102, 4846919; 538092, 4846888; 538081, 4846854; 538071, 4846816; 538061, 4846782; 538055, 4846782; 538052, 4846787; 538055, 4846802; 538053, 4846821; 538047, 4846811; 538041, 4846802; 538044, 4846781; 538049, 4846775; 538046, 4846764; 538037, 4846768; 538031, 4846763; 538033, 4846775; 538033, 4846793; 538033, 4846807; 538038, 4846822; 538041, 4846834; 538049, 4846855; 538056, 4846894; 538051, 4846903; 538053, 4846916; 538058, 4846927; 538065, 4846941; 538066, 4846946; 538061, 4846944; 538056, 4846942; 538048, 4846936; 538038, 4846933; 538033, 4846933; 538022, 4846937; 538016, 4846936; 538011, 4846935; 538007, 4846937; 538003, 4846941; 538004, 4846947; 538007, 4846951; 538011, 4846954; 538015, 4846953; 538022, 4846950; 538028, 4846952; 538036, 4846955; 538045, 4846958; 538053, 4846959; 538061, 4846963; 538067, 4846970; 538072, 4846980; 538077, 4846990; 538080, 4847000; 538080, 4847013; 538081, 4847018; 538082, 4847040; 538082, 4847055; 538099, 4847055; 538112, 4847055; 538120, 4847055; 538134, 4847048; 538138, 4847044;

Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 537853, 4848143; 537863, 4848139; 537873, 4848135; 537889, 4848129; 537907, 4848123; 537925, 4848116; 537946, 4848106; 537968, 4848096; 537985, 4848085; 537996, 4848080; 538021, 4848066; 538035, 4848057; 538048, 4848049; 538058, 4848042; 538068, 4848035; 538078, 4848030; 538089, 4848023; 538102, 4848014; 538112, 4848007; 538120, 4847996; 538124, 4847987; 538133, 4847973; 538147, 4847961; 538159, 4847947; 538168, 4847928; 538179, 4847913; 538194, 4847901; 538208, 4847884; 538215, 4847877; 538237, 4847852; 538253, 4847837; 538266, 4847827; 538281, 4847806; 538297, 4847786; 538308, 4847767; 538311, 4847761; 538305, 4847754; 538281, 4847743; 538264, 4847737; 538251, 4847756; 538229, 4847789; 538198, 4847830; 538185, 4847854; 538178, 4847877; 538171, 4847890; 538160, 4847902; 538149, 4847918; 538139, 4847935; 538129, 4847948; 538118, 4847956; 538109, 4847971; 538102, 4847984; 538096, 4847990; 538083, 4848000; 538064, 4848010; 538045, 4848021; 538040, 4848031; 538032, 4848038; 538023, 4848044; 538013, 4848051; 538003, 4848048; 537985, 4848058; 537966, 4848067; 537959, 4848065; 537948, 4848069; 537936, 4848076; 537921, 4848083; 537903, 4848092; 537885, 4848098; 537872, 4848103; 537859, 4848107; 537846, 4848114; 537837, 4848120; 537827, 4848126; 537820, 4848134; 537822, 4848142; 537827, 4848146; 537833, 4848143; 537840, 4848140; 537842, 4848142; 537841, 4848146; 537837, 4848149; 537839, 4848152; 537845, 4848149; 537849, 4848147; 537853, 4848143;

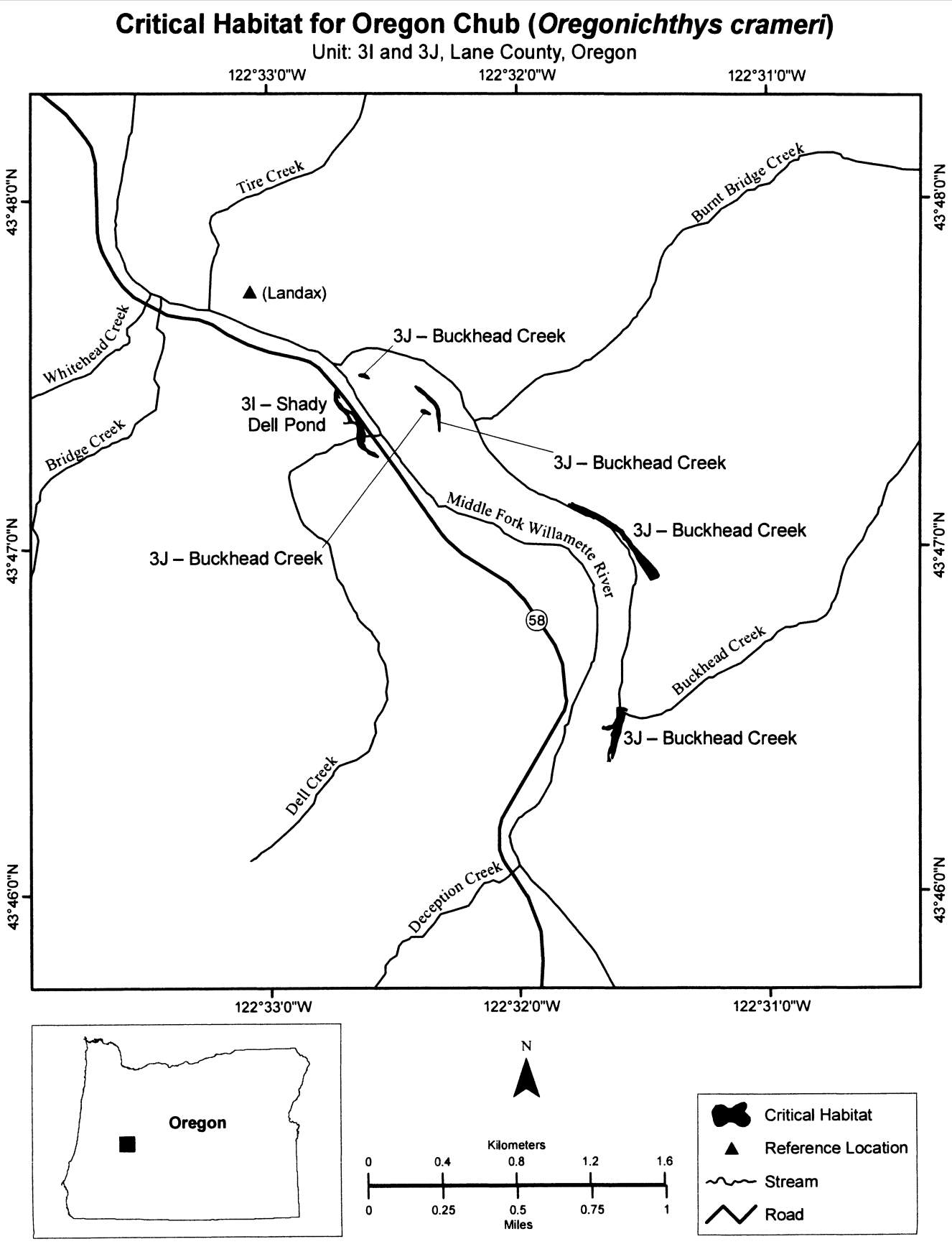
Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 537076, 4848628; 537077, 4848624; 537075, 4848621; 537064, 4848624; 537055, 4848627; 537050, 4848626; 537047, 4848623; 537041, 4848625; 537036, 4848629; 537031, 4848631; 537025, 4848638; 537030, 4848648; 537037, 4848649; 537048, 4848647; 537056, 4848643; 537063, 4848638; 537076, 4848628;

Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 537131, 4848537; 537127, 4848528; 537121, 4848532; 537119, 4848556; 537116, 4848587; 537112, 4848619; 537111, 4848643; 537102, 4848662; 537091, 4848676; 537068, 4848696; 537045, 4848721; 537022, 4848739; 537013, 4848747; 537000, 4848763; 536993, 4848769; 536999, 4848773; 537010, 4848767; 537024, 4848761; 537067, 4848723; 537103, 4848689; 537116, 4848670; 537127, 4848647; 537128, 4848621; 537131, 4848596; 537131, 4848576; 537131, 4848537;

Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 536751, 4848812; 536749, 4848809; 536747, 4848809; 536732, 4848812; 536719, 4848818; 536712, 4848820; 536695, 4848827; 536692, 4848831; 536694, 4848834; 536704, 4848839; 536714, 4848838; 536727, 4848837; 536734, 4848831; 536739, 4848830; 536747, 4848821; 536749, 4848817; 536751, 4848812;

(iii) Map of Units 3I and 3J of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–S



BILLING CODE 4310–55–C

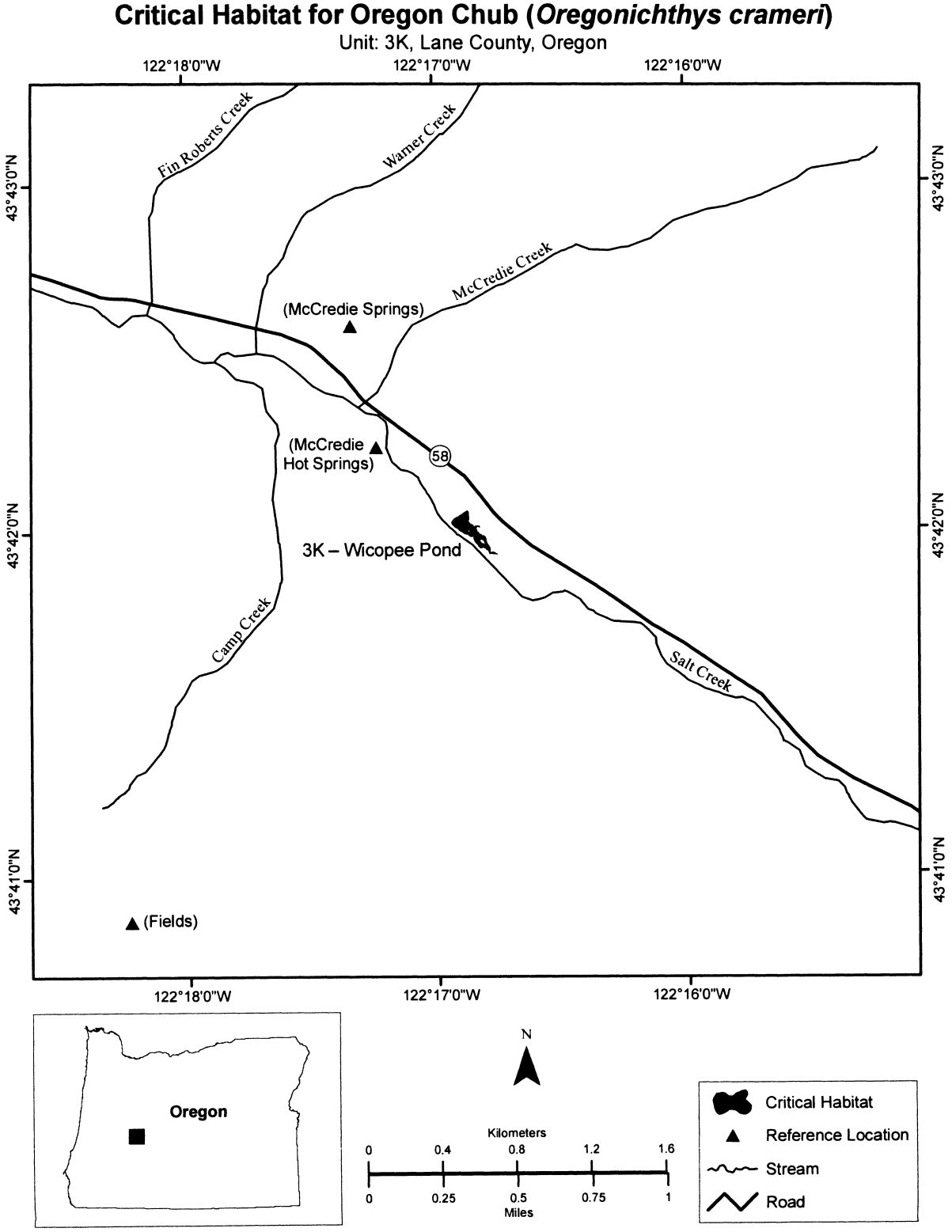
(30) Unit 3K: Wicopee Pond, Lane County, Oregon.

(i) This unit totals 1.4 ha (3.3 ac) and is owned by the USFS. The pond, a former borrow pit adjacent to Salt Creek in the upper Middle Fork Willamette River drainage, was created when a bridge crossing was constructed on a small logging road that crosses Salt Creek, along Highway 58 in Lane County, Oregon.

(ii) Land bounded by the following UTM Zone 10, NAD83 coordinates (E,N): 557923, 4838857; 557919, 4838854; 557919, 4838854; 557926, 4838841; 557935, 4838835; 557951, 4838829; 557948, 4838819; 557955, 4838814; 557958, 4838820; 557963, 4838824; 557971, 4838825; 557977, 4838824; 557982, 4838823; 557984, 4838817; 557978, 4838822; 557972, 4838823; 557970, 4838823; 557966, 4838816; 557963, 4838813; 557968, 4838803; 557970, 4838793; 557978, 4838789; 557977, 4838786; 557983, 4838780; 557994, 4838777; 557996, 4838772; 557997, 4838771; 558006, 4838770; 558018, 4838760; 558021, 4838741; 558026, 4838725; 558037, 4838714; 558041, 4838701; 558040, 4838682; 558058, 4838684; 558080, 4838674; 558079, 4838673; 558077, 4838674; 558068, 4838675; 558058, 4838674; 558049, 4838677; 558038, 4838677; 558037, 4838684; 558032, 4838695; 558022, 4838698; 558019, 4838705; 558006, 4838709; 558004, 4838715; 557997, 4838708; 557990, 4838708; 557986, 4838710; 557978, 4838715; 557976, 4838722; 557971, 4838727; 557965, 4838732; 557959, 4838742; 557954, 4838754; 557952, 4838763; 557956, 4838770; 557951, 4838778; 557947, 4838769; 557948, 4838766; 557935, 4838767; 557924, 4838776; 557918, 4838781; 557904, 4838782; 557898, 4838786; 557890, 4838791; 557877, 4838800; 557865, 4838811; 557859, 4838814; 557851, 4838819; 557846, 4838827; 557840, 4838832; 557834, 4838837; 557833, 4838844; 557834, 4838850; 557842, 4838858; 557854, 4838868; 557869, 4838875; 557878, 4838880; 557887, 4838885; 557902, 4838897; 557913, 4838905; 557919, 4838906; 557922, 4838902; 557923, 4838891; 557918, 4838889; 557920, 4838884; 557926, 4838876; 557923, 4838863; 557923, 4838857; and excluding land bound by 557921, 4838792; 557923, 4838788; 557932, 4838789; 557932, 4838793; 557931, 4838796; 557933, 4838803; 557929, 4838808; 557925, 4838805; 557922, 4838800; 557922, 4838796; 557922, 4838793; 557921, 4838792; and excluding land bound by 557990, 4838734; 557995, 4838729; 558006, 4838731; 558006, 4838730; 558009, 4838724; 558014, 4838720; 558022, 4838721; 558018, 4838722; 558015, 4838728; 558012, 4838742; 558007, 4838749; 557993, 4838754; 557987, 4838754; 557984, 4838747; 557986, 4838741; 557990, 4838734;

(iii) Map of Unit 3K of critical habitat for the Oregon chub *(Oregonichthys crameri)* follows:

BILLING CODE 4310–55–P



* * * * *

Dated: February 22, 2010.

Thomas L. Strickland.

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2010–4654 Filed 3–9– 10; 8:45 am]

BILLING CODE 4310–55–C

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 040205043–4043–01]

RIN 0648–XU86

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery of the South Atlantic; Closure

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS closes the commercial fishery for vermilion snapper in the exclusive economic zone (EEZ) of the South Atlantic. This closure is necessary to protect the vermilion snapper resource.

DATES: This rule is effective 12:01 a.m., local time, March 19, 2010, through June 30, 2010.

FOR FURTHER INFORMATION CONTACT: Catherine Bruger, telephone 727–824–5305, fax 727–824–5308, e-mail *Catherine.Bruger@noaa.gov*.

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the South Atlantic Fishery Management Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act by regulations at 50 CFR part 622.

The commercial quota for vermilion snapper in the South Atlantic is 315,523 lb (143,119 kg) for the current fishing period, January 1 through June 30, 2010, as specified in 50 CFR 622.42(e)(4)(ii).

Under 50 CFR 622.43(a), NMFS is required to close the commercial fishery for vermilion snapper when its quota has been reached, or is projected to be reached, by filing a notification to that effect with the Office of the **Federal Register**. NMFS has determined that the commercial quota for South Atlantic vermilion snapper will be reached by March 19, 2010. Accordingly, the commercial fishery for South Atlantic vermilion snapper is closed effective 12:01 a.m., local time, March 19, 2010, through June 30, 2010.

The operator of a vessel with a valid commercial vessel permit for South Atlantic snapper-grouper having vermilion snapper onboard must have landed and bartered, traded, or sold such vermilion snapper prior to 12:01 a.m., local time, March 19, 2010. During the closure, the bag limit and possession limits specified in 50 CFR 622.39(d)(1)(v) and (d)(2), respectively, apply to all harvest or possession of vermilion snapper in or from the South Atlantic EEZ, and the sale or purchase of vermilion snapper taken from the EEZ is prohibited. The prohibition on sale or purchase does not apply to sale or purchase of vermilion snapper that were harvested, landed ashore, and sold prior to 12:01 a.m., local time, March 19, 2010, and were held in cold storage by a dealer or processor. For a person on board a vessel for which a Federal commercial or charter vessel/headboat permit for the South Atlantic snapper-grouper fishery has been issued, the sale and purchase provisions of the commercial closure for vermilion snapper would apply regardless of whether the fish are harvested in state or Federal waters, as specified in 50 CFR 622.43(a)(5)(ii).

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA, (AA), finds that the need to immediately implement this action to close the fishery constitutes good cause to waive the requirements to provide prior notice and opportunity for public comment pursuant to the authority set forth in 5 U.S.C. 553(b)(B), as such procedures would be unnecessary and contrary to the public interest. Such procedures would be unnecessary because the rule itself has been subject to notice and comment, and all that remains is to notify the public of the closure.

Allowing prior notice and opportunity for public comment is contrary to the public interest because of the need to immediately implement this action to protect the fishery since the capacity of the fishing fleet allows for rapid harvest of the quota. Prior notice and opportunity for public comment would require time and would potentially result in a harvest well in excess of the established quota.

For the aforementioned reasons, the AA also finds good cause to waive the 30–day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

This action is taken under 50 CFR 622.43(a) and is exempt from review under Executive Order 12866.

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

Dated: March 5, 2010.

Alan D. Risenhoover,

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

[FR Doc. 2010–5128 Filed 3–5–10; 4:15 pm]

BILLING CODE S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 0912281446–0111–02]

RIN 0648–XT32

Fisheries Off West Coast States; Coastal Pelagic Species Fisheries; Annual Specifications

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement the annual harvest guideline (HG) and seasonal allocations for Pacific sardine in the U.S. exclusive economic zone (EEZ) off the Pacific coast for the fishing season of January 1, 2010, through December 31, 2010. These specifications have been determined according to the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). This rule is intended to conserve and manage Pacific sardine off the West Coast.

DATES: Effective March 10, 2010 through December 31, 2010.

ADDRESSES: Copies of the report "Assessment of Pacific Sardine Stock for U.S. Management in 2010" may be obtained from the Southwest Regional Office (see the Mailing address above).

FOR FURTHER INFORMATION CONTACT: Joshua Lindsay, Southwest Region, NMFS, (562) 980–4034.

SUPPLEMENTARY INFORMATION: The CPS FMP, which was implemented by publication of the final rule in the **Federal Register** on December 15, 1999 (64 FR 69888), divides management unit species into two categories: actively managed and monitored. Harvest guidelines for actively managed species (Pacific sardine and Pacific mackerel) are based on formulas applied to current biomass estimates. Biomass estimates are not calculated for species that are only monitored (jack mackerel, northern anchovy, and market squid).

During public meetings each year, the biomass for each actively managed species within the CPS FMP is

presented to the Pacific Fishery Management Council's (Council) CPS Management Team (Team), the Council's CPS Advisory Subpanel (Subpanel) and the Council's Scientific and Statistical Committee (SSC). At that time, the biomass, the overall HG and the status of the fisheries are reviewed and discussed. This information is then presented to the Council along with HG recommendations and comments from the Team, Subpanel and SSC. Following review by the Council and after hearing public comment, the Council makes its HG recommendation to NMFS.

In November 2009, the Council recommended, and NMFS then approved, a maximum HG of 72,039 mt for the 2010 Pacific sardine fishing year. This HG is based on a biomass estimate of 702,204 mt and the harvest control rule established in the CPS FMP. This HG is slightly higher than the HG for the 2009 fishing season, which was 66,932 mt. The Council also recommended, and NMFS approved, that 5,000 mt of the available 2010 ABC/HG be initially reserved for research activities that would be undertaken under a potential EFP. In 2009, 2,400 mt was subtracted from the total HG for an EFP. The Council will hear proposals and comments on any potential EFPs at its March Council meeting and make a recommendation to NMFS on the proposed EFP(s) for the 5,000 mt research set aside at their April 2010 Council meeting. NMFS will likely make a decision on whether or not to issue an EFP some time prior to the start of the second seasonal period (July 1, 2010). Any of the 5,000 mt that is not issued to an EFP will be rolled into the third allocation period's directed fishery. Any research set aside attributed to an EFP designed to be conducted during the closed fishing time in the second allocation period (prior to September 15), but not utilized, will roll into the third allocation period's directed fishery. Any research set aside attributed to an EFP designed to be conducted during closed fishing times in the third allocation, but not utilized, will not be re-allocated.

The Council recommended, and NMFS approved, that the remaining 67,039 mt (HG of 72,039 mt minus provisional 5,000 mt EFP set aside) be used as the initial overall fishing HG and be allocated across the seasonal periods established by Amendment 11 (71 FR 36999). The Council also recommended, and NMFS approved, an incidental catch set aside of 3,000 mt and a management uncertainty buffer of 4,000 mt. Subtracting this set aside from the initial overall HG establishes an initial directed harvest fishery of 60,039 mt and an incidental fishery of 3,000 mt. The purpose of the incidental fishery is to allow for the restricted incidental landings of Pacific sardine in other fisheries, particularly other CPS fisheries, if and when a seasonal directed fishery is closed.

The directed harvest levels and incidental set-aside are initially allocated across the three seasonal allocation periods in the following way: January 1–June 30, 22,463 mt is allocated for directed harvest with an incidental set aside of 1,000 mt; July 1–September 14, 25,861 mt is allocated for directed harvest with an incidental set aside of 1,000 mt; September 15–December 31, 11,760 mt is allocated for directed harvest with an incidental set aside of 1,000 mt. If during any of the seasonal allocation periods the applicable adjusted directed harvest allocation is projected to be taken, fishing is closed to directed harvest and only incidental harvest is allowed. For the remainder of the period, any incidental Pacific sardine landings are counted against that period's incidental set-aside. During times when only incidental landings of Pacific sardine are allowed, catch of Pacific sardine is constrained to a 30 percent by weight incidental catch rate when Pacific sardine are landed with other CPS so as to minimize the targeting of Pacific sardine. In the event that an incidental set aside is projected to be attained, all fisheries will be closed to the retention of Pacific sardine for the remainder of the period. If a set-aside is not fully attained or is exceeded in a given seasonal period, the directed harvest allocation in the following seasonal period is automatically adjusted to account for the discrepancy. Additionally, if during any seasonal period the directed harvest allocation is not fully attained or is exceeded, then the following period's directed harvest total is adjusted to account for this discrepancy as well.

If the total HG or these apportionment levels for Pacific sardine are reached or are expected to be reached, the Pacific sardine fishery will be closed via an appropriate rulemaking until it re-opens either per the allocation scheme or the beginning of the next fishing season. The Regional Administrator will publish a notice in the **Federal Register** announcing the date of such closures.

As stated above, the overall or maximum HG for the 2010 Pacific sardine fishing season is 72,039 mt.; 5,000 mt of this 72,039 mt is initially set aside for use under an Exempted Fishing Permit (EFP), if issued, leaving the remaining 65,732 mt as the initial commercial fishing HG. This HG is divided across the seasonal allocation periods in the following way: January 1–June 30, 22,463 mt is allocated for directed harvest with an incidental set-aside of 1,000 mt; July 1–September 14, 25,861 mt is allocated for directed harvest with an incidental set-aside of 1,000 mt; September 15–December 31, 11,760 mt is allocated for directed harvest with an incidental set-aside of 1,000 mt with an additional 4,000 mt set aside to buffer against reaching the overall HG.

On January 13, 2010, a proposed rule was published for this action that solicited public comments (75 FR 1745). No comments were received. For further background information on this action please refer to the preamble of the proposed rule (75 FR 1745, January 13, 2010).

Classification

The Administrator, Southwest Region, NMFS, determined that this final rule is necessary for the conservation and management of the CPS fishery and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

NMFS finds good cause pursuant to 5 U.S.C. 553(d)(3) to waive the 30–day delay in effectiveness for the establishment of the harvest specifications for the 2010 Pacific sardine fishing season. For the reasons set forth below, the immediate implementation of this measure is necessary for the conservation and management of the Pacific sardine resource. This rule establishes seasonal harvest allocations and the ability to restrict fishing when these allocations are approached or reached. These specified allocations are important mechanisms in preventing overfishing and managing the fishery at optimum yield while allowing fair and equitable opportunity to the resource by all sectors of the Pacific sardine fishery. A delay in effectiveness is likely to prevent the ability to the close the fishery when necessary and cause the fishery to exceed an in-season directed harvest level. These seasonal harvest levels are important mechanisms in preventing overfishing and managing the fishery at optimum yield. The established directed and incidental harvest allocations are designed to allow fair and equitable opportunity to the resource by all sectors of the Pacific sardine fishery and to allow access to other profitable CPS fisheries, such as squid and Pacific mackerel. During the 2009 fishing season, which had a similar HG as this 2010 season, the first allocation period was closed on

February 20, 2009. Although it has not been necessary to close the 2010 season as quickly, based on the most recent catch data, and best available information from the fishery, it is likely that it will be necessary to close the 2010 fishing season in the near future. Therefore, NMFS finds that there is good cause to waive the 30–day delay in effectiveness in this circumstance. To help keep the regulated community informed of this final rule NMFS will also announce this action through other means available, including fax, email, and mail to fishermen, processors, and state fishery management agencies. Additionally, NMFS will advise the CPS Advisory Subpanel, which is comprised of representatives from all sectors and regions of the sardine industry, including processors, fishermen, user groups, conservation groups and fishermen association representatives, of current landings as they become available and for the public at-large also post them on NMFS' Southwest Regional Office website, *http://swr.nmfs.noaa.gov/*.

This final rule is exempt from Office of Management and Budget review under Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would 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 (75 FR 1745) and is not repeated here.

No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

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

Dated: March 5, 2010.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2010–5151 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 75, No. 46
Wednesday, March 10, 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.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 319

[Docket No. APHIS-2009-0020]

RIN 0579-AD08

Removal of Varietal Restrictions on Apples from Japan

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the regulations that allow the importation of Fuji variety apples from Japan to allow all varieties of *Malus domestica* apples into the United States under the same conditions as those for Fuji variety apples. We have determined that the risk of introducing insects and diseases through the pathway of all varieties of *M. domestica* fresh apples to be very low under the mitigation measures presently in place for Fuji apples. This action would allow all varieties of *M. domestica* apples from Japan to be imported into the United States while continuing to protect against the introduction of quarantine pests.

DATES: We will consider all comments that we receive on or before May 10, 2010.

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

- Federal eRulemaking Portal: Go to (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2009-0020*) to submit or view comments and to view supporting and related materials available electronically.
- Postal Mail/Commercial Delivery: Please send two copies of your comment to Docket No. APHIS-2009-0020, Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road Unit 118, Riverdale, MD 20737-1238. Please state that your comment refers to Docket No. APHIS-2009-0020.

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

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

FOR FURTHER INFORMATION CONTACT: Ms. Claudia Ferguson, M.S., Regulatory Policy Specialist, PPQ, APHIS, 4700 River Road Unit 39, Riverdale, MD 20737-1231; (301) 734-0754.

SUPPLEMENTARY INFORMATION:

Background

The regulations in "Subpart–Fruits and Vegetables" (7 CFR 319.56-1 through 319.56-50, referred to below as the regulations) prohibit or restrict the importation of fruits and vegetables into the United States from certain parts of the world to prevent the introduction and dissemination of plant pests that are new to or not widely distributed within the United States.

The regulations in § 319.56-27 allow the importation of Fuji variety apples from Japan and the Republic of Korea if the apples are cold treated and then fumigated under the supervision of an Animal and Plant Health Inspection Service (APHIS) inspector for the peach fruit moth (*Carposina niponensis*), the yellow peach moth (*Conogethes punctiferalis*), and the fruit tree spider mite (*Tetranychus viennensis*), in accordance with 7 CFR part 305. The regulations also provide that the apples must be inspected upon completion of the cold treatment and fumigation, prior to export from Japan or the Republic of Korea, by an APHIS inspector and an inspector from the national plant protection organization (NPPO) of Japan or the Republic of Korea. The regulations also require the NPPO of the exporting country to enter into a trust fund agreement with APHIS in accordance with § 319.56-6 before APHIS will provide the services necessary for Fuji apples to be imported into the United States from Japan or the Republic of Korea.

The Japanese NPPO has requested that APHIS amend the regulations in § 319.56-27 to allow any variety of *M. domestica* apples to be imported into the United States under the conditions currently prescribed for Fuji variety apples. As part of our evaluation of Japan's request, we prepared a commodity import evaluation document (CIED, February 2009). The CIED documents our review of the data collected from 1994 to 2008 regarding pest interceptions of Fuji apples from Japan and our evaluation of any additional potential risks that might be associated with the importation of all varieties of *M. domestica* apples into the United States from Japan based on the collected data. Copies of the CIED may be obtained from the person listed under **FOR FURTHER INFORMATION CONTACT**. The CIED may also be viewed on the Internet on the Regulations.gov Web site or in our reading room (see **ADDRESSES** above for a link to Regulations.gov and information on the location and hours of the reading room).

As noted in the CIED, no pests of concern have been reported from the preclearance program in Japan, and no quarantine pests on commercial cargo of Fuji apples have been intercepted, reported, or identified at U.S. ports of entry from 1994 to 2008. Treatment of the apples and inspection of packed fruit prior to export from Japan by an APHIS inspector and an inspector from the Japanese NPPO during preclearance program activities both reduce the probability that pests will follow the pathway of fresh apples.

APHIS considers it highly unlikely that any other varieties of *M. domestica* apples would have a significantly different pest host status than Fuji variety apples given that the varieties are of the same species. The treatment and inspection required by the regulations have been effective in mitigating the pest risks at origin for Fuji variety apples. Consequently, APHIS has concluded that the risk of introducing insects and diseases through the pathway of all varieties of *M. domestica* fresh apples to be very low under the mitigation measures presently in place for Fuji apples.

Based on the evidence presented in the CIED, we have determined that the measures currently in place for Fuji

apples are effective and appropriate to manage pest risks associated with all varieties of *M. domestica* apples from Japan. Therefore, we propose to amend the regulations to allow the entry of all varieties of *M. domestica* apples from approved areas in Japan to the United States under the provisions of § 319.56-27.

Specifically, we would revise the introductory text of § 319.56-27 to indicate that any variety of *M. domestica* apples may be imported from Japan under the conditions in § 319.56-27. We would also remove specific references to Fuji variety apples in the section heading and the regulatory text and instead refer generally to apples. We would also revise the term "national plant protection agency" to read "national plant protection organization," to make the regulations consistent with the International Glossary of Phytosanitary Terms (International Standards for Phytosanitary Measures No. 5).[1]

Executive Order 12866 and Regulatory Flexibility Act

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

For this proposed rule we have prepared an economic analysis. The economic analysis supports our conclusion that allowing imports of all varieties of *M. domestica* apples from Japan into the United States would have minimal economic impact on U.S. entities, large or small. Although the Fuji apple is the most common variety grown in Japan, it constituted only 0.1 percent of U.S. apple imports in 2008. Allowing entry of other *M. domestica* varieties is expected to change the quantity of apple imports from Japan only minimally. The wide price differential between apples grown in Japan and in the United States suggests that apples imported from Japan are not a close substitute for the principal U.S.-grown apple varieties. Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

The full economic analysis may be viewed on the Regulations.gov Web site or in our reading room. (Instructions for accessing Regulations.gov and information on the location and hours of the reading room are provided under the heading **ADDRESSES** at the beginning of this proposed rule.) In addition, copies may be obtained by calling or writing to the individual listed under **FOR FURTHER INFORMATION CONTACT**.

Executive Order 12988

This proposed rule would allow all varieties of *M. domestica* apples to be imported into the United States from Japan. If this proposed rule is adopted, State and local laws and regulations regarding all varieties of *M. domestica* apples imported under this rule would be preempted while the fruit is in foreign commerce. Fresh fruits are generally imported for immediate distribution and sale to the consuming public and would remain in foreign commerce until sold to the ultimate consumer. The question of when foreign commerce ceases in other cases must be addressed on a case-by-case basis. If this proposed rule is adopted, no retroactive effect will be given to this rule, and this rule will not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This proposed rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 7 CFR Part 319

Coffee, Cotton, Fruits, Imports, Logs, Nursery stock, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Rice, Vegetables.

Accordingly, we propose to amend 7 CFR part 319 as follows:

PART 319—FOREIGN QUARANTINE NOTICES

1. The authority citation for part 319 continues to read as follows:

Authority: 7 U.S.C. 450, 7701-7772, and 7781-7786; 21 U.S.C. 136 and 136a; 7 CFR 2.22, 2.80, and 371.3.

2. Section 319.56-27 is amended as follows:

a. By revising the section heading and the introductory text to read as set forth below.

b. In paragraphs (b) and (c), by removing the words "Fuji variety" each time they occur.

c. In paragraphs (b) and (c), by removing the word "agency" each time it occurs and adding the word "organization" in its place.

§ 319.56-27 Apples from Japan and the Republic of Korea.

Any variety of *Malus domestica* apples may be imported into the United States from Japan, and Fuji variety apples may be imported into the United States from the Republic of Korea, only in accordance with this section and all other applicable provisions of this subpart.

* * * * *

Done in Washington, DC, this 4th day of March 2010.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2010–5114 Filed 3–9–10: 12:46 pm]

BILLING CODE 3410–34–S

[1] To view the glossary on the Internet, go to (*http://www.ippc.int/IPP/En/default.jsp*) and click on the "Adopted ISPMs" link under the "Standards (ISPMs)" heading.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–21242; Directorate Identifier 2005–NE–09–AD]

RIN 2120–AA64

Airworthiness Directives; Turbomeca Arriel 1B, 1D, 1D1, and 1S1 Turboshaft Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to supersede an existing airworthiness directive (AD) for certain Turbomeca Arriel 1B, 1D, 1D1, and 1S1 turboshaft engines. That AD requires initial and repetitive relative position checks of the gas generator 2nd stage turbine blades on Turbomeca Arriel 1B (that incorporate Turbomeca Modification (mod) TU 148), Arriel 1D, 1D1, and 1S1 turboshaft engines that do not incorporate mod TU 347. That AD also requires initial and repetitive replacements of 2nd stage turbines on Arriel 1B, 1D, and 1D1 engines. This proposed AD would require lowering the repetitive threshold for relative position checks on Arriel 1B engines. This proposed AD would also require lowering the initial and repetitive thresholds for replacement of 2nd stage turbines on Arriel 1B, 1D, and 1D1 engines. This proposed AD results from reports of new cases of failures of 2nd stage turbine blades since we issued AD 2008–07–01. We are proposing this AD to prevent the failure of 2nd stage turbine blades, which could result in an uncommanded in-flight engine

shutdown, and a subsequent forced autorotation landing or accident.

DATES: We must receive any comments on this proposed AD by April 9, 2010.

ADDRESSES: Use one of the following addresses to comment on this proposed AD.

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Contact Turbomeca, 40220 Tarnos, France; telephone (33) 05 59 74 40 00, fax (33) 05 59 74 45 15 for the service information identified in this proposed AD.

FOR FURTHER INFORMATION CONTACT: Kevin Dickert, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *kevin.dickert@faa.gov;* telephone (781) 238–7117, fax (781) 238–7199.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2005–21242; Directorate Identifier 2005–NE–09–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

We 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 with FAA personnel concerning this proposed AD. Using the search function of the Web site, anyone can find and read the comments in any of our dockets, including, if provided, the name of the individual who sent the comment (or signed the comment on behalf of an association, business, labor union, etc.). You may review the DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

Examining the AD Docket

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

Discussion

On March 17, 2008, the FAA issued AD 2008–07–01, Amendment 39–15442 (73 FR 15866, March 26, 2008). That AD requires initial and repetitive relative position checks of the gas generator 2nd stage turbine blades on Turbomeca Arriel 1B (that incorporate mod TU 148), 1D, 1D1, and 1S1 turboshaft engines that do not incorporate mod TU 347. That AD also requires initial and repetitive replacements of 2nd stage turbines on 1B, 1D, and 1D1 engines. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, recently notified us that an unsafe condition likely exists on Turbomeca Arriel 1B, 1D, 1D1, and 1S1 turboshaft engines.

Since AD 2008–07–01 Was Issued

Since AD 2008–07–01 was issued, EASA reports that in engines that do not incorporate mod TU 347, new cases of gas generator 2nd stage turbine blade release have occurred, at lower blade service lives than previously reported. EASA issued AD 2009–0236, dated October 29, 2009, to optimize the 2nd stage turbine blade life limit and the replacement allowances for turbines currently in service in Europe, based on parts availability while keeping the risk level within acceptable limits.

Relevant Service Information

We have reviewed and approved the technical contents of Turbomeca Mandatory Service Bulletin (MSB) No. A292 72 0807, Version E, dated October 29, 2009, that describes procedures for the relative position check of 2nd stage turbine blades, and replacement of 2nd stage turbines that do not incorporate mod TU 347, with inspected 2nd stage turbines, or with 2nd stage turbines that incorporate mod TU 347, on Arriel 1B, 1D, and 1D1 engines. We have also reviewed and approved the technical contents of Turbomeca MSB No. A292 72 0810, Version C, dated July 24, 2009, that describes procedures for the relative position check of 2nd stage turbine blades on Arriel 1S1 engines. EASA classified these MSBs as mandatory and issued AD 2009–0236, dated October 29, 2009, to ensure the airworthiness of these Turbomeca Arriel engines in Europe.

Bilateral Agreement Information

This engine model is manufactured in France, and is type certificated for operation in the United States under the provisions of Section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Under this bilateral airworthiness agreement, EASA kept us informed of the situation described above. We have examined the findings of the EASA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

FAA's Determination and Requirements of the Proposed AD

We have evaluated all pertinent information and identified an unsafe condition that is likely to exist or develop on other products of this same type design. We are proposing this AD supersedure, which would require lowering the repetitive threshold for relative position checks on Arriel 1B engines. This proposed AD would also require lowering the initial and repetitive thresholds for replacement of 2nd stage turbines on Arriel 1B, 1D, and 1D1 engines. The proposed AD would require that you do these actions using the service information described previously.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 587 Turbomeca Arriel 1B, 1D, 1D1, and 1S1 turboshaft engines installed on products of U.S. registry. We also estimate that it would take about 2 work-hours per engine to perform one inspection, and about 40 work-hours per engine to replace the gas turbine discs and blades. The average labor rate is $85 per work-hour. Required parts would cost about $54,000 per engine. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $33,793,590.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I,

section 106, describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the Agency's authority.

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by removing Amendment 39–15442 (73 FR 15866, March 26, 2008) and by adding a new airworthiness directive, to read as follows:

Turbomeca: Docket No. FAA–2005–21242; Directorate Identifier 2005–NE–09–AD.

Comments Due Date

(a) The Federal Aviation Administration (FAA) must receive comments on this airworthiness directive (AD) action by April 9, 2010.

Affected ADs

(b) This AD supersedes AD 2008–07–01, Amendment 39–15442.

Applicability

(c) This AD applies to Turbomeca Arriel 1B (that incorporate Turbomeca Modification (mod) TU 148), Arriel 1D, 1D1, and 1S1 engines that do not incorporate mod TU 347. Arriel 1B engines are installed on, but not limited to, Eurocopter AS–350B and AS–350BA "Ecureuil" helicopters. Arriel 1D engines are installed on, but not limited to, Eurocopter France AS–350B1 "Ecureuil" helicopters. Arriel 1D1 engines are installed on, but not limited to, Eurocopter France AS–350B2 "Ecureuil" helicopters. Arriel 1S1 engines are installed on, but not limited to, Sikorsky Aircraft Corporation S–76C helicopters.

Unsafe Condition

(d) This AD results from reports of new cases of failures of 2nd stage turbine blades since we issued AD 2008–07–01. We are issuing this AD to prevent the failure of 2nd stage turbine blades, which could result in an uncommanded in-flight engine shutdown, and a subsequent forced autorotation landing or accident.

Compliance

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

Initial Relative Position Check of 2nd Stage Turbine Blades

(f) Do an initial relative position check of the 2nd stage turbine blades using the Turbomeca Mandatory Service Bulletins (MSBs) specified in the following Table 1. Do the check before reaching any of the intervals specified in Table 1 or within 50 hours time-in-service after the effective date of this AD, whichever occurs later.

TABLE 1—INITIAL AND REPETITIVE RELATIVE POSITION CHECK INTERVALS OF 2ND STAGE TURBINE BLADE

Turbomeca engine model	Initial relative position check interval	Repetitive interval	Mandatory service bulletin
Arriel 1B (that incorporate mod TU 148), 1D1, and 1D.	Within 1,200 hours time-since-new (TSN) or time-since-overhaul (TSO) or 3,500 cycles-since-new (CSN) or cycles-since-overhaul (CSO), whichever occurs earlier.	Within 150 hours time-in-service-since-last-relative-position-check (TSLRPC).	A292 72 0807, Version E, dated October 29, 2009, paragraphs 2B(1)(a) and (b), or 2B(2)(a).
Arriel 1S1	Within 1,200 hours TSN or TSO or 3,500 CSN or CSO, whichever occurs earlier.	Within 150 hours TSLRPC	A292 72 0810, Version C, dated July 24, 2009, paragraphs 2B(1)(a) and (b), or 2B(2)(a), (b), and (c).

Repetitive Relative Position Check of 2nd Stage Turbine Blades

(g) Recheck the relative position of 2nd stage turbine blades at the TSLRPC intervals specified in Table 1 of this AD, using the Turbomeca MSBs indicated.

Credit for Previous Relative Position Checks

(h) Credit is allowed for previous relative position checks of 2nd stage turbine blades done using the following Turbomeca MSBs:

(1) MSB No. A292 72 0263, Update Nos. 1 through 5.

(2) MSB No. A292 72 0807, Original, and Update No. 1 through Version D.

(3) MSB No. A292 72 0809, Update No. 1.

(4) MSB No. A292 72 0810, Original, and Version A through Version B.

Initial Replacement of 2nd Stage Turbines on Arriel 1B Engines

(i) Initially replace the Arriel 1B 2nd stage turbine disk and blades with an inspected 2nd stage turbine that does not incorporate mod TU 347 and is fitted with new blades or with a 2nd stage turbine that incorporates

mod TU 347, using Turbomeca MSB No. A292 72 0807, Version E, dated October 29, 2009, paragraphs 2B(1)(c) or (d), or 2B(2)(b) or (c), at the following times:

(1) Replace before further flight on engines with a 2nd stage turbine disk having accumulated more than 2,200 hours TIS since-new or since-last-inspection, whichever occurs later, or with 2nd stage turbine blades that have accumulated more than 3,000 hours TIS since-new.

(2) For engines with 2nd stage turbine blades having accumulated on the effective date of this AD, more than 1,800 hours TIS since-new, but 3,000 or fewer hours TIS since-new, replace before reaching any of the following:

(i) 400 hours TIS from the effective date of this AD, or

(ii) 3,000 hours TIS since-new on the 2nd stage turbine blades, or

(iii) 2,200 hours TIS since-new or since-last-inspection, whichever occurs later, on the 2nd stage turbine disk.

(3) For engines with 2nd stage turbine blades having accumulated on the effective date of this AD, more than 900 hours TIS since-new, but 1,800 or fewer hours TIS since-new, replace before reaching any of the following:

(i) 800 hours TIS from the effective date of this AD, or

(ii) 2,200 hours TIS since-new or since-last-inspection, whichever occurs later, on the 2nd stage turbine disk.

(4) For engines with 2nd stage turbine blades having accumulated on the effective date of this AD, 900 or fewer hours TIS since-new, replace before the 2nd stage turbine blades have accumulated 1,200 hours TIS since-new.

Repetitive Replacements of 2nd Stage Turbines on Arriel 1B Engines

(j) Thereafter, for 2nd stage turbines that do not incorporate mod TU 347, replace the 2nd stage turbine disk and blades before the blades have accumulated 1,200 hours TIS since-new.

Initial Replacement of 2nd Stage Turbines on Arriel 1D and 1D1 Engines

(k) Initially replace the Arriel 1D and 1D1 2nd stage turbine disk and blades with an inspected turbine that does not incorporate mod TU 347 and is fitted with new blades or with a turbine that incorporates mod TU 347, using Turbomeca MSB No. A292 72 0807, Version E, dated October 29, 2009, paragraphs 2B(1)(c) or (d), or 2B(2)(b) or (c), at the following times:

(1) Replace before further flight on engines with a 2nd stage turbine disk having accumulated more than 1,500 hours TIS since-new or since-last-inspection, whichever occurs later, or with 2nd stage turbine blades having accumulated more than 1,500 hours TIS since-new.

(2) For engines with 2nd stage turbine blades having accumulated on the effective date of this AD, more than 900 hours TIS since-new, but 1,500 or fewer hours TIS since-new, replace before the 2nd stage turbine blades have accumulated 1,500 hours TIS since-new, or before the 2nd stage turbine disk has accumulated 1,500 hours TIS since-new, whichever occurs first.

(3) For engines with 2nd stage turbine blades having accumulated on the effective date of this AD, 900 or fewer hours TIS since-new, replace before the 2nd stage turbine blades have accumulated 1,200 hours TIS since-new.

Repetitive Replacements of 2nd Stage Turbines on Arriel 1D and 1D1 Engines

(l) Thereafter, for 2nd stage turbines that do not incorporate mod TU 347, replace the 2nd stage turbine disk and blades before the blades have accumulated 1,200 hours TIS since-new.

Relative Position Check Continuing Compliance Requirements

(m) All 2nd stage turbines, including those that are new or overhauled, must continue to comply with the actions specified in paragraphs (f) and (g) of this AD, unless mod TU 347 has been incorporated.

Optional Terminating Action

(n) Installing a new turbine, P/N 0 292 25 039 0, (incorporation of mod TU 347) terminates the requirements to perform the repetitive actions specified in paragraphs (g), (j), and (l) of this AD.

Alternative Methods of Compliance

(o) The Manager, Engine Certification Office, has the authority to approve alternative methods of compliance for this AD if requested using the procedures found in 14 CFR 39.19.

Related Information

(p) The EASA airworthiness directive 2009–0236, dated October 29, 2009, also addresses the subject of this AD.

(q) Contact Kevin Dickert, Aerospace Engineer, Engine Certification Office, FAA, Engine and Propeller Directorate, 12 New England Executive Park, Burlington, MA 01803; e-mail: *kevin.dickert@faa.gov;* telephone (781) 238–7117, fax (781) 238–7199, for more information about this AD.

Issued in Burlington, Massachusetts, on March 1, 2010.

Thomas A. Boudreau,

Acting Manager, Engine and Propeller Directorate, Aircraft Certification Service.

[FR Doc. 2010–5028 Filed 3–9–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 234

[Docket No. DOT–OST–2010–0039]

RIN No. 2105–AE00

Enhancing Airline Passenger Protections: Response to Requests To Extend Compliance Date

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Transportation is proposing to extend by 45 days, or until June 14, 2010, the compliance date of the provision in its final rule entitled "Enhancing Airline Passenger Protections," published December 30, 2009, and effective April 29, 2010, that requires airlines to publish flight delay information on their Web sites. This proposal is in response to the petition of the Air Transport Association of America (ATA), the Regional Airline Association (RAA) and the Air Carrier Association of America (ACAA) for an additional 90 days time for airlines to comply with the requirement to display flight delay data on Web sites in view of the extensive changes to carriers' reporting systems that are necessitated by the rule and their contention that completion of these tasks is not possible by April 29, 2010, the current effective date of the requirement. The Department acknowledges that additional time to comply with the posting of flight delay information on the carriers' Web sites may be warranted to ensure the posting of complete and accurate information but is not persuaded that the full 90 days requested by the carrier associations is needed. Therefore, this NPRM proposes to extend the compliance date for the provision in question for an additional 45 days, from April 29, 2010, to June 14, 2010.

DATES: Comments on amending the final rule published December 30, 2009, at 74 FR 68983, effective April 29, 2010, should be filed by March 25, 2010.

ADDRESSES: You may file comments identified by the docket number DOT–OST–2010–0039 by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE., Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave., SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

Instructions: You must include the agency name and docket number DOT–OST–2010–0039 or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comment. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of all comments

received in any of our dockets by the name of the individual submitting the comment (or signing the comment if submitted on behalf of an association, a business, a 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://DocketsInfo.dot.gov.*

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

FOR FURTHER INFORMATION CONTACT: Blane A. Workie, Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, U.S. Department of Transportation, 1200 New Jersey Ave., SE., Washington, DC 20590, 202–366–9342 (phone), 202–366–7152 (fax), *blane.workie@dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION: On December 30, 2009, the Department of Transportation published a final rule in the **Federal Register** (74 FR 68983), titled the "Enhancing Airline Passenger Protections" final rule that, among other things, requires certificated air carriers that account for at least 1 percent of domestic scheduled passenger revenues (reporting carriers) to provide certain flight delay data on their websites. Under the rule, a reporting carrier must display on its Web site flight delay information for each flight it operates and for each flight its U.S. code-share partners operate for which schedule information is available. More specifically, the rule requires that reporting carriers provide on their websites the following on-time performance information: (1) Percentage of arrivals that were on time—i.e., within 15 minutes of scheduled arrival time; (2) the percentage of arrivals that were more than 30 minutes late (including special highlighting if the flight was late more than 50 percent of the time); and (3) the percentage of flight cancellations if 5 percent or more of the flight's operations were canceled in the month covered. As published, the effective date of the rule is April 29, 2010.

The Air Transport Association of America (ATA), the Regional Airline Association (RAA) and the Air Carrier Association of America (ACAA) have requested that the Department of Transportation extend the compliance time for publishing flight delay information on airlines' websites by 90 days. The carrier associations state that the compliance date of April 29, 2010, is unworkable because of the extensive changes to carrier reporting systems and internet displays needed to comply with the rule. ATA asserts that, on average, each carrier will need to expend 1550 hours to comply with the new disclosure requirements. ATA explains that this work involves a number of company disciplines and that each area of work must be completed in succession. For example, according to ATA, the work to ensure compliance with the flight time disclosure requirements in the rule must be completed in a particular order: Each carrier must first design changes based on its current data capabilities, which on average will take approximately 415 hours; once the design is completed, programming changes, which on average will take approximately 560 hours, will need to be done; the testing period once programming is completed will then take on average approximately 445 hours; and finally the deployment process, once testing is completed, will take on average approximately 130 hours. ATA points out that, during the past month, while some work has began, carriers have spent the majority of the time determining the new regulatory requirements including seeking clarification on aspects of the rule and identifying the system changes that are needed in order to begin the first phase of system design. ATA also calls attention to the fact that delays at one carrier will impact the compliance schedule of all of its domestic code-share partners because the rule requires reporting carriers to post flight delay information not only for each flight it operates but also for each flight its U.S. code-share partners operate for which schedule information is available. Some of the code-share partners of the reporting carriers, it is noted, do not report on-time performance data to the Department. This will likely necessitate the reporting carriers collecting the on-time performance data for these carriers through third party entities. In addition, ATA notes that a number of U.S. carriers are discussing the possibility of creating and implementing an International Air Transport Association (IATA) standard for displaying code-share information to be shared among carriers, but that such standardization is likely to require a minimum 60-day approval process once the data standards are defined. For these reasons, ATA asserts that carriers need additional time to fulfill the Department's goal of providing accurate flight delay information for the public. Interested parties can read the carrier associations' requests to extend the compliance date in their entirety at DOT–OST–2010–0039.

The Department tentatively agrees that some extension of time in the compliance date for publishing flight delay data on airlines' Web sites may be warranted, but does not believe that a 90-day extension is justified. Instead, the Department is proposing to revise 14 CFR 234.11 to extend the compliance date of sections 234.11(b) and (c) by an additional 45 days until June 14, 2010. We believe this revised compliance date will provide the airlines adequate time to comply with the requirement to provide certain flight delay data on their Web sites. We emphasize that this proposed extension of time is limited to that portion of our "Enhancing Airline Passenger Protections" rule described above dealing with publication on carrier websites of flight delay data. It does not affect any other provision in the "Enhancing Airline Passenger Protections" rule, including the provision requiring U.S. carriers to allow passengers on domestic flights to deplane after three hours on the tarmac subject to exceptions for safety, security or ATC considerations, and the compliance date for those provisions remains April 29, 2009. In proposing the June 14, 2010, compliance date for the requirements pertaining to publishing delay data on carriers' websites, the Department is balancing the benefit of having accurate and complete flight delay data available to consumers with the capability of airlines to comply with the additional requirements being imposed upon them in a reasonable timeframe. We are specifically inviting comment on the issue of the proposed change in the compliance date. Is a 45-day extension too long or too short? We are not convinced at this juncture that a 90-day extension is necessary and invite carriers to provide evidence to the contrary in their comments on this proposal.

The Department is providing a very limited comment period on this proposal because the issue on which comment is sought is limited to a change in the compliance date of only a small portion of the "Enhancing Airline Passenger Protections" final rule. Additionally, the final rule has an effective date of April 29, 2010, less than two months from today. We believe that, under these circumstances, fifteen days will provide the public with meaningful participation in the regulatory process and enable the Department to review the comments submitted and issue a final rule on this matter sufficiently before April 29, 2010, to permit the air carriers to

efficiently complete the tasks necessitated by the rule.

Regulatory Analyses and Notices

A. Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

This rulemaking action is not a significant regulatory action under Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

B. Regulatory Flexibility Act

Pursuant to section 605 of the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), DOT certifies that this rulemaking will not have a significant impact on a substantial number of small entities. The NPRM would impose no duties or obligations on small entities.

C. Executive Order 13132 (Federalism)

This action will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore will not have federalism implications.

D. Executive Order 13084

This notice has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 ("Consultation and Coordination with Indian Tribal Governments"). Because the provision on which we are seeking comment would not significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13084 do not apply.

E. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that DOT consider the impact of paperwork and other information collection burdens imposed on the public and, under the provisions of PRA section 3507(d), obtain approval from the Office of Management and Budget (OMB) for each collection of information it conducts, sponsors, or requires through regulations. DOT has determined that there are no new information collection requirements associated with this NPRM. The NPRM merely proposes to provide an additional 45 days to comply with a regulatory provision whose paperwork impact has already been analyzed by the Department.

F. Unfunded Mandates Reform Act

The Department has determined that the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this rulemaking.

Issued this 5th day of March 2009, in Washington, DC.

Ray LaHood,

Secretary of Transportation.

List of Subjects in 14 CFR Part 234

Air carriers, Consumer protection, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Department proposes to amend the final rule published December 30, 2009, at 74 FR 68983, effective April 29, 2010, amending Title 14, Chapter II, Subchapter A, part 234, as follows:

PART 234—AIRLINE SERVICE QUALITY PERFORMANCE REPORTS

1. The authority citation for Part 234 continues to read as follows:

Authority: 49 U.S.C. 329 and chapters 401 and 417.

2. In the final rule published December 30, 2009, at 74 FR 68983, effective April 29, 2010, § 234.11 is amended by adding paragraph (d) to read as follows:

§ 234.11 Disclosure to consumers.

* * * * *

(d) A reporting carrier must meet the requirements of paragraphs (b) and (c) of this section by June 14, 2010.

[FR Doc. 2010–5244 Filed 3–9–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

28 CFR Part 115

[Docket No. OAG–131; AG Order No. 3143–2010]

RIN 1105–AB34

National Standards To Prevent, Detect, and Respond to Prison Rape

AGENCY: Department of Justice.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Department of Justice (Department) is reviewing national standards for enhancing the prevention, detection, and response to sexual abuse in confinement settings that were prepared by the National Prison Rape Elimination Commission (Commission) pursuant to the Prison Rape Elimination Act of 2003 (PREA) and recommended by the Commission to the Attorney General. The Department is issuing this Advance Notice of Proposed Rulemaking to solicit public input on the Commission's proposed national standards and to receive information useful to the Department in publishing a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape, as mandated by PREA.

DATES: Written comments must be postmarked on or before May 10, 2010, and electronic comments must be sent on or before midnight Eastern Time May 10, 2010.

ADDRESSES: To ensure proper handling of comments, please reference "Docket No. OAG–131" on all written and electronic correspondence. Written comments being sent via regular or express mail should be sent to Robert Hinchman, Senior Counsel, Office of Legal Policy, Department of Justice, 950 Pennsylvania Avenue, NW., Room 4252, Washington, DC 20530. Comments may also be sent electronically through *http://www.regulations.gov* using the electronic comment form provided on that site. An electronic copy of this document is also available at the *http://www.regulations.gov* Web site. The Department will accept attachments to electronic comments in Microsoft Word, WordPerfect, Adobe PDF, or Excel file formats only. The Department will not accept any file formats other than those specifically listed here.

Please note that the Department 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. 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: Robert Hinchman, Senior Counsel, Office of Legal Policy, Department of Justice, 950 Pennsylvania Avenue, NW., Room 4252, Washington, DC 20530; telephone: (202) 514–8059. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: *Posting of Public Comments:* Please note that all comments received are considered part of the public record and made available

for public inspection online at *www.regulations.gov* and in the Department'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 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 INFORMATION" 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 Department'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 instructions at the **FOR FURTHER INFORMATION CONTACT** caption.

Background

The Prison Rape Elimination Act of 2003, 42 U.S.C. 15601 *et seq.,* requires the Attorney General to promulgate regulations that adopt national standards for the detection, prevention, reduction, and punishment of prison rape. PREA established the Commission to carry out a comprehensive legal and factual study of the penological, physical, mental, medical, social, and economic impacts of prison rape in the United States, and to provide to the Attorney General and the Secretary of Health and Human Services national standards for enhancing the detection, prevention, reduction, and punishment of prison rape. The Commission published its recommended national standards in a report dated June 23, 2009. The Commission's report and recommended national standards are available at *http://www.ncjrs.gov/pdffiles1/226680.pdf*. The Commission set forth four sets of recommended national standards for eliminating prison rape and other forms of sexual abuse applicable to (1) Adult prisons and jails, including facilities with immigration detainees; (2) juvenile facilities; (3) community corrections; and (4) lockups (i.e., temporary holding facilities). The Commission's proposed standards apply to federal, state, and local correctional and detention facilities. The standards developed by the Commission for each category of confinement facility address prevention and response planning; prevention; detection and response; and monitoring. Each standard developed by the Commission contains requirements that the Commission believes should be mandatory. Accompanying each standard is an assessment checklist, which is not considered mandatory by the Commission but is designed as a tool to provide agencies and facilities with examples of how to meet the requirements of the standards. The Commission's assessment checklists, along with a glossary of terms and discussion sections providing explanations for the rationale of the standards and, in some cases, guidance for achieving compliance, are available at *http://www.ncjrs.gov/pdffiles1/226682.pdf* (adult prisons and jails), *http://www.ncjrs.gov/pdffiles1/226684.pdf* (juvenile facilities), *http://www.ncjrs.gov/pdffiles1/226683.pdf* (community corrections), and *http://www.ncjrs.gov/pdffiles1/226685.pdf* (lockups).

Pursuant to PREA, the final rule adopting national standards "shall be based upon the independent judgment of the Attorney General, after giving due consideration to the recommended national standards provided by the Commission * * * and being informed by such data, opinions, and proposals that the Attorney General determines to be appropriate to consider." 42 U.S.C. 15607(a)(2). PREA expressly mandates that the Department shall not establish a national standard "that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities." 42 U.S.C. 15607(a)(3). The Department "may, however, provide a list of improvements for consideration by correctional facilities." 42 U.S.C. 15607(a)(3).

PREA Working Group

The Attorney General has established a PREA Working Group to review each of the Commission's proposed standards and to prepare a draft final rule. The Working Group includes representatives from a wide range of Department components, including the Bureau of Justice Assistance, the Bureau of Justice Statistics, the Federal Bureau of Prisons, the Civil Rights Division, the National Institute of Corrections, the National Institute of Justice, the Office of Legal Policy, the Office of Legislative Affairs, the Office of Juvenile Justice and Delinquency Prevention, the Office of Justice Programs, the Office for Victims of Crime, and the Office on Violence Against Women. The Working Group is completing an in-depth initial review of the standards proposed by the Commission, and is currently examining whether the Department may be able to implement certain standards on an interim basis before a final rule is published.

The Working Group has conducted a number of listening sessions, at which a wide variety of individuals and groups have provided preliminary input prior to the start of the regulatory process. Participants have included representatives of state and local prisons and jails, juvenile facilities, community corrections programs, lockups, state and local sexual abuse associations and service providers, national advocacy groups, survivors of prison rape, and members of the Commission.

Because PREA prohibits the Department from establishing a national standard that would impose substantial additional costs compared to the costs presently expended by federal, state, and local prison authorities, 42 U.S.C. 15607(a)(3), the Department must carefully examine the potential cost implications of the standards proposed by the Commission. Accordingly, the Department has commissioned an independent contractor to perform a cost analysis of the Commission's proposed standards. The contractor is expected to complete the cost analysis in the coming months.

The Department is also working to address the other recommendations put forth by the Commission. For example, the Attorney General has designated a Senior Counsel in the Office of the Deputy Attorney General to monitor and coordinate the Department's PREA implementation efforts. The Department is also in the process of developing a corollary to the 2004 "National Protocol for Sexual Assault Medical Forensic Examinations" that will be customized to the conditions of confinement. In

addition, via a separate rulemaking process, the Department intends to remove the current ban on Victims of Crime Act funding for treatment and rehabilitation services for incarcerated victims of sexual abuse.

The Department's Request for Comments

The Department is soliciting public input on the Commission's proposed national standards. The Department welcomes all comments, including any comments addressing specific standards proposed by the Commission. In addition, the Department specifically requests comments regarding three general questions listed below.

1. The Commission's proposed standards are intended to prevent, detect, and respond to "sexual abuse," which is defined in the glossary that precedes each checklist. PREA directed the Department to publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison "rape," which is defined in section 10 of Public Law 108–79 (42 U.S.C. 15609(9)). What would be the implications of referring to one term as opposed to the other in the Department's consideration of the Commission's proposed national standards?

2. PREA mandates that the Attorney General shall not establish a national standard "that would impose substantial additional costs compared to the costs presently expended by Federal, State and local prison authorities." Would any of the Commission's proposed standards impose "substantial additional costs"? How should any such standards be revised so as not to impose such costs? The Department welcomes all cost data or cost estimations that would help it determine whether particular proposed standards would—or would not—impose substantial additional costs. In assessing costs, please consider whether and to what extent implementation of particular standards would mitigate costs currently expended.

3. Should the Department consider differentiating within any of the four categories of facilities for which the Commission proposed standards (i.e., adult prisons and jails; juvenile facilities; community corrections facilities; and lockups) with compliance requirements dependent on size, personnel or resource limitations, or any other factors?

Regulatory Certifications

This action is an Advance Notice of Proposed Rulemaking (ANPRM). Accordingly, the requirement of Executive Order 12866 to assess the costs and benefits of this action does not apply. Similarly, the requirements of section 603 of the Regulatory Flexibility Act do not apply to this action because, at this stage, it is an ANPRM and not a "rule" as defined in section 601 of the Regulatory Flexibility Act. Following review of the comments received to this ANPRM, as the Department promulgates a Notice of Proposed Rulemaking regarding this issue, the Department will conduct all analyses required by the Regulatory Flexibility Act, Executive Order 12866, and any other statutes or Executive Orders relevant to those rules and in effect at the time of promulgation.

Dated: March 3, 2010.

Eric H. Holder, Jr.,

Attorney General.

[FR Doc. 2010–4907 Filed 3–9–10; 8:45 am]

BILLING CODE 44120–05–P; 4410–18–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 131

[EPA–HQ–OW–2009–0596; FRL–9125–7]

RIN 2040–AF11

Extension of Public Comment Period for Water Quality Standards for the State of Florida's Lakes and Flowing Waters

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; extension of the public comment period.

SUMMARY: On January 14, 2010, EPA signed a proposed rule entitled "Water Quality Standards for the State of Florida's Lakes and Flowing Waters." On January 26, 2010 (75 FR 4174), EPA published this proposed rule. Written comments on the proposed rulemaking were to be submitted to EPA on or before March 29, 2010 (a 60-day public comment period). Since publication, the Agency has received several requests for additional time to submit comments. Therefore, EPA is extending the public comment period for 30 days.

DATES: Comments must be received on or before April 28, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2009–0596, by one of the following methods:

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

2. *E-mail: ow-docket@epa.gov.*

3. *Mail to:* Water Docket, U.S. Environmental Protection Agency, Mail code: 2822T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, Attention: Docket ID No. EPA–HQ–OW–2009–0596.

4. *Hand Delivery:* EPA Docket Center, EPA West Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20004, Attention Docket ID No. EPA–HQ–OW–2009–0596. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2009–0596. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* 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.*

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

in hard copy at a docket facility. The Office of Water (OW) Docket Center is open from 8:30 a.m. until 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket Center telephone number is (202) 566–2426, and the Docket address is OW Docket, EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC 20004. 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.

Public Hearings: Additional public hearings will be held in Florida in mid-April, 2010. The dates and locations of these hearings have yet to be confirmed. Relevant information pertaining to these hearings will be provided at the following Web site: *http://www.epa.gov/waterscience/standards/rules/florida/Information* on the public hearings will be available shortly after publication of this notice in the **Federal Register**. For further information, please contact Sharon Frey at 202–566–1480 or *frey.sharon@epa.gov*

FOR FURTHER INFORMATION CONTACT: Danielle Salvaterra, U.S. EPA Headquarters, Office of Water, Mailcode: 4305T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; telephone number: 202–564–1649; fax number: 202–566–9981; e-mail address: *salvaterra.danielle@epa.gov.*

Dated: March 4, 2010.

Peter S. Silva,

Assistant Administrator for Water.

[FR Doc. 2010–5103 Filed 3–9–10; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS- R4-ES-2010-0003]
[MO 92210-0-0009-B4]

[RIN 1018-AW55]

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Carex lutea* (Golden Sedge)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to designate critical habitat for the *Carex lutea* (golden sedge) under the Endangered Species Act of 1973, as amended. We propose to designate as critical habitat approximately 189 acres (76 hectares) in 8 units. The proposed critical habitat is located in Onslow and Pender Counties in North Carolina.

DATES: We will consider comments from all interested parties until May 10, 2010. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by April 26, 2010.

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

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments on Docket No. FWS-R4-ES-2010-0003.
- U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS-R4-ES-2010-0003; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Pete Benjamin, Field Supervisor, U.S. Fish and Wildlife Service, Raleigh Fish and Wildlife Office, P.O. Box 33726, Raleigh, NC 27636-3726; telephone 919-856-4520; facsimile 919-856-4556. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from government agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why we should or should not designate habitat as "critical habitat" under section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether the benefit of designation would be outweighed by threats to the species caused by the designation, such that the designation of critical habitat is not prudent.

(2) Comments or information that may assist us in identifying or clarifying the primary constituent elements for *Carex lutea*.

(3) Specific information on:

- The amount and distribution of *Carex lutea* habitat,
- What areas occupied at the time of listing and that contain features essential to the conservation of the species which may require special management considerations or protections we should include in the designation and why, and
- What areas not occupied at the time of listing are essential for the conservation of the species and why.

(4) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(5) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities (e.g., small businesses or small governments) or families, and the benefits of including or excluding areas that exhibit these impacts.

(6) Whether any specific areas we are proposing as critical habitat should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(7) Information on any quantifiable economic costs or benefits of the proposed designation of critical habitat.

(8) Information on the projected and reasonably likely impacts of climate change on *Carex lutea*, and any special management needs or protections that may be needed in the critical habitat areas we are proposing.

(9) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov*. If your written comments provide personal identifying information, you may request at the top of your document that we withhold this information from public review.

However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Raleigh Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat in this proposed rule. For more information on *Carex lutea*, refer to the final listing rule published in the **Federal Register** on January 23, 2002 (67 FR 3120).

Carex lutea is a perennial member of the sedge family (Cyperaceae). Fertile culms (stems) may reach 39 in (1 m) or more in height. The yellowish green leaves are grass-like, with those of the culm mostly basal and up to 11 in (28 cm) in length, while those of the vegetative shoots reach a length of 25.6 in (65 cm).

The species is endemic to Onslow and Pender Counties in the Black River section of the Coastal Plain Province of North Carolina. The North Carolina Natural Heritage Program (NCNHP) recognizes eight populations made up of 17 distinct locations or element occurrences. All of the locations occur within a 16- by 5-mile (26-by-8-kilometer) area, extending southwest from the community of Maple Hill.

Carex lutea generally occurs on fine sandy loam, loamy fine sands, and fine sands with a pH of 5.5 to 7.2, and with a mean of 6.7. These soils are moist to saturated to periodically inundated. *Carex lutea* occurs in the Pine Savanna (Very Wet Clay Variant) natural community type (Schafale 1994, p. 136). Community structure is characterized by an open to sparse canopy dominated by pond pine *(Pinus serotina)*, and usually with some longleaf pine *(P. palustris)* and pond cypress *(Taxodium ascendens)*.

Carex lutea is threatened by fire suppression; habitat alteration such as land conversion for residential, commercial, or industrial development; mining, drainage for silviculture and agriculture; highway expansion; and herbicide use along utility and highway rights-of-way.

Previous Federal Actions

Carex lutea was listed as endangered under the Act on January 23, 2002 (67 FR 3120). Designation of critical habitat had been found to be not prudent in the proposed listing rule (64 FR 44470, August 16, 1999); however, following a reevaulation of information available for the proposal and new information that came in through the public comment period on the proposal, critical habitat designation was determined to be prudent in the final listing rule (67 FR 3120). However, the development of a designation was deferred due to budgetary and workload constraints.

On December 19, 2007, the Center for Biological Diversity filed a complaint for declaratory and injunctive relief challenging the Service's continuing failure to timely designate critical habitat for this species as well as three other plant species (*Center for Biological Diversity* v. *Kempthorne*, C-04-3240 JL (N. D. Cal.). In a settlement agreement dated April 11, 2008, the Service agreed to submit for publication in the **Federal Register** a proposed designation of critical habitat, if prudent and determinable, on or before February 28, 2010, and a final determination by February 28, 2011.

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided underuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7(a)(2)of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7(a)(2) requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner seeks or requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) would apply, but even in the event of a destruction or adverse modification finding, the Federal action agency's and the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

To be considered for inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time it was listed must contain the physical and biological features essential to the conservation of the species. Areas supporting the essential physical or biological features are identified, to the extent known using the best scientific data available, as the habitat areas that provide essential life cycle needs of the species. Habitat within the geographical area occupied by the species at the time of listing that contains features essential to the conservation of the species meets the definition of critical habitat only if these features may require special management consideration or protection. Under the Act and regulations at 50 CFR 424.12, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed only when we determine that the best available scientific data demonstrate that the designation of those areas is essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General

Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Climate change may lead to increased frequency and duration of severe storms and droughts (Golladay *et al.* 2004, p. 504; McLaughlin *et al.* 2002, p. 6074; Cook *et al.* 2004, p. 1015). According to the America's Longleaf Regional Working Group (2009, p. 19), the U.S. Department of Agriculture concluded that longleaf pine may extend its range northward, but will likely lose very little of its southern range. The Hadley Centre model suggests that savanna and grasslands may expand and replace southeastern pine forests at some sites in the coastal plain due to increased moisture stress (America's Longleaf Regional Working Group 2009, p. 19). While the effects of climate change on longleaf ecosystem plant communities have not been well studied, one report concluded that while longleaf pine might perform well with increased carbon dioxide, the herbaceous species may not compete as well (America's Longleaf Regional Working Group 2009, p. 19).

The information currently available on the effects of global climate change and increasing temperatures does not make sufficiently precise estimates of the location and magnitude of the effects. Nor are we currently aware of any climate change information specific to the habitat of *Carex lutea* that would indicate what areas may become important to the species in the future. Therefore, we are unable to determine what additional areas, if any, may be appropriate to include in the proposed critical habitat for this species; however, we specifically request information from the public on the currently predicted effects of climate change on *Carex lutea* and its habitat. Additionally, we recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated critical habitat area is unimportant or may not be required for recovery of the species.

Areas that are important to the conservation of the species, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act. Areas that support populations are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), section 7 consultations, or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time the species is determined to be endangered or threatened. Our regulations at 50 CFR 424.12(a)(1) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species; or (2) the designation of critical habitat would not be beneficial to the species.

There is no documentation that *Carex lutea* is threatened by taking or other human activity such as collection. In the absence of finding that the designation of critical habitat would increase threats to the species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. The potential benefits include: (1) Triggering consultation, under section 7 of the Act, in new areas for action in which there may be a Federal nexus where consultation would not otherwise occur because, for example, an area is or has become unoccupied or the occupancy is in question; (2) identifying the physical and biological features essential to the conservation of *Carex lutea* and focusing conservation activities on these essential features and the areas that support them; (3) providing educational benefits to State or county governments or private entities engaged in activities or long-range planning in areas essential to the conservation of the species; and (4) preventing people from causing inadvertent harm to the species. Conservation of *Carex lutea* and the essential features of the habitat will require habitat protection and restoration, which will be facilitated by knowledge of habitat locations and the physical and biological features of those habitats.

Therefore, since we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and may provide some measure of benefit, we find that the designation of critical habitat for the *Carex lutea* is prudent.

Critical Habitat Determinability

As stated above, section 4(a)(3) of the Act requires the designation of critical habitat concurrently with the species' listing "to the maximum extent prudent and determinable." Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(1) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(2) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

When critical habitat is not determinable, the Act provides for an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the *Carex lutea,* the historical distribution of the *Carex lutea*, and the habitat characteristics where the species currently occurs. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the *Carex lutea*.

Methods

As required by section 4(b) of the Act, we used the best scientific and commercial data available in determining which areas within the geographical area occupied by the species at the time of listing contain the features essential to the conservation of the *Carex lutea* that may require special management considerations or protections, and which areas outside of the geographical area occupied at the time of listing are essential for the conservation of the species.

We reviewed the available information pertaining to historical and current distributions, life histories, and habitat requirements of this species. Our sources included peer-reviewed scientific publications; unpublished survey reports; unpublished field observations by Service, State, and other experienced biologists; notes and communications from qualified biologists or experts; and Service publications such as the final listing rule for *Carex lutea*.

Physical and Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and our regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied at the time of listing to propose as critical habitat, we consider the physical and biological features essential to the conservation of the species which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historic, geographical, and ecological distributions of a species.

We consider the physical and biological features to be the primary constituent elements PCEs laid out in the appropriate quantity and spatial arrangement for the conservation of the species. We derive the PCEs from the biological needs of *Carex lutea* as described in the Background section of this proposed rule and in the final listing rule (67 FR 3120). The areas included in this proposed critical habitat rule for *Carex lutea* contain the appropriate soils and associated vegetation, and adjacent areas necessary to maintain associated physical processes such as a suitable hydrological regime. The areas provide suitable habitat, water, minerals, and other physiological needs for reproduction and growth of *Carex lutea*.

Space for Individual and Population Growth and for Normal Behavior

Clonal Growth

Carex lutea is a caespitose, or clumping, perennial. New shoots develop from a central point, forming a tufted clump of vegetation that is genetically identical to the parent plant. The full extent to which a plant can expand has not been determined.

Therefore, based on the information above, we identify bare soil areas immediately adjacent to existing clumps of mature *Carex lutea* plants to allow room for expansion of the clump to be a PCE for this species.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Water

Although the specific water needs of the species are unknown, *Carex lutea* is found in wet to saturated to periodically inundated soils. The largest populations are found in the wet to saturated ecotones of savannas and hardwood forests. At a few sites, the plants are most abundant in wet to saturated soils adjacent to drainage ditches, and in the saturated to inundated ditches themselves. The occurrence of individuals in ditches is likely due to the wetter soils of the ditches, or the washing of seeds into the ditches from adjacent habitat or both. Sometimes *Carex lutea* occurs in very wet soil in areas of savanna habitat characterized by an open to absent canopy, suggesting that its abundance in the savanna-wet hardwood ecotone is strongly influenced by hydrologic conditions as well as by edaphic (influenced by factors inherent in the soil rather than by climatic factors) or light conditions or both. The annual average precipitation in Wilmington, NC, (approximately 25 miles (40 kilometers) south-southwest of the epicenter of *Carex lutea*) is 54.3 inches (138 centimeters). (*http://www.weatherpages.com/variety/precip.html*).

Light

Most *Carex lutea* plants occur in the partially tree-shaded ecotone between savannas and hardwood swamps, with scattered shrubs and a moderate to dense herb layer. The savanna/hardwood swamp ecotone is subject to frequent fires, which favor an herbaceous ground layer and suppress shrub dominance. There is evidence that increased shading and shrub competition from fire suppression has resulted in the reduction in the number of individuals observed.

Soil

Carex lutea occurs on a wide variety of mapped soil types, including fine sands (Baymeade, Mandarin, and Pactolus), loamy sands (Stallings), loamy fine sands (Foreston and Grifton), fine sandy loams (Torhunta and Woodington), and loams (Muckalee). The soils are formed from marine sediments and have a range of permeability (from rapid to moderately rapid) and drainage class (from well drained to very poorly drained). Soil tests at the type site (The Neck Savanna) indicate that microsites not supporting *Carex lutea* regularly test at lower pH levels than those supporting *Carex lutea*, with values at inhabited sites ranging from a pH of 5.5 to 7.2, with a mean of 6.7 (Glover 1994, p. 7). This finding may indicate a preference to soils with a high base saturation or low aluminum saturation or both. The extent of the soils with these chemical characteristics is usually limited within the Coastal Plain and, therefore, are normally not mapped as separate soil map units due to the scale of mapping.

Temperature

The outer southeastern coastal plain of North Carolina experiences hot and humid subtropical summers and cool temperate winters with subfreezing periods. Persistent snow accumulation is rare. The average crop growing season (daily minimum temperature higher than 32 degrees Fahrenheit (0 degrees Celsius)) for Onslow County is 162 days (Barnhill 1992, p. 99) and for Pender County is 185 days (Barnhill 1990, p. 105). We have no information about the tolerance of *Carex lutea* to temperature extremes.

Therefore, based on the information above, we identify wet to completely saturated loamy fine sands, fine sands, fine sandy loams, and loamy sands soils with a pH of 5.5 to 7.2, in sunny to partially tree-shaded areas or ecotones between savannas and hardwood forests to be a PCE for this species.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

The reproductive biology of *Carex lutea* is unknown; however, due to the observation of ample mature seed production, we can confidently surmise that *Carex lutea* reproduces both

sexually, involving gravity and wind-dispersed pollen, as well as vegetatively (LeBlond 1996, p. 19). Perigynia (a special bract that encloses the achene of a *Carex* species) are dispersed when rigid fertile culms fall to the ground, thereby depositing the fruits on the substrate adjacent to, but at some distance from, the maternal parent (LeBlond 1996, p. 19). Seeds have been observed in ditches adjacent to colonies, indicating dispersal by precipitation sheet flow. Animals may also be seed dispersers; the perigynia beaks are minutely serrulate (minutely serrated), perhaps for attachment to fur (LeBlond 1996, p. 19). Survival rates of individual plants are unknown. Based on observation of the larger known populations, it appears that *Carex lutea* is a successful colonizer of suitable newly disturbed areas (LeBlond 1996, p. 19).

Therefore, based on the information above, we identify areas of bare soil immediately adjacent [within 12 inches (30 cm)] to mature *Carex lutea* plants where seeds may fall and germinate to be a PCE for this species.

Habitats Protected from Disturbance or Representative of the Historic, Geographical, and Ecological Distributions of the Species

The area supporting the *Carex lutea* populations is located in the Black River section of the Coastal Plain Province, and within the Northeast Cape Fear River watershed. The land surface is characterized by large areas of broad, level flatlands and shallow stream basins. The broad flatlands support longleaf pine forests, pond pine woodlands, shrub swamp pocosins, pine plantations, and cropland. The geology is characterized by unconsolidated sand overlying layers of clayey sand and weakly consolidated marine shell deposits (coquina limestone). These sediments were deposited and reshaped during several cycles of coastal emergence and submergence from the Cretaceous period to the present (LeBlond *et al.* 1994, p. 159).

More specifically, *Carex lutea* occurs in the Very Wet Clay Variant of the Pine Savanna community (Schafale 1994, p. 136) or its ecotones. Community structure is characterized by an open to sparse canopy dominated by pond pine (*Pinus serotina*), and usually with some longleaf pine *(Pinus palustris*) and pond cypress *(Taxodium ascendens*). The shrub layer typically is sparse to patchy, with wax myrtle (*Morella carolinensis*), ti-ti (*Cyrilla racemiflora),* Ink berry *(Ilex glabra),* myrtle dahoon *(Ilex myrtifolia*), and black highbush blueberry (*Vaccinium fuscatum*) prominent. Juvenile red maple *(Acer rubrum* var. *trilobum*) and swamp tupelo (*Nyssa biflora*) are often present. The herb layer is dense, and dominated by combinations of *Ctenium aromaticum* (toothache grass), Carolina dropseed *(Sporobolus pinetorum*), and several *Rhynchospora* taxa [e.g., globe beaksedge *(R. globularis* var. *pinetorum),* sandswamp whitetop *(R. latifolia*), and Thorne's beakrush *(R. thornei*)]. National vegetation type classification places this natural community in the *Pinus palustris - Pinus serotina* / *Sporobolus pinetorum - Ctenium aromaticum - Eriocaulon decangulare* var. *decangulare* (Tenangle pipewort) Woodland association of the *Pinus palustris - Pinus (P. elliottii, P. serotina*) Saturated Woodland Alliance (NatureServe 2010). This association is equivalent to the Pine Savanna (Very Wet Clay Variant), a natural community type with fewer than 10 occurrences globally (Schafale 1994, p. 136). The Pine Savanna Very Wet Clay Variant is known only from the Maple Hill area near the Onslow/Pender County line and north and west of Holly Shelter Game Land, and from the Old Dock area of the Waccamaw River watershed along the Brunswick/Columbus County line.

Therefore, based on the information above, we identify areas containing the natural plant community that would be identified as the Pine Savanna (Very Wet Clay Variant) according to methodology used in Schafale (1994, p. 136) to be a PCE for this species. The structure of this community is characterized by an open to sparse canopy dominated by pond pine, and usually with some longleaf pine and pond cypress.

Based on the above needs and our current knowledge of the life history, biology, and ecology of the species and the habitat requirements for sustaining the essential life history functions of the species, we have determined that the PCEs for *Carex lutea* is Pine Savanna (Very Wet Clay Variant) natural plant community or ecotones that contain:

1. Moist to completely saturated loamy fine sands, fine sands, fine sandy loams, and loamy sands soils with a pH of 5.5 to 7.2;

2. Open to relatively open canopy that allows full to part sun to penetrate to the herbaceous layer between savannas and hardwood forests; and

3. Areas of bare soil immediately adjacent [within 12 inches (30 cm)] to mature *Carex lutea* plants where seeds may fall and germinate or existing plants may expand in size.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain physical and biological features that are essential to the conservation of the species and whether those features may require special management considerations or protection.

As stated in the final listing rule, threats to *Carex lutea* include habitat alteration; conversion of its limited habitat for residential, commercial, or industrial development; mining; drainage activities associated with silviculture and agriculture; suppression of fire; highway expansion; and herbicide use along utility and highway rights-of-way (67 FR 3120). Through our review of the existing data on *Carex lutea*, we conclude that the threats listed in the final listing rule continue to impact this species and its essential physical and biological features.

The destruction of habitat or conversion of habitat for residential, commercial, or industrial development can change the topography, soils, and general character of the site, making it uninhabitable for *Carex lutea*. These activities can remove the PCEs by removing soil (by grading) and changing *Carex lutea* habitat to developed land, which is unsuitable for the species.

Drainage activities associated with silviculture and agriculture may alter the hydrology, which can change the groundwater levels and the amount of moisture in the soil, creating conditions under which *Carex lutea* may not be able to survive. Further, removal of existing vegetation or the planting of trees for silviculture may change the existing conditions such that *Carex lutea* plants no longer receive optimal amounts of sunlight.

The close proximity of roadways and power line corridors to populations of *Carex lutea* may affect the species. Herbicide treatment to maintain vegetation in rights-of-ways has the potential to kill non-target plant species such as *Carex lutea*. Highway expansion may change the local topography and affect water runoff making the site drier or wetter than is optimal for *Carex lutea*.

Mining has been documented in close proximity to one *Carex lutea* population. Mining activities may alter many aspects of *Carex lutea* habitat. Heavy equipment can compact or remove the appropriate soils. The grading of areas adjacent to *Carex lutea* habitat can change the hydrology of those areas and make them more

susceptible to invasion by nonnative plant species.

Regular fire in areas where *Carex lutea* occurs helps to maintain the open savanna habitat that is conducive to *Carex lutea* growth. Fire reduces competition and allows seeds to germinate in open, bare soil areas. Fire suppression in areas where *Carex lutea* occurs may result in the growth of shrubs and trees that will eventually shade out herbaceous species such as *Carex lutea*.

All of these activities may in turn lead to the disruption of the growth and reproduction of *Carex lutea*.

In summary, we find that the areas we are proposing as critical habitat contain the features essential to the conservation of *Carex lutea*, and that these features may require special management considerations or protection. Special management considerations or protection may be required to eliminate, or reduce to negligible level, the threats affecting each unit or subunit and to preserve and maintain the essential features that the proposed critical habitat units and subunits provide to *Carex lutea*. Additional discussions of threats facing individual sites are provided in the individual unit and subunit descriptions.

The designation of critical habitat does not imply that lands outside of critical habitat may not play an important role in the conservation of *Carex lutea*. In the future, and with changed circumstances, these lands may become essential to the conservation of *Carex lutea*. Activities with a Federal nexus that may affect areas outside of critical habitat, such as development, agricultural activities, and road construction, are still subject to review under section 7 of the Act if they may affect *Carex lutea* because Federal agencies must consider both effects to the plant and effects to critical habitat independently. The prohibitions of section 9 of the Act applicable to *Carex lutea* under 50 CFR 17.61 also continue to apply both inside and outside of designated critical habitat.

Criteria Used To Identify Critical Habitat

As required by section 4(b) of the Act, we used the best scientific and commercial data available in determining areas within the geographical area occupied at the time of listing that contain the physical and biological features essential to the conservation of *Carex lutea*, and areas outside of the geographical area occupied at the time of listing that are essential for the conservation of *Carex lutea*. In order to determine which sites were occupied at the time of listing, we used the NCNHP database of rare species (NCNHP 2009). If an element occurrence (EO) record or site was first observed after the species was listed (effective on February 22, 2002), then we considered that those sites were unknown at the time of listing. Five subunits had first observed dates after February 22, 2002. However, given what we know about the biology of this species and the habitats where it occurs, those five subunits were likely occupied at the time the species was listed. The occurrence at Watkins Savannah (O'Berry Tract C) (EO 5.19) was found during surveys for *Carex lutea* in 2006. The two sites on Ashes Creek at the Southwest Ridge Savanna (EO 11) were found during surveys for *Carex lutea* in 2002, just 3 months after the species was listed. In 2007, surveys for *Carex lutea* at the McLean Savanna yielded two new subpopulations of *Carex lutea* (EOs 24.22 and 24.23). *Carex lutea* was already known from a site nearby, and all three of these subpopulations are now considered to be part of one population. To the best of our knowledge, these areas had not been surveyed for *Carex lutea* previously, and we have no reason to believe that the plant was imported or had dispersed into these areas from other areas after *Carex lutea* was listed in 2002. Based on the biology of this species and its limited ability for the seeds to move and colonize new areas, the occurrences identified since listing likely were in existence for many years prior to listing and were only recently detected due to increased awareness of this species.

We have also reviewed available information that pertains to the habitat requirements of this species including NCNHP data, the original species description (LeBlond *et al* 1994, pp. 159-160), the status survey (LeBlond 1996, pp. 11-13), the Service's draft Recovery Plan and the 5-Year Review, regional Geographic Information System (GIS) coverages, survey reports, and other relevant information.

The only criterion that we used to identify proposed critical habitat was that the areas are currently occupied by *Carex lutea*. These areas occur on rare or unique habitat (the Very Wet Clay Variant of the Pine Savanna community, remnant savannas, or ecotones thereof) within the species' range and contain all of the PCEs identified as necessary for the conservation of the species. Since so few populations are known to exist, they are all important to the long-term survival and recovery of the species. Eight units (19 subunits) are proposed for designation based on sufficient quantity and arrangement of the PCEs being present to support *Carex lutea*'s life processes.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas, such as lands covered by buildings, roads, and other structures, because such lands lack PCEs for *Carex lutea*. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical and biological features in the adjacent critical habitat.

To the best of our knowledge, there are no unoccupied areas that contain one or more of the PCEs for Carex lutea. All of the areas proposed as critical habitat for Carex lutea are currently occupied by the species and contain the PCEs. All of the areas proposed as critical habitat are also within the known historical range of the species. Therefore, we are not proposing to designate any areas outside the geographical area occupied by the species at the time of listing. We believe that the occupied areas are sufficient for the conservation of the species.

Proposed Critical Habitat Designation

We are proposing 8 units (19 subunits) totaling approximately 189 acres (ac) (75.6 hectares (ha)) as critical habitat for *Carex lutea*. The areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for *Carex lutea*. The eight areas we propose as critical habitat are: (1) Unit 1: Watkins Savanna, (2) Unit 2: Haws Run Mitigation Site, (3) Unit 3: Maple Hill School Road Savanna, (4) Unit 4: Southwest Ridge Savanna, (5) Unit 5: Sandy Run Savannas, (6) Unit 6: The Neck Savanna, (7) Unit 7: Shaken Creek Savanna, and (8) Unit 8: McLean Savanna. All units are now occupied by *Carex lutea*, but five subunits in three units were unknown at the time of listing. However, based on the biology of this species and its limited ability for the seeds to move and colonize new areas, the occurrences identified since listing likely were in existence for many years prior to listing and were only

recently detected due to increased awareness of this species. Therefore, we are considering them to be occupied at the time of listing. Table 1 identifies the occupancy status for each subunit.

TABLE 1. OCCUPANCY OF *Carex lutea* BY PROPOSED CRITICAL HABITAT UNITS.

Unit	Subunit	Occupied at Time of Listing?	Currently Occupied?
1	A	Yes	Yes
1	B	Yes	Yes
1	C	Yes	Yes
2	Not applicable (N/A)	Yes	Yes
3	N/A	Yes	Yes
4	A	Yes	Yes
4	B	Yes	Yes
5	A	Yes	Yes
5	B	Yes	Yes
5	C	Yes	Yes
5	D	Yes	Yes
5	E	Yes	Yes
6	A	Yes	Yes
6	B	Yes	Yes
6	C	Yes	Yes
7	A	Yes	Yes
7	B	Yes	Yes
7	C	Yes	Yes
8	A	Yes	Yes
8	B	Yes	Yes
8	C	Yes	Yes

Table 2 includes the name, ownership information, and size of each unit and subunit we are proposing as critical habitat.

TABLE 2. OWNERSHIP OF PROPOSED CRITICAL HABITAT UNITS FOR *Carex lutea*.

[Area estimates reflect all land within critical habitat unit boundaries.]

Unit	Subunit	Name	Land Ownership by Type	Size of Unit Acres	Size of Unit Hectares
1	A	Watkins Savanna, O'Berry, Tract A	NCDPR	1.2	0.5
1	B	Watkins Savanna, Unnamed Tract	Private, NCDPR	2.0	0.8
1	C	Watkins Savanna, O'Berry, Tract C	NCDPR	0.6	0.2
2	N/A	Haws Run Mitigation Site	NCDOT	27.1	11.0
3	N/A	Maple Hill School Road, Savanna	Private	27.7	11.2
4	A	Southwest Ridge Savanna, Ashes Creek, *Carex lutea* Survey Site, Southwest of Ashes Creek	NCWRC with Progress Energy, ROW	2.3	0.9

TABLE 2. OWNERSHIP OF PROPOSED CRITICAL HABITAT UNITS FOR *Carex lutea*.—Continued

[Area estimates reflect all land within critical habitat unit boundaries.]

Unit	Subunit	Name	Land Ownership by Type	Size of Unit Acres	Size of Unit Hectares
4	B	Southwest Ridge Savanna, Ashes Creek, *Carex lutea* Survey Site, Northeast of Ashes Creek	NCWRC with Progress Energy, ROW	1.0	0.4
5	A	Sandy Run Savannas	NCDPR with Progress Energy, ROW	2.6	1.1
5	B	Sandy Run Savannas	NCDPR	4.3	1.7
5	C	Sandy Run Savannas	NCDPR	0.3	0.1
5	D	Sandy Run Savannas	NCDPR	0.3	0.1
5	E	Sandy Run Swamp	NCDPR with Progress Energy, ROW	13.1	5.3
6	A	The Neck Savanna	NCDPR	3.6	1.5
6	B	The Neck Savanna, Thorne's Beaksedge Road	Private	0.7	0.3
6	C	The Neck Savanna, former Sandy Run Savanna	Private with Powerline ROW	0.1	0.1
7	A	Shaken Creek Savanna, East Population, East of Patterson Road	TNC	6.9	2.8
7	B	Shaken Creek Savanna, West Population, East of Patterson Road	TNC	24.7	10.0
7	C	Shaken Creek Savanna, West Population	TNC	26.1	10.6
8	A	McLean Savanna	TNC	42.3	17.1
8	B	McLean Savanna	Private	0.5	0.2
8	C	McLean Savanna	TNC, Private	1.6	0.6
Total*				189.0	76.5

*Note: Area sizes may not sum due to rounding.

We present brief descriptions of each unit, and reasons why they meet the definition of critical habitat for *Carex lutea*, below

Unit 1: Watkins Savanna, Pender County, North Carolina

Unit 1 consists of 3.8 ac (1.5 ha) and includes three subunits in Pender County, NC. It contains all of the PCEs for *Carex lutea.* This critical habitat unit includes habitat for *Carex lutea* that is under private and State ownership. This unit contains three element occurrences, two of which were known at the time of listing. The subunits contain all of the PCEs identified for *Carex lutea*; however, they are all very fire suppressed and have been altered by timber management. The NC Division of Parks and Recreation (NCDPR) is currently negotiating with the NCNHP to designate this site as a Dedicated Nature Preserve.

Subunit A (EO 5.12) consists of 1.2 ac (0.5 ha) and was known to be occupied at the time of listing. It is owned by NCDPR and is managed as part of the Sandy Run Savannas State Natural Area.

Subunit B (EO 5.13) consists of 2.0 ac (0.8 ha) and was known to be occupied at the time of listing. It is owned by private entities and NCDPR. NCDPR plans to manage their portion of the subunit as part of the Sandy Run Savannas State Natural Area.

Subunit C (EO 5.19) consists of 0.6 ac (0.2 ha) and was not known to be occupied at the time of listing. This *Carex lutea* site was discovered in 2006; however, based on the habitat conditions at this site and the biology of the species, we believe that this site was occupied in 2002, when the species was listed. It is in conservation ownership by NCDPR and is managed as part of the Sandy Run Savannas State Natural Area.

Unit 2: Haws Run Mitigation Site, Onslow County, North Carolina

Unit 2 (EO 7) consists of 27.1 ac (11.0 ha) in Onslow County, NC. This critical habitat unit includes habitat for *Carex lutea* and was occupied at the time of listing. It is owned by the NC Department of Transportation and is managed by the NC Ecosystem Enhancement Program. This site was purchased as mitigation for wetland impacts from nearby transportation projects. Although the site is somewhat fire suppressed and has been altered by timber management, it contains all of the PCEs identified for *Carex lutea*. The land managers conducted a prescribed fire in the vicinity of the *Carex lutea* plants during the summer of 2009 and will continue restoration efforts there.

The population at this site appears to be stable and not vulnerable to extirpation. Managers are considering designating this site as a Dedicated Nature Preserve by the NCNHP.

Unit 3: Maple Hill School Road Savanna, Pender County, North Carolina

Unit 3 (EO 10) consists of 27.7 ac (11.2 ha) in Pender County, NC. This site is privately owned and has not been revisited since it was discovered in 1998. It was occupied at the time of listing. Although three clumps of *Carex lutea* were discovered here in 1998, the full extent of the population is unknown and the habitat is vulnerable to land use changes.

Unit 4: Southwest Ridge Savanna, Pender County, North Carolina

Unit 4 (EO 11) consists of 3.3 ac (1.3 ha) in two subunits in Pender County, NC. This unit is owned by NC Wildlife Resources Commission and is managed for conservation purposes. These two subpopulations were discovered in May 2002, shortly after the species was listed as endangered (effective on February 2002). Because the species is nearly impossible to identify unless it is flowering and plants less than 3 months old would not be expected to flower in May, it seems reasonable to assume that the plants discovered in May 2002 were present prior to the 2002 growing season and that the site was occupied at the time of listing. The *Carex lutea* plants occur in a power line right-of-way easement that is managed by Progress Energy. The utility company entered into a Registry Agreement with the NCNHP and agreed not to use herbicides or mow during critical *Carex lutea* growth periods. This population is relatively small in size compared to some of the other populations, but appears to be stable. The subunits contain all of the PCEs identified for *Carex lutea.*

Subunit A is 2.3 ac (0.9 ha) in size and is located southwest of Ashes Creek.

Subunit B is 1.0 ac (0.48 ha) in size and is located northeast of Ashes Creek.

Unit 5: Sandy Run Savannas, Onslow County, North Carolina

Unit 5 consists of 20.6 ac (8.3 ha) in Onslow County, NC, and is divided into five subunits. This critical habitat unit is owned by NCDPR and managed as part of the Sandy Run Savannas State Natural Area. All five *Carex lutea* sites were known at the time of listing. This unit is a remnant pine savanna, and the subunits contain all of the PCEs identified for *Carex lutea*; however, the subunits are all fire suppressed and have been altered by timber management including bedding and ditching. The NCDPR is currently negotiating the designation of a Dedicated Nature Preserve with the NCNHP.

Subunit A (EO 15.3) consists of 2.6 ac (1.1 ha) and occurs on the east side of NC 50. Progress Energy has a transmission line right-of-way through this subunit and has entered into a Registry Agreement with the NCNHP in which they have agreed not to use herbicides or mow during critical *Carex lutea* growth periods.

Subunit B (EO 15.4) consists of 4.3 ac (1.7 ha) and occurs contiguous to and along the north side of a private sand road through the property.

Subunit C (EO 15.4) consists of 0.3 ac (0.1 ha) and occurs along the south side of a private sand road through the property and on the west side of a small stream swamp. The plants are growing in an old, wet road bed.

Subunit D (EO 15.4) consists of 0.3 ac (0.1 ha) and occurs along the south side of a private sand road through the property and on the east side of a small stream swamp. The *Carex lutea* plants are growing in a roadside ditch.

Subunit E (EO 15.14) consists of 13.1 ac (5.3 ha) and occurs contiguous to and on the west side of NC 50. Progress Energy has a transmission line right-of-way through this subunit and has entered into a Registry Agreement with the NCNHP in which they have agreed not to use herbicides or mow during critical *Carex lutea* growth periods.

Unit 6: The Neck Savanna, Pender County, North Carolina

Unit 6 consists of 4.4 ac (1.8 ha) in Pender County, NC, and is divided into three subunits. This critical habitat unit includes habitat for *Carex lutea* that is under private and State ownership. This unit contains three element occurrences, two of which were known at the time of listing. The subunits contain all of the PCEs identified for *Carex lutea*; however, they are all very fire suppressed and have been altered by timber management. The NCDPR is currently negotiating the designation of a Dedicated Nature Preserve with the NCNHP. Privately owned portions of this property are threatened by fire suppression, timber harvesting, and herbicide use. Drainage ditches impact the hydrology of the soils in this area.

Subunit A (EO 18.1) consists of 3.6 ac (1.5 ha) and was known to be occupied at the time of listing. It is owned by NCDPR and private entities, some of which will become part of the Sandy Run Savannas State Natural Area.

Subunit B (EO 18.16) consists of 0.7 ac (0.3 ha) and is privately owned. It is currently threatened by fire suppression, but the managers are hopeful that they will be able to burn this tract within the next year or two.

Subunit C (EO 18.17) consists of 0.1 ac (0.1 ha), is privately owned, and occurs in a small power-line corridor along a roadside. It is vulnerable to woody growth and herbicide use in the power line. There has been little management of the site with prescribed fire due to difficult land ownership patterns.

Unit 7: Shaken Creek Savanna, Pender County, North Carolina

Unit 7 consists of 57.7 ac (23.4 ha) in Pender County, NC, and is divided into three subunits. This critical habitat unit includes habitat for *Carex lutea* that is under private ownership. This area is owned by TNC and managed by a private hunt club. This unit contains three element occurrences, all of which were known at the time of listing. This savanna complex contains the highest quality natural habitat and the largest population of *Carex lutea* known. With continued fire management, this site should remain stable. It contains all of the PCEs identified for *Carex lutea.*

Subunit A (EO 21.8) consists of 6.9 ac (2.8 ha) and is east of Patterson Road.

Subunit B (EO 21.8) consists of 24.7 ac (10.0 ha) and is west of Patterson Road.

Subunit C (EO 21.20) consists of 26.1 ac (10.6 ha) and lies south of Bear Garden Road.

Unit 8: McLean Savanna, Pender County, North Carolina

Unit 8 consists of 44.4 ac (17.7 ha) and includes three subunits in Pender County, NC. This site is known as McLean Savanna or McLean Family Farms and has been kept open for hunting through the use of prescribed burning. *Carex lutea* occurs over an extensive area, and it is one of the larger populations known. Each of the three subunits contains all of the PCEs identified for *Carex lutea.*

Subunit A (EO 24.9) is 42.3 ac (17.1 ha) in size and is owned by TNC. *Carex lutea* occupied this area at the time of listing.

Subunit B (EO 24.22) is 0.5 ac (0.2 ha) in size and is privately owned. This *Carex lutea* population was discovered in June 2007, after the species was listed; however, based on what we know about the biology of the species, we believe that this site was occupied at the time of listing.

Subunit C (EO 24.23) is 1.6 ac (0.6 ha) in size and is owned by both private

entities and TNC. This *Carex lutea* population was also discovered in June 2007, after the species was listed; based on what we know about the biology of the species, we believe that this site was occupied at the time of listing.

Because the savannas on the McLean Family Farms have been managed by fire for many years to facilitate hunting, and one subpopulation (Subunit A) has been known on this property since 1997, it is reasonable to believe that these other subpopulations (Subunits B and C) have also occurred there for many years and were just undetected because those areas had not been surveyed specifically for *Carex lutea* until 2007.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the Fifth and Ninth Circuits Courts of Appeals have invalidated our definition of "destruction or adverse modification" (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service*, 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve its intended conservation role for the species.

Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). The conservation recommendations in a conference report or opinion are strictly advisory.

If we list a species or designate critical habitat, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

- A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or
- A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define "reasonable and prudent alternatives" at 50 CFR 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiating of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect *Carex lutea* or its designated critical habitat require section 7 consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit under section 10 of the Act or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency)) are subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not Federally funded, authorized, or permitted, do not require section 7 consultations.

Application of the "Adverse Modification" Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or would retain its current ability for the essential features to be functionally established. Activities that may destroy or adversely modify critical habitat are those that alter the essential features to an extent that appreciably reduces the conservation value of critical habitat for *Carex lutea*.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in consultation for *Carex lutea* include, but are not limited to:

- Actions that would alter the hydrology associated with *Carex lutea* habitat or the savannas where this species occurs. Such activities could include, but are not limited to,

water impoundment, stream channelization, water diversion, water withdrawal and development activities. These activities could alter the biological and physical features that provide the appropriate habitat for *Carex lutea* by altering or eliminating moisture regimes that this species may rely on for seed dispersal and germination and for control of competing species; by reducing or increasing the availability of groundwater, which may result in a shift of habitat type to a community unsuitable for *Carex lutea* (shrub- or tree-dominated habitat, which would inhibit exposure to needed sunlight); or by causing increased erosion that could remove soils appropriate for *Carex lutea* growth.

- Activities that remove soils appropriate for *Carex lutea* growth, such as plowing, grading, or ditch cleaning, or activities that change the characteristics of soils so that *Carex lutea* growth is impeded, such as soil compaction due to silvicultural practices, vehicular access along power line rights-of-ways or roadway expansion or maintenance. These activities may adversely affect critical habitat.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

- An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- A statement of goals and priorities;
- A detailed description of management actions to be implemented to provide for these ecological needs; and
- A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

There are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation. As such, we are not exempting any lands owned or managed by the Department of Defense from this designation of critical habitat for *Carex lutea*.

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate or make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If based on this analysis, we determine that the benefits of exclusion outweigh the benefits of inclusion, we can exclude the area only if such exclusion would not result in the extinction of the species.

Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we are preparing an analysis of the probable economic impacts of the proposed critical habitat designation and related factors.

We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at the *Federal eRulemaking Portal*: *http://www.regulations.gov*, or by contacting the Raleigh Fish and Wildlife Office directly (see **FOR FURTHER INFORMATION CONTACT** section). During the development of a final designation, we will consider economic impacts, public comments, and other new information, and as an outcome of our analysis of this information, we may exclude areas from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense where a national security impact might exist. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for *Carex lutea* are not owned or managed by the Department of Defense, and therefore, we anticipate no impact to national security. There are no areas proposed for exclusion based on impacts on national security.

Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors including whether the landowners have developed any conservation plans or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any Tribal issues, and consider the government-to-government relationship of the United States with Tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this proposed rule, we have determined that there are currently no conservation plans or other management plans for *Carex lutea*, and the proposed designation does not include any Tribal lands or trust resources. We anticipate no impact to Tribal lands, partnerships, or HCPs or other management plans from this proposed critical habitat designation. There are no areas proposed for exclusion from this proposed designation based on other relevant impacts.

Notwithstanding these decisions, as stated under the **Public Comments** section above, we request specific comments on whether any specific areas proposed for designation for *Carex lutea* should be excluded under section 4(b)(2) of the Act from the final designation.

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our proposed actions are based on scientifically sound data, assumptions, and analyses. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests for public hearings must be made in writing within 45 days of the publication of this proposal (see **DATES** and **ADDRESSES** sections). We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings in the **Federal Register** and local newspapers at least 15 days before the first hearing.

Required Determinations

Regulatory Planning and Review—Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this proposed rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, we lack the specific information necessary to provide an adequate factual basis for determining the potential incremental regulatory effects of the designation of critical habitat for the *Carex lutea* to either develop the required RFA finding or provide the necessary certification statement that the designation will not have a significant impact on a substantial number of small business entities. On the basis of the development of our proposal, we have identified certain sectors and activities that may potentially be affected by a designation of critical habitat for the *Carex lutea*. These sectors include industrial development, mining, drainage for silviculture and agriculture, highway expansion and herbicide use along utility and highway rights-of-way. We recognize that not all of these sectors may qualify as small business entities. However, while recognizing that these sectors and activities may be affected by this designation, we are collecting information and initiating our analysis to determine (1) which of these sectors or activities are or involve small business entities, and (2) what extent the effects are related to the *Carex lutea* being listed as an endangered species under the Act (baseline effects) or whether the effects are attributable to the designation of critical habitat (incremental). We believe that the potential incremental effects resulting from a designation will be small. As a consequence, following an initial evaluation of the information available to us, we do not believe that there will be a significant impact on a substantial number of small business entities resulting from this designation of critical habitat for *Carex lutea*. However, we will be conducting a thorough analysis to determine if this may in fact be the case. As such, we are requesting any specific economic information related to small business entities that may be affected by this designation and how the designation may impact their business. Therefore, we defer our RFA finding on this proposal designation until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and E.O. 12866.

As discussed above, this draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, we will announce availability of the draft economic analysis of the proposed designation in the **Federal Register** and reopen the public comment period for the proposed designation. We will include with this announcement, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. We have concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that we make a sufficiently informed determination based on adequate economic information and provide the necessary opportunity for public comment.

Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(a) This rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose

an enforceable duty upon State, local, or Tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)-(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or Tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not jeopardize the continued existence of the species, or destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(b) We do not believe that this rule would significantly or uniquely affect small governments. The lands being proposed for critical habitat designation are owned by private individuals, The Nature Conservancy and the State of North Carolina (Division of Parks and Recreation, Department of Transportation and Wildlife Resources Commission). None of these government entities fit the definition of "small governmental jurisdiction." Therefore, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for *Carex lutea* in a takings implications assessment. The takings implications assessment concludes that this designation of critical habitat for *Carex lutea* does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in North Carolina. The critical habitat designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the essential features themselves are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where state and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the PCEs within the designated areas to assist the public in understanding the habitat needs of the *Carex lutea*.

Paperwork Reduction Act of 1995

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq*.). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq*.) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

We have determined that there are no tribal lands occupied at the time of listing that contain the features essential for the conservation, and no tribal lands that are essential for the conservation, of *Carex lutea*. Therefore, we have not proposed designation of critical habitat for *Carex lutea* on tribal lands.

Energy Supply, Distribution, or Use

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. A total of 19.1 ac (7.8 ha) of critical habitat occur in electrical distribution lines. It is believed that the regular disturbance prevents the natural succession of woody species and serves to keep the habitat open, similar to the role that fire plays in the species' more natural savanna habitat. Critical habitat will include approximately 2,500 linear feet (762 meters) of power lines. However, we do not expect it to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. We will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the Field Supervisor, Raleigh Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Author(s)

The primary authors of this package are the staff members of the Raleigh Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.12(h), revise the entry for "*Carex lutea*" under "Flowering Plants" in the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*	*	
Carex lutea	Golden Sedge	NC	Cyperacea	E	721	17.96(a)	NA
*	*	*	*	*	*	*	

3. In § 17.96(a), add an entry for "*Carex lutea* (golden sedge)," in alphabetical order under the family Cyperacea, to read as follows:

§ 17.96 Critical habitat—plants.

(a)Flowering plants

* * * * *

Family Cyperacea: *Carex lutea* (golden sedge)

(1) Critical habitat units are depicted for Onslow and Pender Counties, NC, on the maps below.

(2) The primary constituent elements (PCEs) of critical habitat for the *Carex lutea* is Pine Savanna (Very Wet Clay Variant) natural plant community or ecotones that contain:

(i) Moist to completely saturated loamy fine sands, fine sands, fine sandy loams, and loamy sands soils with a pH between 5.5 and 7.2.

(ii) Open to relatively open canopy that allows full to part sun to penetrate to the herbaceous layer between savannas and hardwood forests.

(iii) Areas of bare soil immediately adjacent (within 12 inches (30 centimeters)) to mature *Carex lutea*

plants where seeds may fall and germinate or existing plants may expand in size.

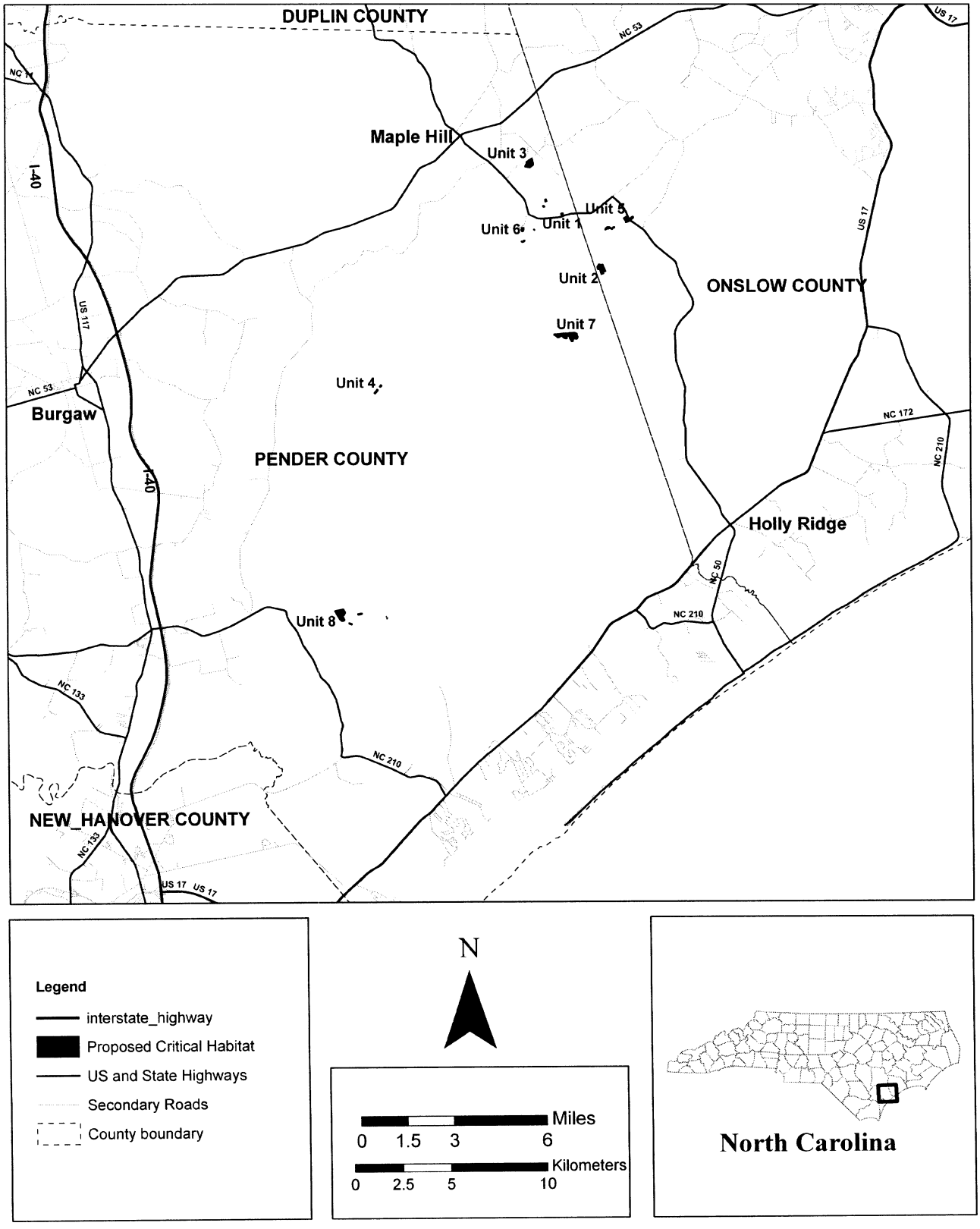
(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(4) *Critical habitat map units.* Data layers defining map units were created using a base of aerial photographs (USDA National Agriculture Imagery Program; NAIP 2008). Critical habitat units were then mapped using Universal Transverse Mercator (UTM) zone 18 North American Datum (NAD) 1983 coordinates. These coordinates establish the vertices and endpoints of the boundaries of the units and subunits.

(5) *Note*: Index Map (Map 1) follows:

BILLING CODE 4310–55–S

Index Map
Critical Habitat for *Carex lutea* (golden sedge), Pender and Onslow Counties, North Carolina



(6) Unit 1: Watkins Savanna, Pender County, NC.

(i) Subunit 1A

[Reserved for textual description of Subunit 1A]

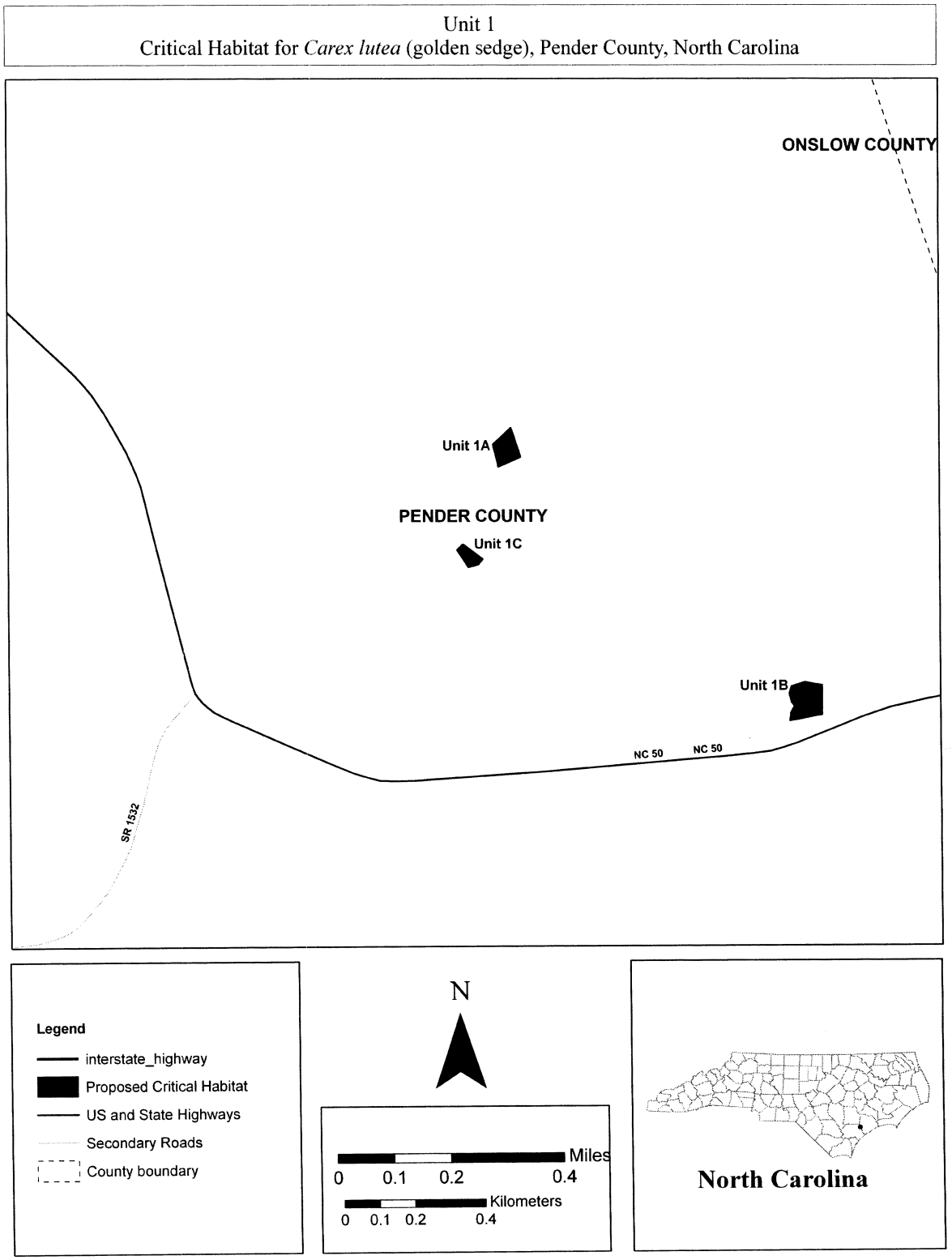
(ii) Subunit 1B

[Reserved for textual description of Subunit 1B]

(iii) Subunit 1C

[Reserved for textual description of Subunit 1C]

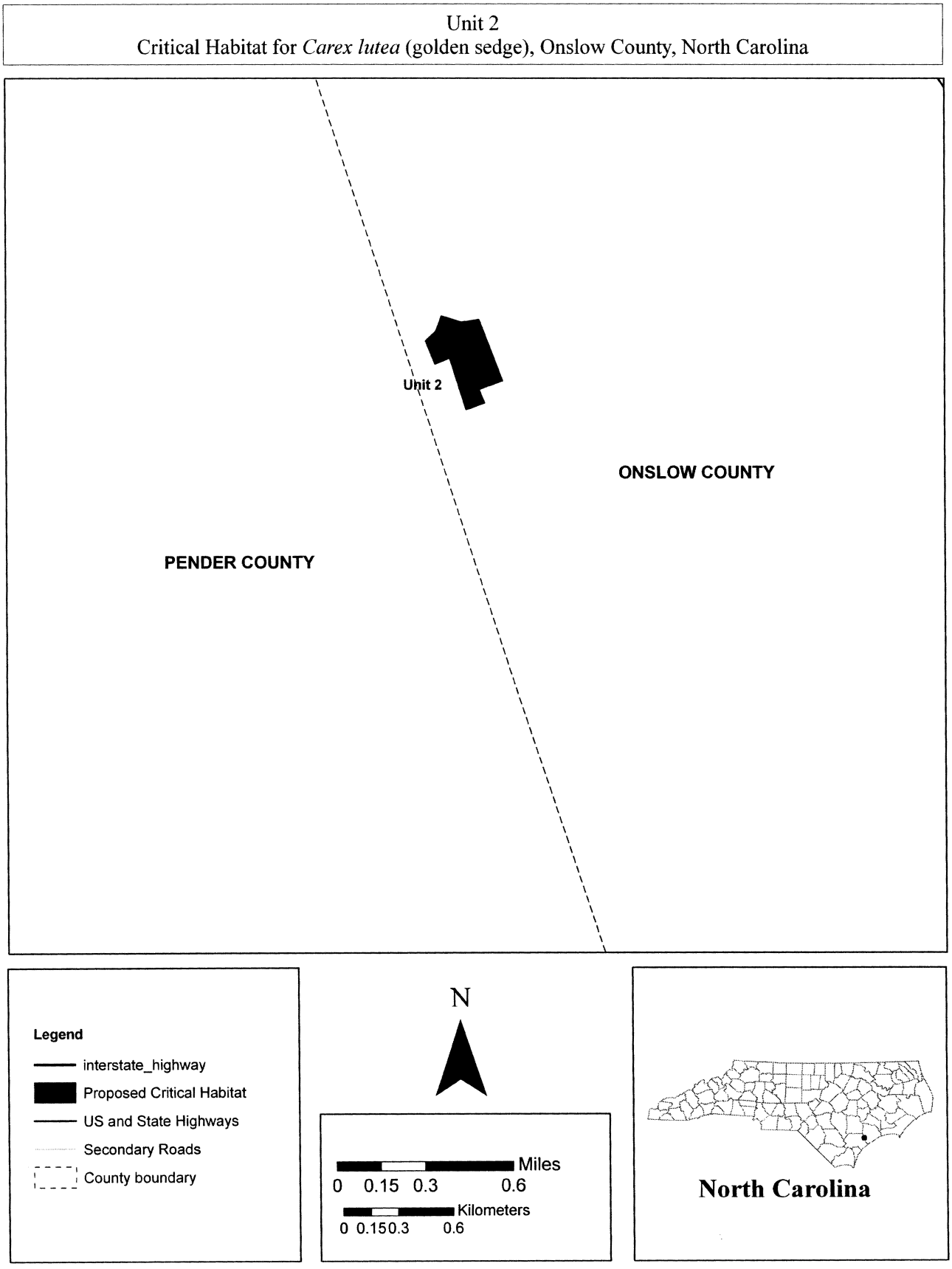
(iv) Map of Unit 1 (Watkins Savanna) follows:



(7) Unit 2: Haws Run Mitigation Site, Onslow County, NC.

(i) [Reserved for textual description of Unit 2]

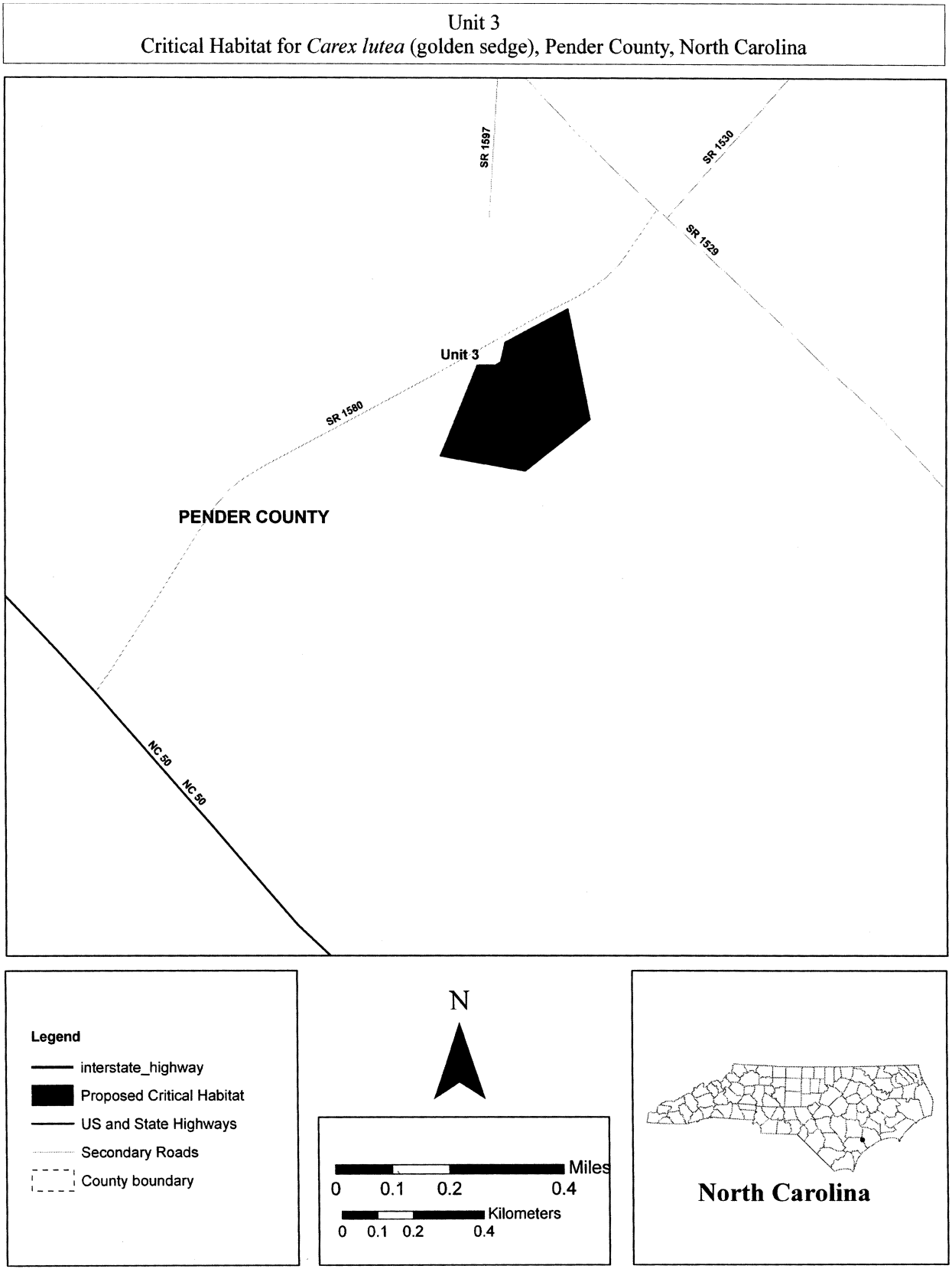
(ii) Map of Unit 2 (Haws Run Mitigation Site) follows:



(8) Unit 3: Maple Hill School Road Savanna, Pender County, NC.

(i) [Reserved for textual description of Unit 3]

(ii) Map of Unit 3 (Maple Hill School Road Savanna) follows:



(9) Unit 4: Southwest Ridge Savanna, Pender County, NC.

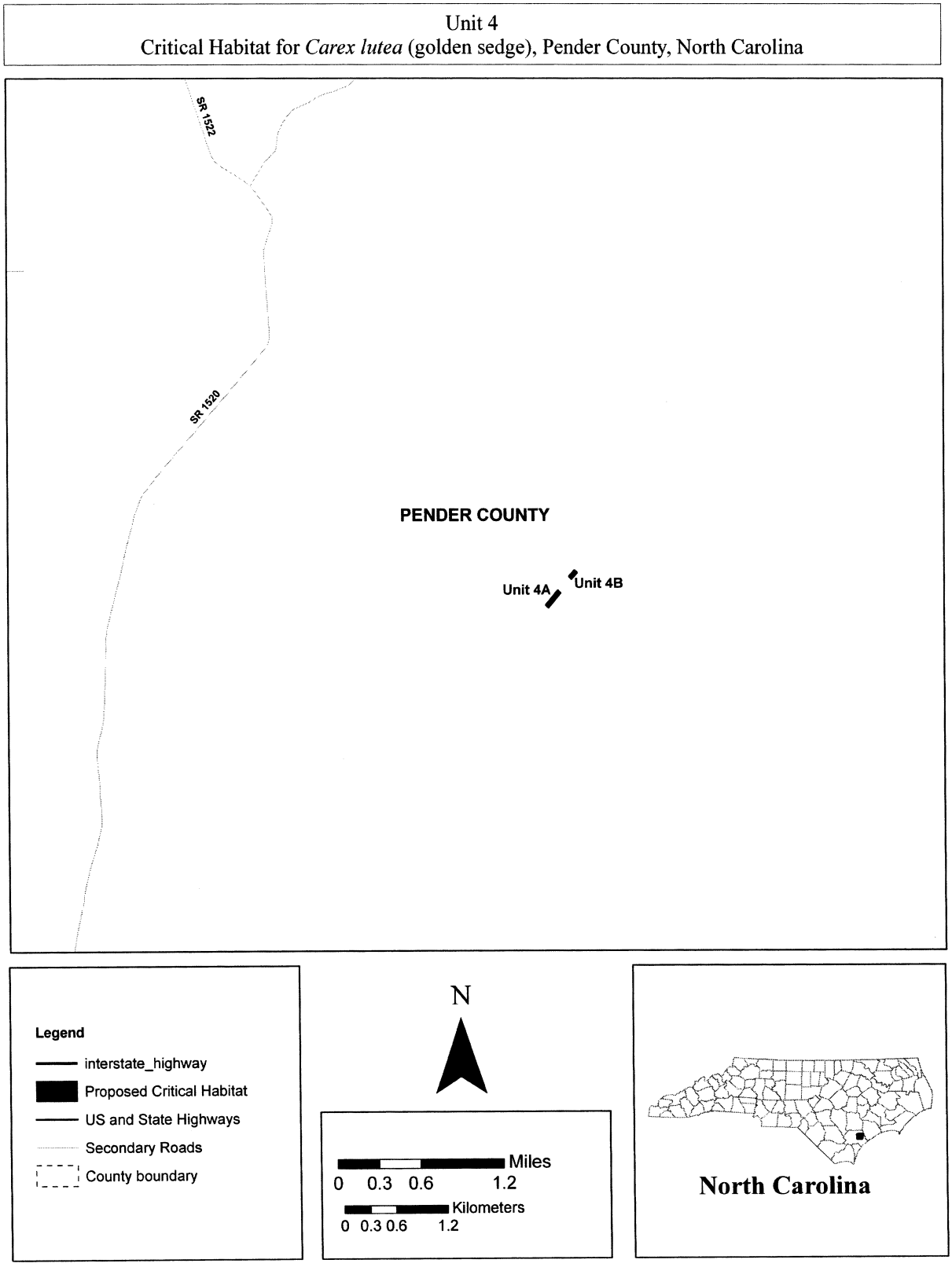
(i) Subunit 4A

[Reserved for textual description of Subunit 4A]

(ii) Subunit 4B

[Reserved for textual description of Subunit 4B]

(iii) Map of Unit 4 (Southwest Ridge Savanna) follows:



(10) Unit 5: Sandy Run Savannas, Onslow County, NC.

(i) Subunit 5A

[Reserved for textual description of Subunit 5A]

(ii) Subunit 5B

[Reserved for textual description of Subunit 5B]

(iii) Subunit 5C

[Reserved for textual description of Subunit 5C]

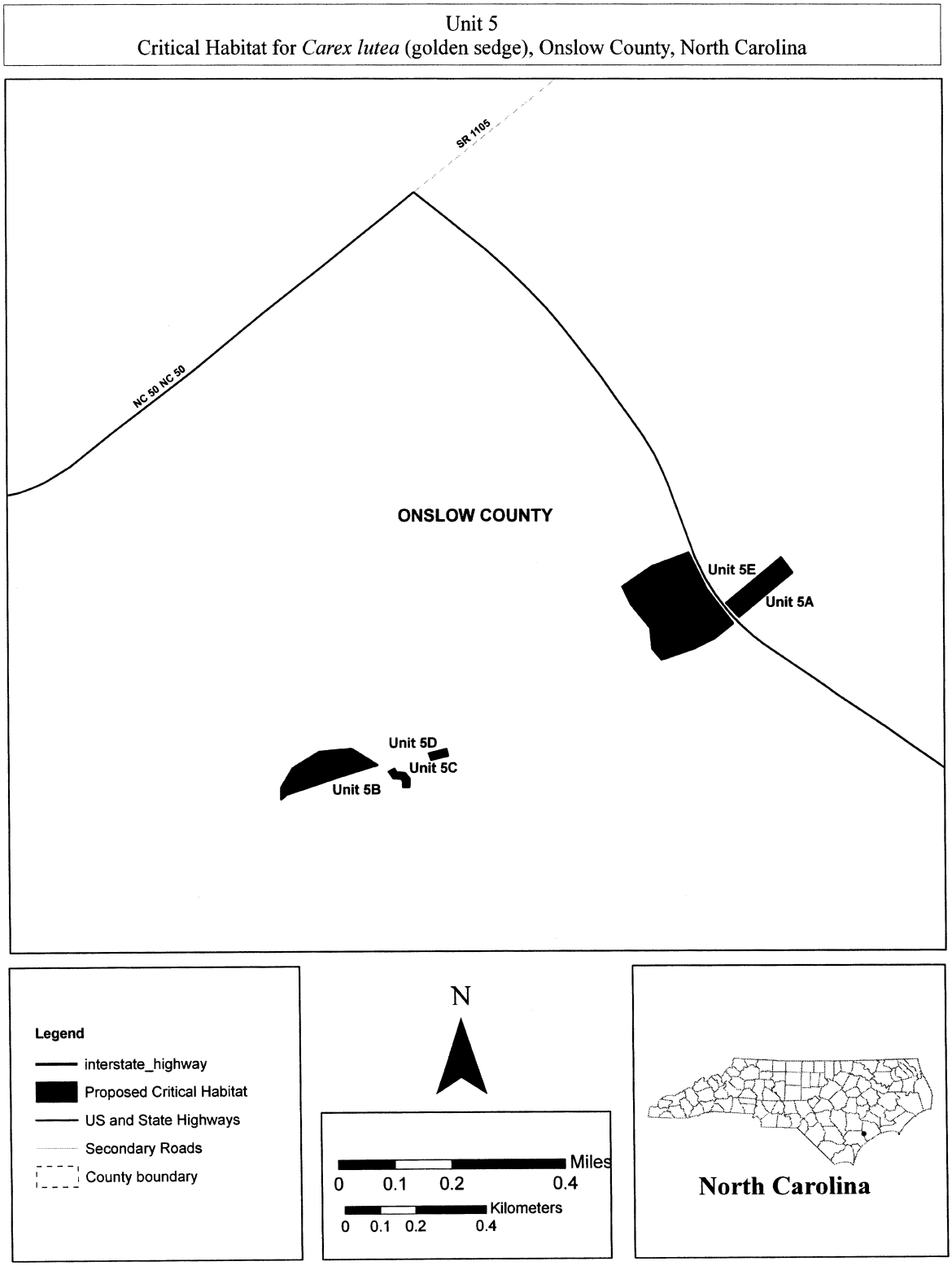
(iv) Subunit 5D

[Reserved for textual description of Subunit 5D]

(v) Subunit 5E

[Reserved for textual description of Subunit 5E]

(vi) Map of Unit 5 (Sandy Run Savannas) follows:



(11) Unit 6: The Neck Savanna, Pender County, NC.

(i) Subunit 6A

[Reserved for textual description of Subunit 6A]

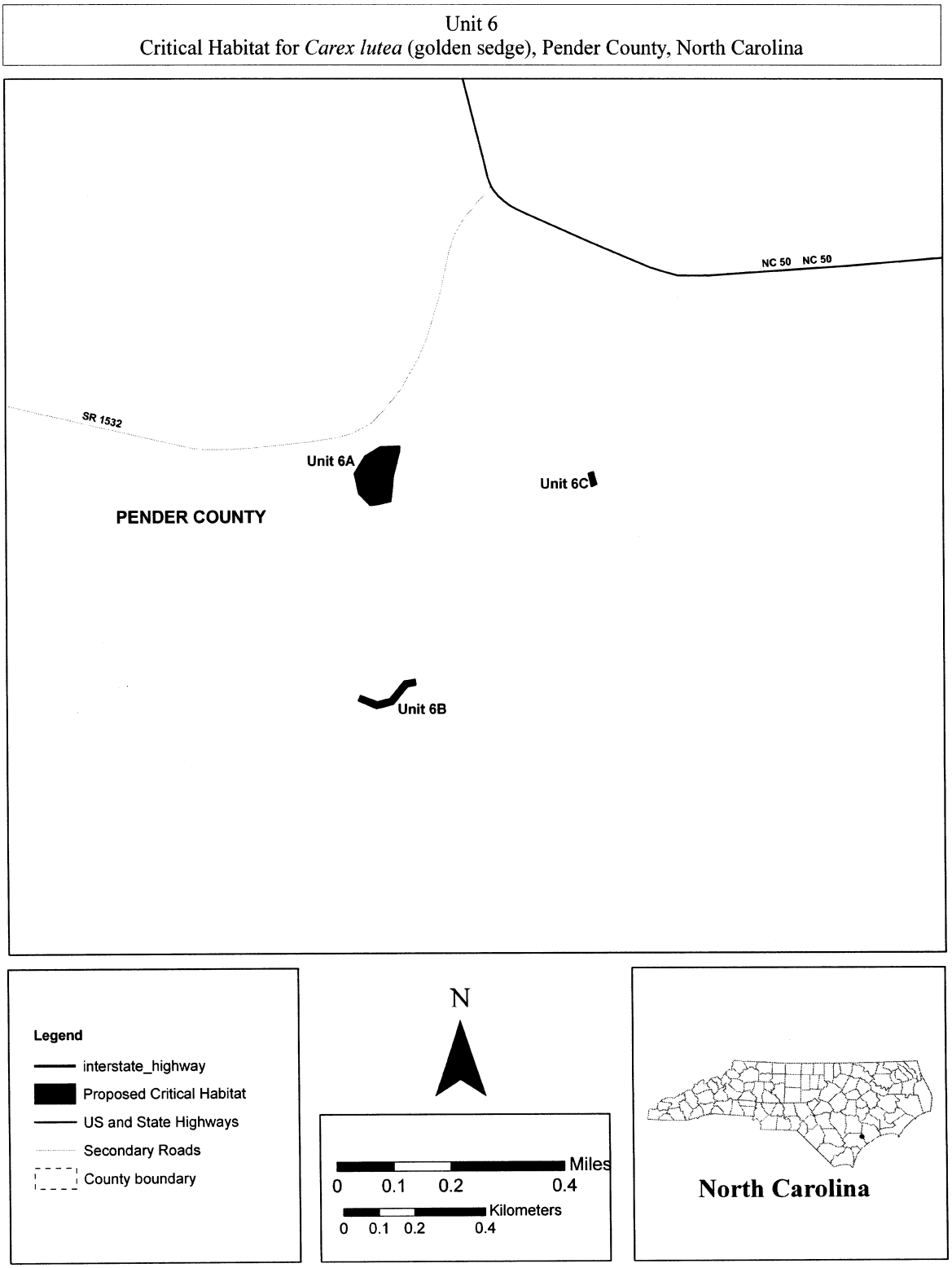
(ii) Subunit 6B

[Reserved for textual description of Subunit 6B]

(iii) Subunit 6C

[Reserved for textual description of Subunit 6C]

(iv) Map of Unit 6 (The Neck Savannas) follows:



(12) Unit 7: Shaken Creek Savanna, Pender County, NC.

(i) Subunit 7A

[Reserved for textual description of Subunit 7A]

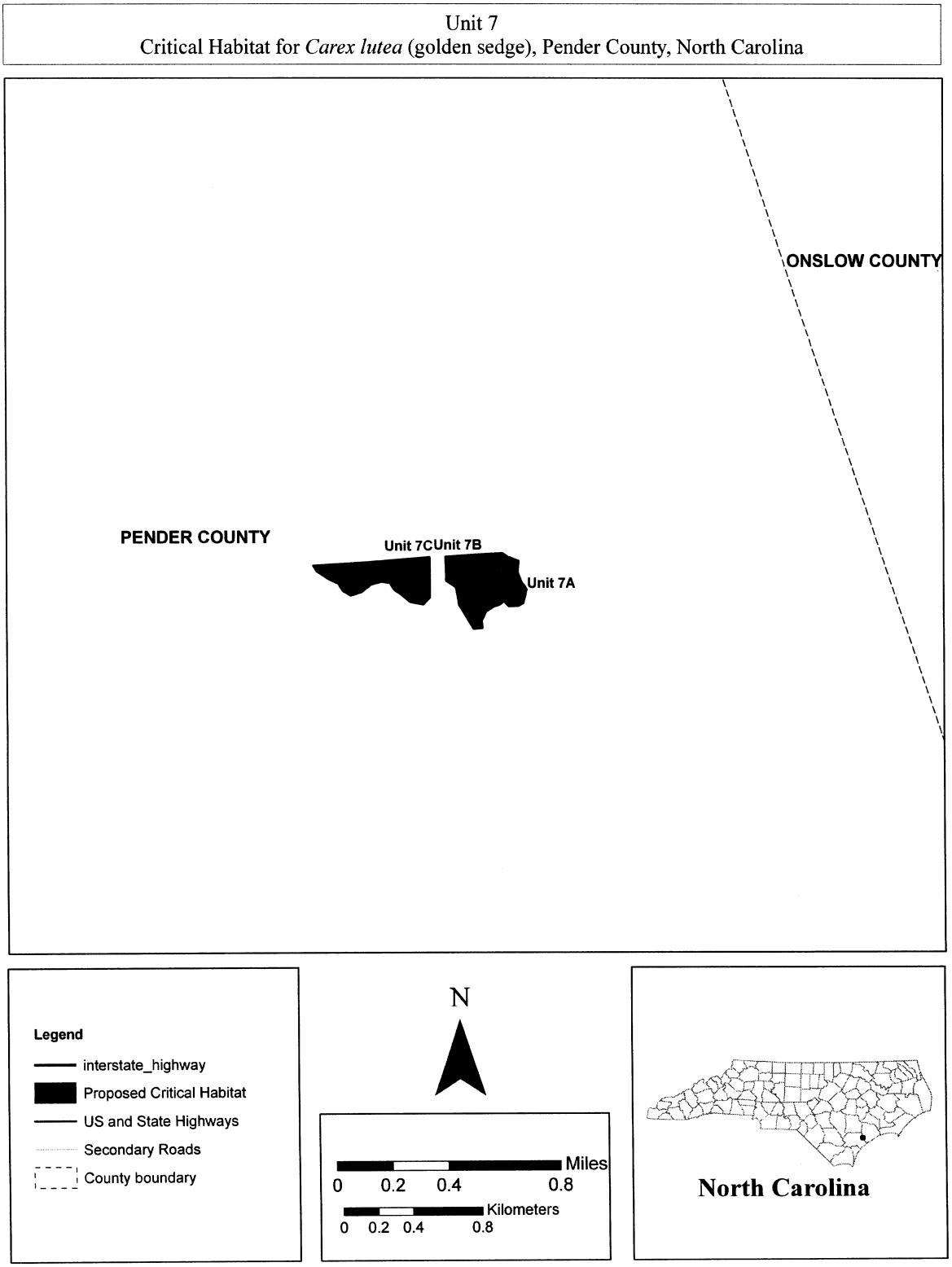
(ii) Subunit 7B

[Reserved for textual description of Subunit 7B]

(iii) Subunit 7C

[Reserved for textual description of Subunit 7C]

(iv) Map of Unit 7 (Shaken Creek Savanna) follows:



(13) Unit 8: McLean Savanna, Pender County, NC.

(i) Subunit 8A

[Reserved for textual description of Subunit 8A]

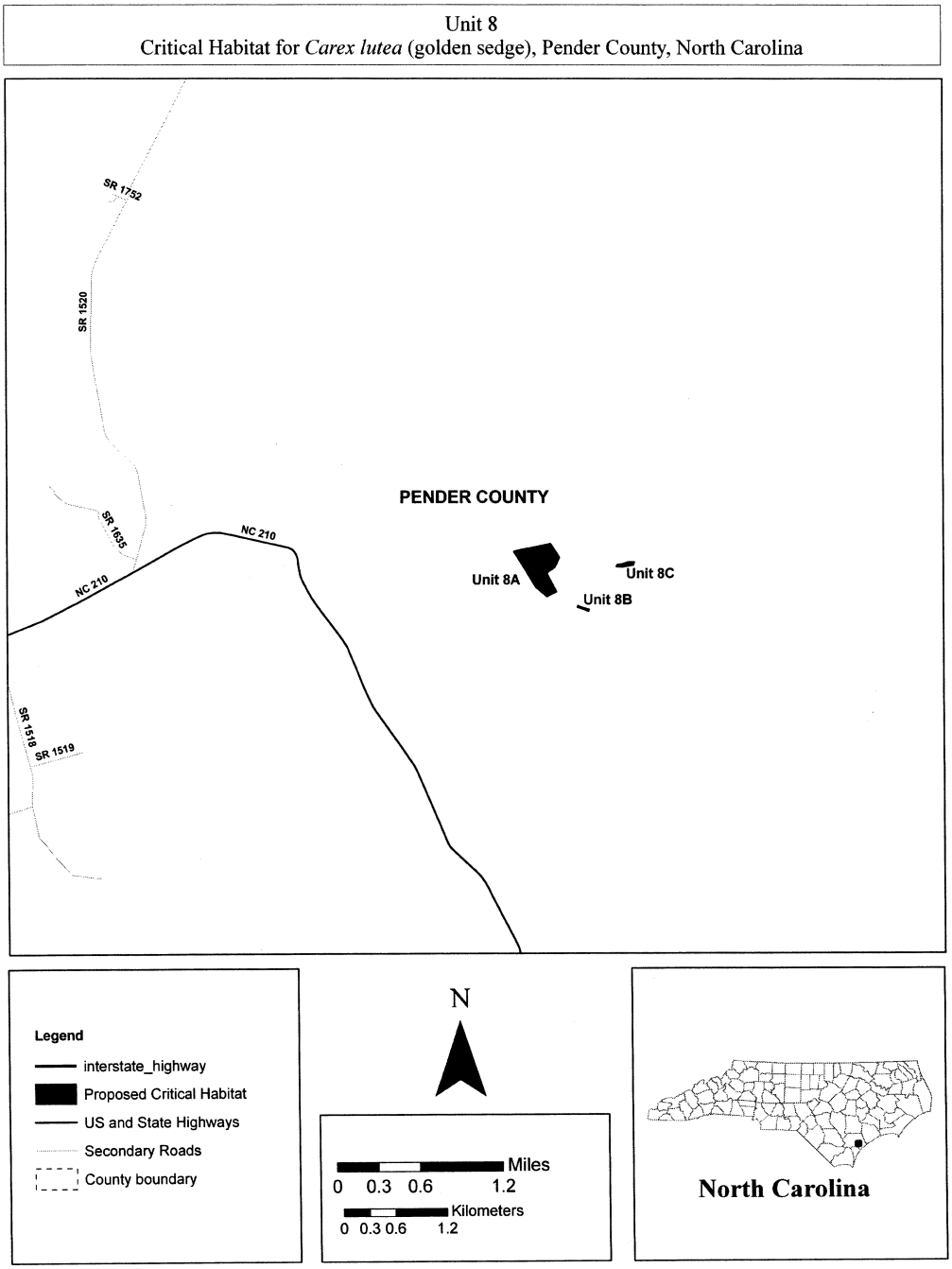
(ii) Subunit 8B

[Reserved for textual description of Subunit 8B]

(iii) Subunit 8C

[Reserved for textual description of Subunit 8C]

(iv) Map of Unit 8 (McLean Savanna) follows:



* * * * *

Dated: February 24, 2010.

Will Shafroth,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2010–4653 Filed 3–9–10; 8:45 am]

BILLING CODE 4310–55–C

Notices

Federal Register
Vol. 75, No. 46
Wednesday, March 10, 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.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

March 5, 2010.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology 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 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

National Agricultural Statistics Service

Title: On-Farm Renewable Energy Production Survey (OREP).

OMB Control Number: 0535–NEW.

Summary of Collection: Under the general authority of Title 7 U.S.C., Sec. 2204(a) the National Agricultural Statistics Service (NASS) is authorized to prepare and issue State and National estimates which include crop and livestock production, economic and environmental inputs, whole farm characteristics and operator demographics covered by the Census of Agriculture and its follow-on surveys. The Energy Production Survey is authorized by Public Law 110–246, Sec. 12023, Title X, the Horticulture and Organic Agriculture of the Food, Conservation, and Energy Act of 2008. The On-Farm Renewable Energy Production (OREP) survey is one of the follow-on surveys to the 2007 Census of Agriculture Survey.

Need and Use of the Information: The OREP survey will use, as a sampling universe, every respondent on the 2007 Census of Agriculture who reported energy generation on the farm. This energy survey will provide a comprehensive inventory of farm generated energy practices with detailed data relating to category or type of energy produced (wind, solar, and manure/methane digester), installation cost, year installed, if any energy was sold onto a power grid, and the average payment received per kilowatt hour or total amount of utility savings from reduced demand.

Description of Respondents: Farmers, ranchers, and farm managers self identified as producers of energy, through the 2007 Census of Agriculture.

Number of Respondents: 16,500.

Frequency of Responses: Reporting: One time.

Total Burden Hours: 8,447.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2010–5113 Filed 3–9–10; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF AGRICULTURE

Forest Service

Del Norte Resource Advisory Committee (RAC)

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Del Norte Resource Advisory Committee (RAC) will meet in Crescent City, California. The committee meeting is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) and in compliance with the Federal Advisory Committee Act. The purposes of the meeting is orientating new committee members to the Secure Rural Schools Act, Federal Advisory Committees Act, and guidelines for Title II and receive public comment on the meeting subjects and proceedings.

DATES: The meeting will be held April 6, 2010, from 6 p.m. to 8:30 p.m.

ADDRESSES: The meeting will be held at the Del Norte County Unified School District, Board Room, 301 West Washington Boulevard, Crescent City, California 95531.

FOR FURTHER INFORMATION CONTACT: Julie Ranieri, Committee Coordinator, Six Rivers National Forest, 1330 Bayshore Way, Eureka, CA 95503; (707) 441–3673; e-mail *jranieri@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Agenda items to be covered include: (1) Welcome and Committee introductions; (2) Federal Advisory Committee Act overview; (3) review of Secure Rural Schools Act and discussion of requirements related to Title II funding; (4) discussion of Committee member and Designated Federal Official roles and (5) review operational guidelines; (6) selection of RAC Chair; (7) next meeting purpose, location, and date; (8) and receive public comment. Public input opportunity will be provided and individuals will have the opportunity to address the Committee at that time.

Dated: March 2, 2010.

Tyrone Kelley,

Forest Supervisor.

[FR Doc. 2010–4928 Filed 3–9–10; 8:45 am]

BILLING CODE M

DEPARTMENT OF AGRICULTURE

Forest Service

Shasta County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Shasta County Resource Advisory Committee (RAC) will meet at the USDA Service Center in Redding, California, on March 31, 2010, from 8:30 a.m. to 12 noon. The purpose of this meeting is to discuss project updates and proposals, information on monitoring efforts, and a timeline for the upcoming year.

DATES: Wednesday, March 31 at 8:30 a.m.

ADDRESSES: The meeting will be held at the USDA Service Center, 3644 Avtech Parkway, Redding, California 96002.

FOR FURTHER INFORMATION CONTACT: Resource Advisory Committee Coordinator Ray Mooney at (530) 226–2494 or *jmooney@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Public input sessions will be provided and individuals will have the opportunity to address the Shasta County Resource Advisory Committee.

Dated: March 10, 2010.

J. Sharon Heywood,

Forest Supervisor, Shasta-Trinity National Forest.

[FR Doc. 2010–4957 Filed 3–8–10; 8:45 am]

BILLING CODE M

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Central Idaho Resource Advisory Committee Meeting

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee Act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self Determination Act of 2000 (Pub. L. 110–343), the Salmon-Challis National Forest's Central Idaho Resource Advisory Committee will conduct a business meeting which is open to the public.

DATES: Tuesday, March 23, 2010, beginning at 4 p.m.

ADDRESSES: Salmon-Challis N.F. South Zone Office, Highway 93, Challis, Idaho.

SUPPLEMENTARY INFORMATION: Agenda topics will include review of RAC 2010 projects, approval of RAC project proposals, and other RAC business. The meeting is an open public forum. Some RAC members may attend the meeting by conference call, telephone, or electronically.

FOR FURTHER INFORMATION CONTACT: Lyle E. Powers, Acting Forest Supervisor and Designated Federal Officer, at 208–756–5557.

Dated: March 2, 2010.

Frank V. Guzman,

Forest Supervisor, Salmon-Challis National Forest.

[FR Doc. 2010–4955 Filed 3–8–10; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Kootenai (KNF) and Idaho Panhandle National Forests (IPNF); Montana, Idaho and Washington; Revised Land and Resource Management Plans

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement (EIS) and revised land management plans using the provisions of the National Forest System land and resource management planning rule in effect prior to November 9, 2000, for the Kootenai and Idaho Panhandle National Forests located in Lincoln, Sanders, and Flathead counties in Montana; Bonner, Boundary, Kootenai, Shoshone, Benewah, Latah, and Clearwater counties in Idaho; and Pend Oreille county in Washington.

SUMMARY: As directed by the National Forest Management Act, the US Forest Service is preparing the revised land management plans for the Kootenai and Idaho Panhandle National Forests and will also prepare one Environmental Impact Statement (EIS) for the revised plans unless, during the revision process, the need for two separate EISs is found to be warranted. The Kootenai and Idaho Panhandle National Forests comprise the Kootenai and Idaho Panhandle Planning Zone (KIPZ). This notice briefly describes where the Forests are in this revision process and information concerning public participation. It also provides estimated dates for filing the EIS and provides the names and addresses of the responsible agency official and the individual who can provide additional information. This notice also briefly describes the applicable planning rule and how work done on the plan revision under the 2008 planning rule will be used or modified for completing the plan revision.

The revised land management plans will supersede the current land management plans previously approved by the Regional Forester in 1987 and as amended. The amended plans will remain in effect until the revision takes effect.

DATES: Comments providing additional information for the plans will be used to develop the draft revised forest plan and EIS. This information would be most useful if received by May 15, 2010. The agency expects to complete a proposed plan and draft EIS by December 2010, and a final plan and final EIS by December 2011. The dates, time, and location of any open houses will be posted on the forests' Web site: *http://www.fs.fed.us/kipz.*

ADDRESSES: Send written comments to KIPZ, Attention: Forest Plan Revision Team, Idaho Panhandle National Forests, Forest Supervisors Office, 3815 Schreiber Way, Coeur d'Alene, ID 83815. Comments may also be sent via e-mail: *rl_kipz_revision@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Linda Clark, revision co-team leader Idaho Panhandle National Forests, 3815 Schreiber Way, Coeur d'Alene, ID 83815, 208 765–7417, *laclark@fs.fed.us* or Kathy Rodriguez, revision co-team leader, Kootenai National Forest, Forest Supervisors Office, 31374 U.S. Highway 2, Libby, MT 59923–3022, 406–293–6211, *krodriguez@fs.fed.us.* Information on this revision is also available at KIPZ revision Web site (*http://www.fs.fed.us/kipz*). Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339 between 8 a.m. and 8 p.m., Eastern Time Monday through Friday.

SUPPLEMENTARY INFORMATION:

Name and Address of the Responsible Official

Leslie A.C. Weldon, Regional Forester, 200 E. Broadway, Missoula, MT 59807.

Nature of the Decision To Be Made

The Kootenai and Idaho Panhandle National Forests are preparing an EIS to revise the current forest plans. The EIS process is meant to inform the Regional Forester so that she can decide which alternative best meets the need to achieve quality land management under the sustainable multiple-use management concept to meet the diverse needs of people while protecting the forests' resources, as required by the National Forest Management Act and the Multiple Use Sustained Yield Act.

The revised forest plans describe the strategic intent of managing the Kootenai and Idaho Panhandle National Forests into the next 10 to 15 years. The revised forest plans provide management direction in the form of goals (desired conditions), objectives, suitability determinations, standards, guidelines, and a monitoring plan. They also make new special area recommendations for wilderness, research natural areas, and other special areas.

Applicable Planning Rule

Preparation of the revised plans was underway when the 2008 National Forest System land management planning rule was enjoined on June 30, 2009, by the United States District Court for the Northern District of California (*Citizens for Better Forestry* v. *United States Department of Agriculture,* 632F. Supp. 2d 968 (N.D.Cal. June, 2009)).

On December 18, 2009, the Department reinstated the previous planning rule, commonly known as the 2000 planning rule in the **Federal Register** (74 FR 242, pages 67059 through 67075 [Friday, December 18, 2009]). The 2000 planning rule was amended in 2002 to allow the Forest Service to follow the procedures of the 1982 Forest System Land and Resource Management Planning Rule (1982 Rule). The Kootenai and Idaho Panhandle National Forests have elected to use the provisions of the 1982 Planning Rule including the requirement to prepare an ETS to complete their revised plans.

In late 2000, the KIPZ began working on revision of their Land Management Plans (LMPs) under the 1982 Planning Rule. In April 2002, a Notice of Intent (NOT) was published in the **Federal Register**, announcing the revision of the LMPs with a 12 month public comment period. Work continued on the LMPs under the 1982, 2000, 2005, and 2008 Planning Rules. Results from public involvement work conducted since 2002, were used as the revision continued through June 2009. Proposed Plans were released in 2006, under the 2005 Planning Rule. Since 2008, work on the revision of the LMPs was conducted in accordance with all Forest Service directives applicable to the 2008 Planning Rule.

Although the 2008 Planning Rule is no longer in effect, information gathered prior to the court's injunction is useful for completing the revision of the plans using the provisions of the 1982 Planning Rule. The KIPZ has concluded that the following material developed during the plan revision process to date is appropriate for continued use in the revision process:

- The Content Analysis report prepared in 2004, summarized what the KIPZ had learned from people that responded to the preliminary proposed action, revision topics, and need for change through the various public and workgroup meetings, open houses, field trips, invited group presentations, and meetings with Tribal partners, agency partners, and elected officials up to that time.
- The Analysis of the Management Situation (AMS) and AMS Technical Report completed in March 2003 forms the basis for need to change the current forest plans and the proposed action for the plan revision.
- The Comprehensive Evaluation Report (CER) provided for public review and comment in 2006, built upon the AMS and documents the evaluation of the 1987 Forest Plans and proposed changes. The CER evaluates current social, economic, and ecological conditions and trends that contribute to sustainability. The CER, under the 2005 and 2008 Planning Rules, served as the principle document that supported the need to establish, amend, or revise a plan. The CER identifies factors that affect conditions and trends, and includes information of what is causing conditions to change, and describes the influence plan implementation would have on moving toward desired conditions.
- The inventory and evaluation of potential wilderness areas presented in the Proposed Land Management Plans and CER made available for public review and comment in May 2006, for both forests, is consistent with appropriate provisions of the 1982 planning Rule and will be brought forward into this planning process.
- The Analysis of Public Comment report prepared in March 2007 synthesizes and summarizes the comments and concerns heard during the comment period for the Proposed Land Management Plans released in May 2006.
- Information developed by the working groups (which included over 140 meetings) and discussions regarding Geographic Area (GA) desired conditions, the revision topics, monitoring and other plan components (1982 Planning Rule) and over fifty meetings and discussions on the starting option maps and potential changes to suggest to Forest Supervisors (2005 Planning Rule) that went into the Proposed LMPs.
- There are additional background reports, assessments, datasets, and public comment that will be used, some of which can be found on the KIPZ Web site.

As necessary or appropriate, the above listed material will be further adjusted as part of the planning process using the provisions of the 1982 Planning Rule (Authority: 16 U.S.C. 1600–1614; 36 CFR 219.35 (December 18, 2009) (74 FR 242)).

Proposed Action

The proposed action will be developed using the information that has been developed and summarized over the last 10 years including: Public comments, public working groups, AMS, CER, and proposed plans. Using the information from public involvement and content analysis on the proposed plans, the revision team worked on finalizing the plans from 2007 to 2009. The Forests propose to review the work that has been completed to date to develop a proposed action and range of alternatives.

Revision Topics Carried Forward

The Forests propose to carry forward the following Forestwide revision topics as published in the May 2006 Proposed Land Management Plans. These revision topics were identified in the 2003 AMS, and updated in the CER under the 2005, and 2008 Planning Rules:

- Access and Recreation
- Vegetation
- Timber
- Fire
- Wildlife
- Watersheds (Water, Soil, and Riparian) and Aquatic Species
- Recommended Wilderness

The Forests propose to start with the Proposed LMPs and comments received (under the 1982 and 2005 Planning Rules) to build Plans under the 1982 Planning Rule and proposed action in the accompanying EIS.

Public Involvement

Extensive public involvement and collaboration has occurred over the past eight years. Informal discussions with the public regarding needed changes to the current forest plans began with a series of public meetings in 2002. This input, along with science-based evaluations, and inventory and monitoring was used to determine the need for change identified above.

Additional meetings, correspondence, news releases, comment periods, and other tools have been utilized to gather feedback from the public, forest employees, tribal governments, federal and state agencies, and local governments.

The KIPZ hosted approximately thirty informational and comment meetings within communities of Idaho, Montana, and Washington during the scoping

process, which started in April 2002, with the Notice of Intent in the **Federal Register**, and ended in May 2004. In addition to the public meetings, briefings and meetings were held with the Tribes, Congressionals and other elected officials, other agencies, and interest groups.

Also during the scoping period, the KIPZ hosted approximately 140 workgroup meetings from August 2003 to May 2004. These meetings were held in communities within the KIPZ zone and the workgroups focused on the GAs surrounding each of these communities. The purpose of these workgroup meetings was to: (1) Share information about the revision topics, (2) collaboratively discuss and develop desired conditions for each of the revision topics within the workgroup's GAs, and (3) gain an understanding of the issues and appreciation of others' viewpoints. Workgroup meeting notes and desired condition statements can be found on the KIPZ Web site (*http://www.fs.fed.us/kipz*).

This information was used in developing forestwide and GA desired conditions, other management direction such as management area direction, and the starting option map, which was used at further workgroup meetings in the summer of 2005.

In addition to these workgroup meetings, briefings and meetings were held with the Tribes, Congressionals and other elected officials, other agencies, and interest groups (upon request). Several elected officials, Congressional staffers, and other agency representatives participated in the workgroup meetings.

From July to September 2005, the KIPZ hosted additional workgroup meetings in the same communities focusing on the same GAs. The purpose of these workgroup meetings was to: (1) Share the starting option maps and discuss how they were developed, (2) validate the information on the maps, and (3) collaboratively discuss any possible changes to the maps. In addition to these meetings, meetings were held with elected officials, the Tribes, and other groups. The comments from all of these meetings resulted in decisions made by the Forest Supervisors to change the starting option maps. Workgroup meeting notes can be found on the KIPZ Web site (*http://www.fs.fed.us/kipz*).

In October 2005, Draft Forest Plans maps were released with the intent to provide information back to the public on how the starting option maps had changed. It did not initiate a comment period. The maps, along with the rationale for the changes, are posted on the KIPZ Web site. The Draft Forest Plans maps were used by the revision team to complete the Proposed Land Management Plans.

In May 2006, the Kootenai and Idaho Panhandle National Forests prepared and released Proposed Land Management Plans, with maps, for a 90-day comment period (extended to 120 days). An Analysis of Public Comment report was prepared in March 2007, and posted on the KIPZ Web site (*http://www.fs.fed.us/kipz*). The report synthesized the comments and concerns heard during the comment period for the Proposed Land Management Plans.

The KIPZ will continue regular and meaningful consultation and collaboration with tribal nations, on a government-to-government basis. The agency will work with tribal governments to address issues concerning Indian tribal self-government and sovereignty, natural and cultural resources held in trust, Indian tribal treaty and Executive order rights, and any issues that significantly or uniquely affect their communities.

The KIPZ desires to continue collaborative efforts with members of the public who are interested in management of the Forests, as well as federal and state agencies, local governments, and private organizations.

If you feel that we missed any substantive issues or concerns from those listed above as revision topics or additional, different comments from those provided on the Proposed LMPs, please e-mail, call or write to us. If you do wish to comment, it is important that you provide comments at such times and in such a way (clearly articulate your concerns) that they are useful to the Agency's preparation of the revised plan and the EIS. The submission of timely and specific comments can affect a reviewer's ability to participate in subsequent administrative or judicial review. At this time, we anticipate using the 2000 Planning Rule pre-decisional objection process (36 CFR 219.32) for administrative review.

Comments received in response to this solicitation, including the names and addresses of those who comment will be part of the public record. Comments submitted anonymously will be accepted and considered.

Dated: March 2, 2010.

Leslie A.C. Weldon,

Regional Forester, Forest Service Northern Region.

[FR Doc. 2010–4929 Filed 3–9–10; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Revision of Land Management Plan for the George Washington National Forest, Virginia and West Virginia

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an environmental impact statement and revised land management plan using the provisions of the 1982 National Forest System land and resource management planning regulations for the George Washington National Forest.

Affected Area: Alleghany, Amherst, Augusta, Bath, Botetourt, Frederick, Highland, Nelson, Page, Rockbridge, Rockingham, Shenandoah and Warren counties, Virginia and in Hampshire, Hardy, Monroe and Pendleton counties, West Virginia.

SUMMARY: As directed by the National Forest Management Act, the USDA Forest Service is preparing the George Washington National Forest (GWNF) revised land and resource management plan (Forest Plan) and an environmental impact statement (EIS) for this revised plan. This notice briefly describes the purpose and need for change, some proposed actions in response to the need for change, preliminary issues, and preliminary alternatives for the plan revision based on what has been identified from internal and external discussions since the revision of the Forest Plan began in 2007. It also provides information concerning public participation, estimated dates for filing the EIS, the names and addresses of the responsible agency official, and the individuals who can provide additional information. Finally, this notice briefly describes the applicable planning rule and how work done on the plan revision under the 2008 planning rule will be used or modified for completing this plan revision.

The revised Forest Plan will supersede the land and resource management plan previously approved by the Regional Forester on January 21, 1993 and as amended nine times from 1993 to 2002. Those amendments include: The availability of oil and gas leasing in Laurel Fork Special Management Area; the designation of Mount Pleasant National Scenic Area; the Biological Opinion for the Indiana bat; and the helicopter application of liming for the St. Mary's River within the St. Mary's Wilderness. The amended Plan will remain in effect until the revision takes effect.

DATES: Comments concerning the scope of this analysis as presented here and on

the Internet Web site *http://www.fs.fed.us/r8/gwj* will be most useful in the development of the draft Forest Plan and draft Environmental Impact Statement if received by May 7, 2010. Public meetings to discuss the need for change, issues for analysis, a range of alternatives and further plan development are planned in March and April 2010 at several locations. The dates, times and locations of these meetings will be posted at the Web site: *http://www.fs.fed.us/r8/gwj.* The agency expects to release a draft revised Forest Plan and draft EIS for formal comment by December 2010 and a final revised Forest Plan and final EIS by September 2011.

ADDRESSES: Send written comments to: George Washington Plan Revision, George Washington & Jefferson National Forests, 5162 Valleypointe Parkway, Roanoke, Virginia 24019–3050. Electronic comments should include "GW Plan Revision" in the subject line and be sent to: *comments-southern-georgewashingtonjefferson@fs.fed.us.*

FOR FURTHER INFORMATION CONTACT: Karen Overcash, Planning Team Leader, Ken Landgraf, Planning Staff Officer, or JoBeth Brown, Public Affairs Officer, George Washington & Jefferson National Forests, (540) 265–5100. Information on this revision is also available at the George Washington & Jefferson National Forests revision Web site *http://www.fs.fed.us/r8/gwj.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time Monday through Friday.

SUPPLEMENTARY INFORMATION:

A. Name and Address of the Responsible Official

The responsible official who will approve the Record of Decision is Elizabeth Agpaoa, Regional Forester, Southern Region, 1720 Peachtree Road, NW., Atlanta, Georgia 30309.

B. Nature of the Decision To Be Made

The George Washington National Forest is preparing an EIS to revise the current Forest Plan. The EIS process is meant to inform the Regional Forester so that she can decide which alternative best meets the diverse needs of the people while protecting the forest's resources, as required by the National Forest Management Act and the Multiple Use Sustained Yield Act. The Revised Forest Plan will establish management direction for the next 10 to 15 years and will address the needs for change described below. Forest Plans typically do not make site-specific decisions but they do establish limitations on what actions may be authorized and what conditions must be met as part of project-level decision-making. The authorization of site-specific activities within a plan area later occurs through project decision-making that must comply with NEPA procedures and must include a determination that the project is consistent with the Forest Plan. The exception to this for the GWNF Forest Plan will be the site-specific designation of those lands administratively available for oil and gas leasing. The environmental analysis for this site-specific decision will be included within the Forest Plan EIS.

A Forest Plan developed under the 1982 planning rule procedures will make the following primary decisions:

1. Establishment of forestwide multiple-use goals and objectives (36 CFR 219.11(b));

2. Establishment of forestwide management requirements (36 CFR 219.13 to 219.27);

3. Establishment of multiple-use prescriptions and associated standards for each management area (36 CFR 219.11(c));

4. Determination of land that is suitable for the production of timber (16 U.S.C. 1604(k) and 36 CFR 219.14);

5. Establishment of the allowable sale quantity for timber within a time frame specified in the plan (36 CFR 219.16);

6. Establishment of monitoring and evaluation requirements (36 CFR 219.11(d));

7. Recommendations concerning roadless areas that Congress could designate as wilderness (36 CFR 219.17); and

8. Where applicable, designation of those lands administratively available for oil and gas leasing (36 CFR 228. 102). The 1993 GWNF Forest Plan contains the designation of those lands administratively available for oil and gas leasing. This designation will be analyzed again in the EIS and addressed in the revised Forest Plan.

C. Background

1. Applicable Planning Rule

Notification of initiation of the plan revision process for the George Washington National Forest was provided in the **Federal Register** on February 15, 2007 [72 FR 73901]. The plan revision was initiated under the planning procedures contained in the 2005 Forest Service planning rule (36 CFR 219 (2005)) and one series of public meetings was held. On March 30, 2007, the federal district court for the Northern District of California enjoined the Forest Service from implementing the 2005 planning rule and the revision of the GWNF Forest Plan under the 36 CFR 219 (2005) rule was suspended in response to the injunction. On April 21, 2008 the Forest Service adopted a new planning rule that allowed resumption of the revision process if it conformed to the new planning rule (36 CFR 219.14(b)(3)(ii), 2008). Notification of adjustment for resuming the land management plan revision process under the 36 CFR 219 (2008) rule for the GWNF was provided in the **Federal Register** on June 24, 2008 [73 FR 35632]. A series of five topical public meetings were held between July 2008 and February 2009. On June 30, 2009, the 2008 planning rule was enjoined by the United States District Court for the Northern District of California (*Citizens for Better Forestry* v. *United States Department of Agriculture*, No. C 08–1927 CW (N.D. Cal. June 30, 2009)) and the revision of the GWNF Forest Plan was again suspended. The Department has determined that the 2000 planning rule is now back in effect. The 2000 Rule's transition provisions (36 CFR 219.35), amended in 2002 and 2003 and clarified by interpretative rules issued in 2001 and 2004, and reissued on December 18, 2009 [74 FR 67059–67075] allow use of the provisions of the National Forest System land and resource management planning rule in effect prior to the effective date of the 2000 Rule (November 9, 2000), commonly called the 1982 planning rule, to amend or revise plans. The GWNF has elected to use the provisions of the 1982 planning rule, including the requirement to prepare an EIS, to complete its plan revision.

2. Relationship to the Southern Appalachian Assessment and the Revised Land and Resource Management Plan for the Jefferson National Forest

The George Washington and Jefferson National Forests, along with four other national forests, participated in the preparation of the Southern Appalachian Assessment, which culminated in a final summary report and four technical reports (atmospheric, social/cultural/economic, terrestrial, and aquatic) that were published in July, 1996. The Assessment facilitated ecologically based approaches to public lands management in the Southern Appalachian region by collecting and analyzing broad scale biological, physical, social and economic data. It addressed the sustainability of Southern Appalachian Mountain public lands in light of increasing urbanization,

changing technologies, forest pests, and other factors. The Assessment supported the revision of five Forest Plans within the Southern Appalachian Mountains, with the exception of the recently revised GWNF Forest Plan, by describing how the lands, resources, people and management of the National Forests are interrelated within the larger context of the Southern Appalachian region.

The Revised Land and Resource Management Plan for the Jefferson National Forest was approved January 15, 2004. Although the Jefferson National Forest was administratively combined with the George Washington National Forest in 1995, the forests still retain separate Forest Plans.

3. Prior Plan Revision Effort

Although the 2008 planning rule is no longer in effect, the information gathered from public collaboration efforts and most of the analysis conducted prior to the court's injunction in June 2009 is useful for completing the plan revision using the provisions of the 1982 planning regulations. The GWNF has concluded that the following material developed during the plan revision process to date is appropriate for continued use:

—The inventory and evaluation of potential wilderness areas that was previously published on August 21, 2008 is consistent with the 1982 planning regulations, and will be brought forward into this plan revision process.

—A Comprehensive Evaluation Report (CER) was developed under the 2005 and 2008 rule provisions, and it has been available for public comment. This analysis will be updated with additional information to meet the requirements of the Analysis of the Management Situation (AMS) provisions of the 1982 rule. The information from this analysis was used to help identify the need for change and the preliminary proposed actions that are identified in this notice. Comments received during the scoping process will be used to further update the need for change analysis. Other AMS requirements will also continue to be worked on as the planning process proceeds.

—Information on the life history, threats, habitat needs and population trends for a number of terrestrial and aquatic species contained in the forest planning records for the ecosystem and species diversity assessments will continue to be used as a reference in the planning process as appropriate to meet the requirements of the 1982 planning regulations. This is scientific information and is not affected by the change of planning rule. This information will be updated with any new available information.

—Public comments previously submitted in writing, or recorded at past public meetings, related to the revision of the GW Forest Plan since 2007 will be used to help identify issues and concerns and to help develop alternatives to address these issues and concerns.

As necessary or appropriate, the above listed material will be further adjusted as part of the planning process using the provisions of the 1982 planning regulations.

D. Issues, Need for Change, and Proposed Actions

According to 36 CFR 219.10(g) (1982 rule), land management plans are ordinarily revised on a 10 to 15 year cycle. The existing Forest Plan for the George Washington National Forest (GWNIF) was approved on January 21, 1993. Since then, changes have occurred in resource conditions, environmental stresses and threats, societal demands and our current state of scientific knowledge. Also since then, the Jefferson National Forest was administratively combined with the George Washington National Forest in 1995. Together, both forests cover almost 1.8 million acres of National Forest system lands in Virginia, West Virginia and a small portion in Kentucky. The Forest Plan for the Jefferson National Forest was approved January 15, 2004 and was prepared in conjunction with four other National Forests in the Southern Appalachians, using the best available science from the Southern Appalachian Assessment. A desire for both the GWNF and JNF Forest Plans to provide some level of consistent management direction has been expressed by members of the public, our state agency partners and our forest employees. This will improve efficiency in plan implementation and monitoring and in responding to regional or landscape level analysis of issues that cross broad landscapes. Therefore, consideration of the management direction in the JNF Revised Forest Plan is important in the revision of the GWNF Forest Plan.

Previous public collaboration efforts with individual members of the public, organizations, user groups, industry representatives, local and state government representatives, state agency partners and forest employees have identified a number of items that should be addressed in the Forest Plan. These include questions about how the Forest will manage terrestrial plants, terrestrial animals, rare species (including threatened, endangered, sensitive and locally rare species), old growth, riparian areas, water quality, drinking water, aquatic animals, wood products, scenery, recreation opportunities in a variety of settings (hiking, mountain biking, All-Terrain Vehicle use, Off-Highway Vehicle use, horseback riding), roadless areas, wilderness, forest health, roads, minerals, fire, subsurface mineral rights, lands, air quality, special uses and the contributions of the forest to local economies. A number of concerns involved issues related to impacts to the Forest from outside the Forest boundary. These include climate change, nonnative invasive species, increasing development adjacent to the Forest, increasing demands for use of Forest (e.g., wind energy development), increasing demands for access to the Forest, and increasing law enforcement problems with illegal access. Most of these concerns are multi-faceted, interconnected and frequently involve conflicting viewpoints. However, from all of the previous public interactions, there appeared to be three prominent areas of discussion: Vegetation management (where, how much, what types); access management (roads and trails); and management of roadless areas, other remote areas, and wilderness.

The need for change topics and proposed actions highlighted here represent efforts to integrate and balance many of the issues and concerns that have been identified to date. They are a starting point for framing future discussions in proceeding with the GWNF Forest Plan revision; discussions that could lead to additional issues and needs for change, different alternatives, different land allocations, changes in objectives, changes in suitable uses and different levels of analysis needed. Every concern or issue is not necessarily mentioned below but more details on the need for change and proposed actions can be found on the forest's Web site at *http://www.fs.fed.us/r8/gwj.*

Need for Change Topic 1—Ecological Health, Restoration and Sustainability

Changes are needed in management direction for maintaining or restoring healthy, resilient forest ecosystems due to the recognition that: Vegetation conditions (structure, composition, and function) for some ecosystems have declined (e.g., oak regeneration, fire dependent pine regeneration); forest conditions indicate a substantial departure from natural fire regimes; stresses and threats from insects, disease, and nonnative invasive plant

and animal species are increasing; and potential effects from climate change are uncertain. By restoring and maintaining the key characteristics, conditions, and functionality of native ecological systems, the GWNF should also provide for the needs of the diverse plant and animal species on the forest. The issue of vegetation management (where, how much, what type) is closely related to this topic because it is one of the tools by which the desired conditions and objectives for ecological health and sustainability can be accomplished.

Proposed Actions

1. Identify desired conditions and objectives to maintain the resilience and function of nine identified ecological systems and determine the desired structure and composition of those ecosystems.

2. Incorporate management direction to provide habitat for maintaining species viability and diversity across the forest. For example, specify objectives to address the many species that need habitat management in some form of opening, open woodland or early successional habitat.

3. Combine the existing management prescriptions for remote wildlife habitat, mosaics of wildlife habitat, early successional habitat and timber management into one broader area for management that will allow better implementation of desired conditions and objectives for ecosystem and species diversity and viability at a larger landscape level.

4. Add about 23,000 acres of new and expanded existing Special Biological Areas to protect and restore rare communities and species.

5. Recognize the role of fire as an essential ecological process. Substantially increase the objective for using prescribed fire for ecosystem restoration to around 12,000 to 20,000 acres per year. Incorporate the use of unplanned natural ignitions for achieving ecological objectives.

6. Incorporate management direction for controlling, treating or eradicating nonnative invasive plant and animal species.

7. Update the Management Indicator Species (MIS) list to use the same species as in the Jefferson NF Forest Plan, except the Cow Knob salamander will replace the Peaks of Otter salamander. MIS are species whose population changes are believed to indicate the effects of management activities.

8. Update the direction for management of old growth to meet guidance for the Southern Region. Provide for small, medium and large patches of old growth with an adequate representation and distribution of the old growth community types. Because an inventory of existing old growth does not exist to the degree it did for the Jefferson NF, manage old growth through the use of forest-wide desired conditions and standards, rather than as a separate management prescription as in the Jefferson NF Forest Plan.

9. Incorporate adaptive management strategies for addressing climate change.

10. Identify five reference watersheds for monitoring of baseline conditions.

Need for Change Topic 2—Roadless Area, Backcountry and Wilderness Management

The 2001 Roadless Area Conservation Rule used the roadless inventory from the 1993 GWNF Forest Plan to identify the inventoried roadless areas covered by the Rule. These Inventoried Roadless Areas, updated to reflect subsequent designations of Wilderness and a National Scenic Area, now include 24 areas for a total of about 242,000 acres. The 2001 Roadless Area Conservation Rule has been litigated, enjoined, and reinstated for part of the U.S., but it is currently not in effect for the GWNF. In 2008, an inventory of Potential Wilderness Areas was completed that identified 37 areas (totaling about 370,000 acres) that meet the definition of wilderness in section 2(c) of the 1964 Wilderness Act. This inventory included almost all of the remaining 2001 Inventoried Roadless Areas. A draft evaluation that is based on the capability (degree to which each area contains the basic natural characteristics that make it suitable for wilderness designation), the availability (value of and need for the wilderness resource compared to the value of and need of each area for other resources) and the need (degree that the area contributes to the local and national distribution of wilderness) for additional wilderness has been conducted for each of these areas.

Proposed Actions

1. Identify one new area and three additions to existing wilderness areas (about 20,400 acres) as recommended wilderness study areas.

2. Expand the current remote backcountry management area allocation to include more of the Inventoried Roadless Areas and update the management direction for these remote backcountry areas to contain management restrictions on road construction and timber harvest that are similar to those described in the 2001 Roadless Area Conservation Rule.

3. Areas in the potential wilderness area inventory that are currently assigned an active management prescription, and that are not recommended for wilderness study, would remain in active management. Many of these areas are long and skinny and surrounded by roads that are suitable for some management activities without additional permanent road construction.

Need for Change Topic 3—Responding to Social Needs

Changes are needed in management direction for some of the tangible and non tangible goods and services offered by various forest resources. The issue of road and trail access is most closely related to this topic.

Proposed Actions

1. Identify the importance of maintaining the high quality of water for drinking water and for aquatic life. Increase the riparian corridor distance definition. Update the standards for riparian area protection to incorporate the best available science. Strengthen the management direction for groundwater and karst areas (two of the nine ecological systems for focusing management direction to maintain or restore sustainability are ones that emphasize the need for protection of surface water and groundwater).

2. Re-evaluate the oil and gas leasing availability designations.

3. Identify uses suitable for specific areas of the forest (e.g., timber production, road construction, wind energy development, prescribed fire).

4. Determine the allowable sale quantity of timber.

5. Re-evaluate road access needs.

E. Preliminary Alternatives

A range of alternatives will be considered during the plan revision process that will propose different options to resolve issues identified in the scoping process. The draft EIS will examine the effects of implementing a reasonable range of alternatives and will identify a preferred alternative. Previous public collaboration efforts have been used to identify the following preliminary alternatives; however, there will be future opportunities to refine and/or develop additional alternatives.

1. *Proposed Action*— The proposed actions identified to date in order to respond to the need for change formulate the basis for an alternative to be evaluated.

2. *No Action*—Management would continue under the existing Forest Plan.

3. *Increased Emphasis on Remote Recreation and Remote Habitats*—This

alternative would recommend additional areas for wilderness study and allocate a backcountry recreation management prescription to more of the potential wilderness areas currently in active management.

F. Documents Available for Review

A number of documents are available for review at the George Washington and Jefferson National Forests' Web site *http://www.fs.fed.us/r8/gwj.* Additional documents will be added to this site throughout the planning process.

G. Lead and Cooperating Agencies

The lead agency for this proposal is the USDA Forest Service. We expect the USDI Bureau of Land Management will be a cooperating agency in the designation of lands available for oil and gas leasing.

H. Scoping Process

When the GWNF Forest Plan revision process initially started, public workshops were held in March of 2007 where participants were asked to describe what they thought was working well on the Forest and what needed to be changed. In July of 2008 another round of public workshops was held where participants were asked to work on District maps and identify areas of the Forest they would like to see managed in a different way. Public workshops were held on various topics (vegetation management, access, roadless areas and wilderness) to have discussions on how we should change the Forest Plan to address concerns. In January and February of 2009 additional workshops were held where preliminary opinions were presented on how the Forest could respond to the information that had been received up to that point. The need for change, issues, proposed actions and alternatives identified in this Notice of Intent reflect those preliminary discussions and opinions as a starting point for proceeding with this revision.

It is important that reviewers provide their comments on what is presented in this notice and on the Web site at such times and in such a way that they are useful to the Agency's preparation of the revised plan and the EIS. Comments on the need for change, proposed actions, issues and preliminary alternatives will be most valuable if received by May 7, 2010 and should clearly articulate the reviewers' concerns. The submission of timely and specific comments can affect a reviewer's ability to participate in any subsequent administrative or judicial review. At this time, we anticipate using a pre decisional objection process for administrative review.

Comments received in response to this solicitation, including the names and addresses of those who comment will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered.

Authority: 16 U.S.C. 1600–1614; 36 CFR 219.35 (74 FR 67073–67074).

Dated: March 2, 2010.

Henry B. Hickerson,

Acting Forest Supervisor.

[FR Doc. 2010–4931 Filed 3–9–10; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2010-0010]

Pale Cyst Nematode; Update of Quarantined Areas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of changes to quarantined area.

SUMMARY: We are advising the public that we have made changes to the area in the State of Idaho that is quarantined to prevent the spread of pale cyst nematode. The description of the quarantined area was updated several times between October 2009 and February 2010. As a result of these changes, 5,710 acres have been removed from the quarantined area.

FOR FURTHER INFORMATION CONTACT: Mr. Jonathan M. Jones, National Program Manager, Emergency and Domestic Programs, PPQ, 4700 River Road Unit 160, Riverdale, MD 20737; (301) 734-5038.

SUPPLEMENTARY INFORMATION:

Background

The pale cyst nematode (PCN, *Globodera pallida*) is a major pest of potato crops in cool-temperature areas. Other solanaceous hosts include tomatoes, eggplants, peppers, tomatillos, and some weeds. The PCN is thought to have originated in Peru and is now widely distributed in many potato-growing regions of the world. PCN infestations may be expressed as patches of poor growth. Affected potato plants may exhibit yellowing, wilting, or death of foliage. Even with only minor symptoms on the foliage, potato tuber size can be affected. Unmanaged infestations can cause potato yield loss ranging from 20 to 70 percent. The spread of this pest in the United States could result in a loss of domestic or foreign markets for U.S. potatoes and other commodities.

In 7 CFR part 301, the PCN quarantine regulations (§§ 301.86 through 301.86-9, referred to below as the regulations) set out procedures for determining the areas quarantined for PCN and impose restrictions on the interstate movement of regulated articles from quarantined areas.

Section 301.86-3 of the regulations sets out the procedures for determining the areas quarantined for PCN. Paragraph (a) of § 301.86-3 states that, in accordance with the criteria listed in § 301.86-3(c), the Administrator will designate as a quarantined area each field that has been found to be infested with PCN, each field that has been found to be associated with an infested field, and any area that the Administrator considers necessary to quarantine because of its inseparability for quarantine enforcement purposes from infested or associated fields.

Paragraph (d) provides for the removal of fields from quarantine. An infested field will be removed from quarantine when a protocol approved by the Administrator as sufficient to support the removal of infested fields from quarantine has been completed and the field has been found to be free of PCN. An associated field will be removed from quarantine when the field has been found to be free of PCN according to a protocol approved by the Administrator as sufficient to support removal of associated fields from quarantine. Any area other than infested or associated fields that has been quarantined by the Administrator because of its inseparability for quarantine enforcement purposes from infested or associated fields will be removed from quarantine when the relevant infested or associated fields are removed from quarantine.

Paragraph (a) of § 301.86-3 further provides that the Administrator will publish a description of the quarantined area on the Plant Protection and Quarantine (PPQ) Web site, (*http://www.aphis.usda.gov/plant_health/plant_pest_info/potato/pcn.shtml*). The description of the quarantined area will include the date the description was last updated and a description of the changes that have been made to the quarantined area. The description of the quarantined area may also be obtained by request from any local office of PPQ; local offices are listed in telephone directories. Finally, paragraph (a) establishes that, after a change is made to the quarantined area, we will publish a notice in the **Federal Register** informing the public that the change has

occurred and describing the change to the quarantined area.

Therefore, we are publishing this notice to inform the public of changes to the PCN quarantined area in the State of Idaho. The changes are as follows:

- On October 23, 2009, we updated the quarantined area to remove 3.32 acres from Bingham County and 623.30 acres from Bonneville County.
- On November 23, 2009, we updated the quarantined area to remove 465.13 acres from Bingham County and 402.97 acres from Bonneville County.
- On December 18, 2009, we updated the quarantined area to remove 1,313.92 acres from Bingham County and 648.36 acres from Bonneville County.
- On January 8, 2010, we updated the quarantined area to remove 188.79 acres from Bingham County and 1,373.15 acres from Bonneville County.
- On January 15, 2010, we updated the quarantined area to remove 621.52 acres from Bonneville County.
- On February 15, 2010, we updated the quarantined area to remove 70 acres from Bonneville County.

This acreage consisted of associated fields that were found to be free of PCN according to a survey protocol approved by the Administrator in accordance with § 301.86-3 as sufficient to support removal of associated fields from quarantine.

The current map of the quarantined area can be viewed on the PPQ Web site at (*http://www.aphis.usda.gov/plant_health/plant_pest_info/potato/pcn.shtml*).

Authority: 7 U.S.C. 7701-7772 and 7781-7786; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 4th day of March 2010.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2010–5119 Filed 3–9–10; 12:48 pm]

BILLING CODE 3410–34–S

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Southeast Region Logbook Family of Forms.

OMB Control Number: 0648–0016.

Form Number(s): NA.

Type of Request: Regular submission.

Number of Respondents: 9,325.

Average Hours per Response: Logbook responses for fishing trips, 10, 15 or 18 minutes; no-fishing responses, 2 minutes; annual fixed cost survey, 30 minutes.

Burden Hours: 33,950.

Needs and Uses: Under Fisheries Management Plans developed under the Authority of the Magnuson-Stevens Fishery Conservation and Management Act, the participants in most federally-managed fisheries in the National Marine Fisheries' Southeast Region are currently required to keep and submit catch and effort logbooks from their fishing trips. A subset of these vessels also provide information on the species and quantities of fish, shellfish, marine turtles, and marine mammals that are caught and discarded or have interacted with the vessel's fishing gear. A subset of these vessels also provide information about dockside prices, trip operating costs, and annual fixed costs.

The data are used for scientific analyses that support critical conservation and management decisions made by national and international fishery management organizations. Interaction reports are needed for fishery management planning and to help protect endangered species and marine mammals. The price and cost data will be used in analyses of the economic effects of proposed regulations.

Affected Public: Business or other for-profit organizations.

Frequency: Annually.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number (202) 395–7285, or *David_Rostker@omb.eop.gov*.

Dated: March 5, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–5121 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Action Affecting Export Privileges; Robert Kraaipoel

In the Matter of: Robert Kraaipoel, P.O. Box 418, Heerhugowaard, Netherlands 1700AK.

and

Flemming Straat 36, Heerhugowaard, Netherlands 1700AK.

Respondent.

Order Relating to Robert Kraaipoel

The Bureau of Industry and Security, U.S. Department of Commerce ("BIS"), has notified Robert Kraaipoel, in his individual capacity, of its intention to initiate an administrative proceeding against him pursuant to section 766.3 of the Export Administration Regulations (the "Regulations"),[1] and section 13(c) of the Export Administration Act of 1979, as amended (the "Act"),[2] through the issuance of a Proposed Charging Letter to Robert Kraaipoel that alleged that he committed one violation of the Regulations. Specifically, the charge is:

Charge 1 15 CFR 764.2(d)—Conspiracy

Between on or about October 1, 2005, and continuing through on or about October 30, 2007, Robert Kraaipoel conspired and acted in concert with others, known and unknown, to violate the Regulations and to bring about acts that constitute violations of the Regulations. The purpose of the conspiracy was to export U.S.-origin items including aircraft parts, electronic components, and polymide film on multiple occasions, from the United States to Iran, via the Netherlands, Cyprus, and the United Arab Emirates ("UAE"), without the required U.S. Government authorization. Pursuant to section 746.7 of the Regulations, authorization was required from OFAC before the aircraft parts, electronic components, and polymide film, items

[1] The Regulations are currently codified in the Code of Federal Regulations at 15 *CFR* Parts 730–774 (2009). The charged violations occurred between 2005 and 2007. The Regulations governing the violations at issue are found in the 2005 through 2007 versions of the Code of Federal Regulations (15 *CFR* Parts 730–774 (2005–2007)). The 2009 Regulations set forth the procedures that apply to this matter.

[2] 50 U.S.C. app. 2401–2420 (2000). Since August 21, 2001, the Act has been in lapse. However, the President, through Executive Order 13222 of August 17, 2001 (3 *CFR,* 2001 Comp. 783 (2002)), which has been extended by successive Presidential Notices, the most recent being that of August 13, 2009 (74 FR 41,325 (Aug. 14, 2009)), has continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.*).

subject to the Regulations [3] and the Iranian Transactions Regulations, 31 CFR Part 560 ("ITR"), could be exported from the United States to Iran. Pursuant to Section 560.204 of the ITR, an export to a third country intended for transshipment to Iran is a transaction subject to the ITR. In furtherance of the conspiracy, Robert Kraaipoel and his co-conspirators devised and employed a scheme to purchase these items from the United States on behalf of Iranian customers and give U.S. manufacturers false information regarding the ultimate destination, end user, and end use of the items, thereby causing false export control documents to be submitted to the U.S. Government listing countries other than Iran as the ultimate destination for the items. These acts were taken to export U.S.-origin items to Iran without the required U.S. Government authorization and avoid detection by law enforcement. By engaging in this activity, Robert Kraaipoel committed one violation of section 764.2(d) of the Regulations.

Whereas, BIS and Robert Kraaipoel have entered into a Settlement Agreement pursuant to Section 766.18(a) of the Regulations, whereby they agreed to settle this matter in accordance with the terms and conditions set forth therein; and

Whereas, I have approved of the terms of such Settlement Agreement;

It is therefore ordered:

First, Robert Kraaipoel shall be assessed a civil penalty in the amount of $250,000. Payment of the $250,000 penalty shall be suspended for a period of three (3) years from the date of this Order, and thereafter shall be waived, provided that during the period of suspension, Robert Kraaipoel has committed no violation of the Act, or any regulation, order, or license issued thereunder.

Second, for a period of seven (7) years from the date of this Order, Robert Kraaipoel, P.O. Box 418, Heerhugowaard, Netherlands 1700AK and Flemming Straat 36, Heerhugowaard, Netherlands 1700AK, his representatives, assigns or agents (hereinafter collectively referred to as "Denied Person") may not participate, directly or indirectly, in any way in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

Third, that no person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by the Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Fourth, that, after notice and opportunity for comment as provided in section 766.23 of the Regulations, any person, firm, corporation, or business organization related to Robert Kraaipoel by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of the Order.

Fifth, that this Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

Sixth, that the Proposed Charging Letter, the Settlement Agreement, and this Order shall be made available to the public.

Seventh, that this Order shall be served on the Denied Person, and shall be published in the **Federal Register**.

This Order, which constitutes the final agency action in this matter, is effective immediately.

Issued this 2nd day of March 2010.

David W. Mills,

Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2010–5109 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–DT–P

[3] The items were classified as Export Control Classification Numbers ("ECCNs") 9A991, 1C008.a.3, and 5A991. Additionally, some of the aircraft parts were designated EAR99, which is a designation for items subject to the Regulations but not listed on the Commerce Control List. (2005–2007).

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Action Affecting Export Privileges; Aviation Services International, B.V.

In the Matter of: Aviation Services International, B.V. also known as Delta Logistics, B.V., P.O. Box 418, Heerhugowaard, Netherlands 1700AK and Flemming Straat 36, Heerhugowaard, Netherlands 1700AK Respondent; *Order Relating to Aviation Services International, B.V.*

The Bureau of Industry and Security, U.S. Department of Commerce ("BIS"), has initiated an administrative proceeding against Aviation Services International, B.V., also known as Delta Logistics, B.V. (collectively referred to herein as "ASI") pursuant to Section 766.3 of the Export Administration Regulations (currently codified at 15 CFR parts 730–774 (2009)) ("EAR"),[1] and Section 13(c) of the Export Administration Act of 1979, as amended (50 U.S.C. app. §§ 2401–2420) (the

[1] The violation alleged by BIS occurred between 2005 and 2007. The governing provisions of the EAR are found in the 2005–2007 versions of the Code of Federal Regulations (15 CFR Parts 730–774 (2005–2007)). The 2009 version of the EAR establishes the procedures that apply to the BIS administrative proceeding.

"EAA"),[2] through issuance of a Proposed Charging Letter to ASI that alleged that ASI committed one violation of the EAR. Specifically:

Charge 1 15 CFR 764.2(d)—Conspiracy

Between on or about October 1, 2005, and continuing through on or about October 30, 2007, ASI conspired and acted in concert with others, known and unknown, to violate the Regulations and to bring about acts that constitute violations of the Regulations. The purpose of the conspiracy was to export U.S.-origin items including aircraft parts, electronic components, and polymide film on multiple occasions, from the United States to Iran, via the Netherlands, Cyprus, and the United Arab Emirates ("UAE"), without the required U.S. Government authorization. Pursuant to section 746.7 of the Regulations, authorization was required from OFAC before the aircraft parts, electronic components, and polymide film, items subject to the Regulations[3] and the Iranian Transactions Regulations, 31 CFR part 560 ("ITR"), could be exported from the United States to Iran. Pursuant to section 560.204 of the ITR, an export to a third country intended for transshipment to Iran is a transaction subject to the ITR. In furtherance of the conspiracy, ASI and its co-conspirators devised and employed a scheme to purchase these items from the United States on behalf of Iranian customers and give U.S. manufacturers false information regarding the ultimate destination, end user, and end use of the items, thereby causing false export control documents to be submitted to the U.S. Government listing countries other than Iran as the ultimate destination for the items. These acts were taken to export U.S.-origin items to Iran without the required U.S. Government authorization and avoid detection by law enforcement. By engaging in this activity, ASI committed one violation of section 764.2(d) of the Regulations.

Whereas, BIS and ASI have entered into a Settlement Agreement pursuant to Section 766.18 of the EAR, whereby they agreed to settle this matter in accordance with the terms and conditions set forth therein;[4] and

Whereas, I have approved of the terms of the Settlement Agreement;[5]

It is therefore ordered:

First, that a civil penalty of $250,000 is assessed against ASI. Payment of the $250,000 penalty shall be suspended for a period of three (3) years from the date the BIS Order is issued and thereafter shall be waived provided that during the period of suspension, ASI has committed no violation of the EAA, EAR or any order or license issued thereunder.

Second, that for a period of seven (7) years from the date of this Order, Aviation Services International, B.V., also known as Delta Logistics, B.V., P.O. Box 418, Heerhugowaard, Netherlands 1700AK and Fleming Straat 36, Heerhugowaard, Netherlands, 1700AK, its successors or assigns, and, when acting for or on behalf of ASI, its officers, representatives, agents or employees ("Denied Person") may not participate, directly or indirectly, in any way in any transaction involving any commodity, software, or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

Third, that no person may, directly or indirectly, do any of the actions described below with respect to an item that is subject to the Regulations that has been, will be, or is intended to be exported or reexported from the United States:

A. Export or reexport to or on behalf of a Denied Person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by a Denied Person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby a Denied Person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from a Denied Person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from a Denied Person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and that is owned, possessed or controlled by a Denied Person, or service any item, of whatever origin, that is owned, possessed or controlled by a Denied Person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Fourth, that, after notice and opportunity for comment as provided in Section 766.23 of the Regulations, any person, firm, corporation, or business organization related to ASI by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be made subject to the provisions of the Order.

Fifth, that this Order does not prohibit any export, reexport, or other transaction subject to the EAR where the only items involved that are subject to the EAR are the foreign-produced direct product of U.S.-origin technology.

Sixth, that the Proposed Charging Letter, the Settlement Agreement, and this Order shall be made available to the public.

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[2] Since August 21, 2001, the EAA has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 CFR, 2001 Comp. 783 (2002)), as extended most recently by the Notice of August 13, 2009 (74 FR 41325 (August 14, 2009)), has continued the EAR in effect under the International Emergency Economic Powers Act (50 U.S.C. 1701, *et seq.*) ("IEEPA").

[3] The items were classified as Export Control Classification Numbers ("ECCN") 9A991, 1C008.A.3, 5A991. Additionally, some of the aircraft parts were designated EAR99, which is a designation for items subject to the Regulations but not listed on the Commerce Control List. (2005–2007).

[4] The Settlement Agreement also resolves allegations by the U.S. Department of Treasury, Office of Foreign Assets Control ("OFAC"), which is also a party to the Settlement Agreement, of apparent violations of the Iranian Transactions Regulations, 31 CFR part 560 ("ITR" or the "OFAC Regulations"). ASI's apparent violations of the OFAC Regulations are contained in an OFAC Prepenalty Notice that was issued by OFAC on or about September 24, 2009, identified as FAC Number IA–365318.

[5] This Order signifies my approval of the Settlement Agreement based on the violations alleged in the Proposed Charging Letter, and not the OFAC Prepenalty Notice referenced in note 4, *supra.*

Seventh, that this Order shall be served on the Denied Person and shall be published in the **Federal Register**.

This Order, which constitutes the final BIS action in this matter, is effective immediately.

Issued this 2nd day of March 2010.

David W. Mills,

Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 2010–5107 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–DT–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Reporting Requirements for Sea Otter Interactions with the Pacific Sardine Fishery; Coastal Pelagic Species Fishery Management Plan

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, 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 proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before May 10, 2010.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Gary Rule, (503) 230–5424 or *Gary.Rule@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

In accordance with the regulations implementing the Endangered Species Act (ESA), National Marine Fisheries Service (NMFS) initiated an ESA section 7 consultation with the United States Fish and Wildlife Service (USFWS) regarding the possible effects of implementing Amendment 11 (71 FR 36999) to the Coastal Pelagic Species (CPS) Fishery Management Plan (FMP). USFWS determined that formal consultation was necessary on the possible effects to the threatened southern sea otter. USFWS completed a biological opinion for this action and although it was concluded that fishing activities were not likely to jeopardize the continued existence of the southern sea otter there remained the potential to incidentally take southern sea otters. USFWS determined that certain measures should be put in place to ensure the continued protection of the species. Therefore on May 30, 2007, NMFS published a final rule (72 FR 29891) implementing new reporting requirements and conservation measures under the CPS FMP. This included the requirement to report any interactions that may occur between a CPS vessel and/or fishing gear and sea otters.

Specifically, these reporting requirements are:

1. If a southern sea otter is entangled in a net, regardless of whether the animal is injured or killed, such an occurrence must be reported within 24 hours to the Regional Administrator, NMFS Southwest Region.

2. While fishing for CPS, vessel operators must record all observations of otter interactions (defined as otters within encircled nets or coming into contact with nets or vessels, including but not limited to entanglement) with their purse seine net(s) or vessel(s). With the exception of an entanglement, which will be initially reported as described in #2 above, all other observations must be reported within 20 days to the Regional Administrator.

When contacting NMFS after an interaction, fishermen are required to provide information regarding the location, specifically latitude and longitude, of the interaction and a description of the interaction itself. If available, location information should also include: Water depth; distance from shore; and, relation to port or other landmarks. Descriptive information of the interaction should include: Whether or not the otters were seen inside or outside the net; if inside the net, had the net been completely encircled; did contact occur with net or vessel; the number of otters present; duration of interaction; otter's behavior during interaction; and, measures taken to avoid interaction.

II. Method of Collection

The information will be collected on forms submitted by mail, phone, facsimile or e-mail.

III. Data

OMB Control Number: 0648–0566.

Form Number: None.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 2.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 1.

Estimated Total Annual Cost to Public: $10.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) 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.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 5, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–5117 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Interim Capital Construction Fund Agreement and Certificate Family of Forms

AGENCY: National Oceanic and Atmospheric Administration (NOAA), DOC.

ACTION: Notice.

SUMMARY: The Department of Commerce, 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 proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before May 10, 2010.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Richard Vangorder, (301) 713–2393 or *Richard.Vangorder@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The respondents will be commercial fishing industry individuals, partnerships, and corporations which are applying for or have entered into Capital Construction Fund Agreements with the Secretary of Commerce allowing deferral of Federal taxation on fishing vessel income deposited into the fund for use in the acquisition, construction, or reconstruction of fishing vessels. Deferred taxes are recaptured by reducing an agreement vessel's basis for depreciation by the amount withdrawn from the fund for its acquisition, construction, or reconstruction. The information collected from agreement holders is used to determine their eligibility to participate in the Capital Construction Fund Program pursuant to 50 CFR part 259.

At the completion of construction/reconstruction, a certificate to that effect must be submitted.

II. Method of Collection

The information will be collected on forms submitted electronically or by mail.

III. Data

OMB Control Number: 0648–0090.

Form Number: NOAA Form 88–14.

Type of Review: Regular submission.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 1,000.

Estimated Time per Response: 3.5 hours for agreements; and 1 hour for certificate.

Estimated Total Annual Burden Hours: 2,250.

Estimated Total Annual Cost to Public: $3,600 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) 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.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 5, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–5116 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–818]

Certain Pasta from Italy: Notice of Amended Final Results of the Twelfth Antidumping Duty Administrative Review

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

SUMMARY: On February 9, 2010, the Department of Commerce (the Department) published its final results of the twelfth administrative review for certain pasta from Italy for the period of review (POR) of July 1, 2007, through June 30, 2008. *See Certain Pasta from Italy: Notice of Final Results of the Twelfth Administrative Review*, 75 FR 6352 (February 9, 2010) (Final Results). We are amending our final results to correct ministerial errors made in the calculation of the dumping margins for Pastificio Lucio Garofalo S.p.A.(Garofalo) and PAM S.p.A. (PAM), pursuant to section 751(h) of the Tariff Act of 1930, as amended (the Act).

EFFECTIVE DATE: March 10, 2010.

FOR FURTHER INFORMATION CONTACT: Christopher Hargett, 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) 482–4161.

SUPPLEMENTARY INFORMATION:

Background

On February 9, 2010, the Department published the final results of this administrative review. On February 9 and February 12, 2010, pursuant to 19 CFR 351.224(c), PAM and Garofalo submitted comments alleging ministerial errors, and requested that the Department correct these alleged ministerial errors. On February 18, 2010, petitioners submitted rebuttal briefs to PAM's ministerial error allegation. No party submitted comments regarding Garofalo's request to correct alleged ministerial errors.

Scope of the Order

Imports covered by this order are shipments of certain non–egg dry pasta in packages of five pounds four ounces or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastasis, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by this scope is typically sold in the retail market, in fiberboard or cardboard cartons, or polyethylene or polypropylene bags of varying dimensions.

Excluded from the scope of this order are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non–egg dry pasta containing up to two percent egg white. Also excluded are imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by the Instituto Mediterraneo Di Certificazione, by QC&I International Services, by Ecocert Italia, by Consorzio per il Controllo dei Prodotti Biologici, by Associazione Italiana per l'Agricoltura Biologica, by Codex S.r.L., by Bioagricert S.r.L., or by Instituto per la Certificazione Etica e Ambientale. Effective July 1, 2008, gluten free pasta is also excluded from this order. *See Certain Pasta from Italy: Notice of Final Results of Antidumping Duty Changed Circumstances Review and Revocation, in Part*, 74 FR 41120 (August 14, 2009). The merchandise subject to this order is currently classifiable under items 1902.19.20 and 1901.90.9095 of the *Harmonized Tariff Schedule of the United States* (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

Amended Final Results of Review

In the *Final Results*, the Department incorrectly stated that it would apply the average percent margin of the two reviewed companies in this review to all

companies that were not selected as mandatory respondents for the period July 1, 2006, through June 30, 2007. The Department intended to apply and in fact applied the average to the instant POR of July 1, 2007 through June 30, 2008, because the calculations were based on the actual factual information for this period.

Garofalo

After analyzing Garofalo's comments, we have determined, in accordance with section 751(h) of Act and 19 CFR 351.224, that the Department made ministerial errors in the *Final Results* calculation for Garofalo in this administrative review. *See Allegations of Clerical Errors* Memorandum dated February 26, 2010 (*Clerical Error Memo*).

First, the Department made a clerical error by using the wrong currency to convert Garofalo's reported warehousing costs (DWAREHU) in the *Final Results*. During the *Final Results*, the Department's attempt to convert Garofalo's reported DWAREHU from Euro/Kg to USD/Kg was done incorrectly. The exchange rate conversion the Department attempted to update in Garofalo's margin program was not correctly applied. For the amended final results, the Department made the correction to the submitted field DWAREHU before the conversion of this field into USD/Kg of the margin program.

Second, the Department incorrectly implemented certain verification changes in the calculation of Garofalo's home market freight revenue (FRTREVH) during the *Final Results*. For the amended final results, the Department hard–coded these changes to the comparison market program as correctly referenced in attachment 8 of Exhibit 1 in Garofalo's Verification Report.

Third, the Department used incorrect exchange factors during the *Final Results* in converting Garofalo's reported U.S. brokerage. The Department verified the values reported in Garofalo's reported USBROKU during the sales verification of Garofalo as being incurred in USD/Kg. During the Final Results, however, the Department inadvertently treated Garofalo's USBROKU as being reported in Euro/Kg. The Department treated this variable as being incurred in USD/Kg in the margin calculations for the amended final results.

PAM

After analyzing PAM's comments, and as more fully explained in the *Clerical Error Memo*, we have determined, in accordance with section 751(h) of the Act and 19 CFR 351.224, that the Department made ministerial errors in the *Final Results* calculation for PAM in this administrative review. The Department finds that it inadvertently used incorrect entered value data for entries made by PAM during the POR. Specifically, the Department erred by not adding transport recovery to the U.S. price for the entered value calculation for entries made by PAM, while including the transport recovery for other importers. Accordingly, it is clear that the Department intended to make this adjustment and our failure to do so was a clerical error. Thus, for the amended *Final Results* the Department has calculated entered value including the transport recovery for entries made by PAM, consistent with how it calculated entered value for entries made by companies other than PAM. Although, this does not affect the average margin, it does affect the importer specific assessment rates.

In accordance with section 751(h) of the Act, we are amending the final results of the antidumping duty administrative review of certain pasta from Italy for the period July 1, 2007, through June 30, 2008. As a result of correcting the ministerial errors discussed above, and in the company–specific memos listed above, the following margins apply:

Company	Final Margin	Amended Final Margin
Garofalo	16.26	15.87
PAM	8.54	8.54
Review - Specific Average[1]	12.40	12.21

[1] Because there are only two respondents for which a company-specific margin was calculated in this review, the Department has calculated a simple average margin to ensure that the total import quantity and value for each company is not inadvertently revealed.

Assessment

The Department will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries, pursuant to 19 CFR 351.212(b). The Department calculated importer–specific duty assessment rates on the basis of the ratio of the total antidumping duties calculated for the examined sales to the total entered value of the examined sales for that importer. Where the assessment rate is above *de minimis*, we will instruct CBP to assess duties on all entries of subject merchandise by that importer. The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of these amended final results of review.

The Department clarified its "automatic assessment'" regulation on May 6, 2003 (68 FR 23954). This clarification applies to POR entries of subject merchandise produced by companies examined in this review (*i.e.*, companies for which a dumping margin was calculated) where the companies did not know that their merchandise was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all–others rate if there is no rate for the intermediate company(ies) involved in the transaction. For a full discussion of this clarification, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of the amended final results of this administrative review for all shipments of certain pasta from Italy entered, or withdrawn from warehouse, for consumption on or after the publication date of these amended final results, as provided by section 751(a) of the Act: (1) for companies covered by this review, the cash deposit rate will be the rate listed above; (2) for previously reviewed or investigated companies other than those covered by this review, the cash deposit rate will be the company–specific rate established for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the less–than-fair–value investigation, but the producer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the subject merchandise; and (4) if neither the exporter nor the producer is a firm covered in this review, a prior review, or the investigation, the cash deposit

rate will be 15.45 percent, the all–others rate established in the less–than-fair–value investigation. These deposit requirements shall remain in effect until further notice.

Reimbursement of Duties

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping and/or countervailing duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent increase in antidumping duties by the amount of antidumping and/or countervailing duties reimbursed.

Administrative Protective Order

This notice also is the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

These amended final results of administrative review and notice are issued and published in accordance with sections 751(a)(1) and (h), and 777(i)(1) of the Act, and 19 CFR 351.224.

Dated: March 3, 2010.

Carole A. Showers,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–5124 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XU49

Fisheries of the Pacific Region

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

ACTION: Notification of determination of an overfished condition.

SUMMARY: This action serves as a notice that NMFS, on behalf of the Secretary of Commerce (Secretary), has determined that in the Pacific Region, the petrale sole stock has been determined to be in an overfished condition. The Pacific Fishery Management Council is in the process of reviewing the overfished threshold for petrale sole; however, regardless of future changes, NMFS has determined that the stock is overfished at this time, based on the current status determination criteria. For stocks which NMFS determines to be in an overfished condition and provides notice to the applicable Council, the applicable Council must, within two years of such notification, prepare and implement an FMP amendment or proposed regulations to rebuild such stocks.

FOR FURTHER INFORMATION CONTACT: Mark Nelson, (301) 713–2341.

SUPPLEMENTARY INFORMATION: Pursuant to sections 304(e)(2) and (e)(7) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. 1854(e)(2), and implementing regulations at 50 CFR 600.310(e)(2), NMFS, on behalf of the Secretary, must notify the appropriate Council whenever it determines a stock or stock complex is overfished.

For a fishery determined to be in an overfished condition, NMFS requests that the appropriate Council take action to end overfishing in the fishery and to implement conservation and management measures to rebuild affected stocks. A Council receiving notification that a fishery is overfished must, within 2 years of notification, implement a rebuilding plan, through an FMP amendment, which ends overfishing immediately and provides for rebuilding the fishery in accordance with 16 U.S.C. 1854(e)(3)-(4) as implemented by 50 CFR 600.310(j)(2)(ii). When developing rebuilding plans Councils, in addition to rebuilding the fishery within the shortest time possible in accordance with 16 U.S.C. 1854(e)(4) and 50 CFR 600.310(j)(2)(ii), must ensure that such management actions address the requirements to establish a mechanism for specifying and actually specify annual catch limits (ACLs) and accountability measures (AMs) to prevent overfishing in accordance with 16 U.S.C. 1853(a)(15) and 50 CFR 600.310(j)(2)(i) for each affected stock or stock complex.

On February 9, 2010, NMFS notified the Pacific Fishery Management Council that the most recent stock assessment for petrale sole indicated that the biomass fell below the overfished threshold which triggered an overfished determination. The letter acknowledges that the Pacific Fishery Management Council is in the process of reviewing the overfished threshold for petrale sole. Regardless of future changes to the overfished threshold, based on the current status determination criteria, NMFS has determined the stock to be overfished at this time.

As noted above, within 2 years of notification that a fishery is overfished, the respective Council must adopt and implement a rebuilding plan, through a FMP amendment which immediately ends overfishing and provides for rebuilding of the overfished stock.

Dated: March 3, 2010.

Emily H. Menashes,

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

[FR Doc. 2010–5154 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

[Application No. 99–4A005]

Export Trade Certificate of Review

ACTION: Notice of Application (#99–4A005) to Amend the Export Trade Certificate of Review Issued to California Almond Export Association, LLC, Application no. 99–00005.

SUMMARY: The Export Trading Company Affairs unit, Office of Competition and Economic Analysis, International Trade Administration, U.S. Department of Commerce, has received an application to amend an Export Trade Certificate of Review ("Certificate"). This notice summarizes the proposed amendment and requests comments relevant to whether the amended Certificate should be issued.

FOR FURTHER INFORMATION CONTACT: Joseph E. Flynn, Director, Office of Competition and Economic Analysis, International Trade Administration, (202) 482–5131 (this is not a toll-free number) or by E-mail at *oetca@ita.doc.gov.*

SUPPLEMENTARY INFORMATION: Title III of the Export Trading Company Act of 1982 (15 U.S.C. 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 of 1982 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.

Request for Public Comments

Interested parties may submit written comments relevant to the determination whether an amended Certificate should be issued. If the comments include any privileged or confidential business information, it must be clearly marked and a nonconfidential version of the comments (identified as such) should be included. Any comments not marked as 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: Export Trading Company Affairs, International Trade Administration, U.S. Department of Commerce, Room 7021X, Washington, DC 20230, or transmitted by E-mail to *oetca@ita.doc.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 99–4A005."

The original Certificate for the California Almond Export Association, LLC was issued on December 27, 1999 (65 FR 760, January 6, 2000). The Certificate has been previously amended three times. The last amendment was issued on May 25, 2007 (72 FR 30775, June 4, 2007). A summary of the current application for an amendment follows.

Summary of the Application

Applicant: California Almond Export Association LLC ("CAEA"), 4800 Sisk Road, Modesto, California 95356.

Contact: Doug Youngdahl, Chairman, P.O. Box 1768, Sacramento, CA 95812. *Telephone:* (916) 446–8595.

Application No.: 99–4A005.

Date Deemed Submitted: March 1, 2010.

Proposed Amendment: CAEA seeks to amend its Certificate to reflect the following changes:

1. Add the following company as a new Member of the Certificate within the meaning of section 325.2(1) of the Regulations (15 CFR 325.2(1)): Mariani Nut Company, Winters, CA;

2. Amend the listing of the following Member: "South Valley Farms, Wasco, California" to read "South Valley Almond Company, LLC" and

3. Delete the following Members from the Certificate: A & P Growers Cooperative, Inc; Gold Hills Nut Co., Inc.; Harris Woolf California Almonds; Golden West Nuts, Inc.; and RPAC, LLC.

Dated: March 4, 2010.

Joseph E. Flynn,

Director, Office of Competition and Economic Analysis.

[FR Doc. 2010–5138 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–850]

Certain Large Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe From Japan: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review

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

FOR FURTHER INFORMATION CONTACT: Mary Kolberg or Nancy Decker, AD/CVD Operations, Office 1, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–1785 or (202) 482–0196, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 29, 2009, the Department of Commerce ("Department") published in the **Federal Register** the initiation of administrative review of the antidumping duty order on certain large diameter carbon and alloy seamless standard, line, and pressure pipe from Japan, covering the period June 1, 2008, through May 31, 2009. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Review*, 74 FR 37690 (July 29, 2009). The preliminary results for this administrative review are currently due no later than March 9, 2010.[1]

Extension of Time Limits for Preliminary Results

Section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("the Act"), requires the Department to issue the preliminary results of an administrative review within 245 days after the last day of the anniversary month of an order for which a review is requested and a final determination within 120 days after the date on which the preliminary results are published. If it is not practicable to complete the review within the time period, section 751(a)(3)(A) of the Act allows the Department to extend these deadlines to a maximum of 365 days and 180 days, respectively.

The review covers four manufacturers/exporters: JFE Steel Corporation; Nippon Steel Corporation; NKK Tubes; and Sumitomo Metal Industries, Ltd. These four manufacturer/exporters submitted letters to the Department certifying that they made no shipments or entries for consumption in the United States of the subject merchandise during the period of review ("POR"). In response to the Department's query to U.S. Customs and Border Protection ("CBP"), CBP data showed POR entries for consumption of subject merchandise that were manufactured by one of the respondent companies. The information regarding these entries has been placed on the record of this review under the terms of the administrative protective order. The Department solicited additional information and comments regarding these entries. Because the Department requires additional time to analyze the additional information and comments, it is not practicable to complete this review within the original time limit (*i.e.*, March 9, 2010). Therefore, the Department is extending the time limit for completion of the preliminary results by 30 days to April 8, 2010, in accordance with section 751(a)(3)(A) of the Act and section 351.213(h)(2) of the Department's regulations.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: March 4, 2010.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–5127 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–DS–S

[1] As explained in the memorandum from the Deputy Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5, through February 12, 2010. Thus, all deadlines in this segment of the proceeding have been extended by seven days. The revised deadline for the preliminary determination of this review is now March 9, 2010. See Memorandum to the Record from Ronald Lorentzen, DAS for Import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm," dated February 12, 2010.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–868]

Folding Metal Tables and Chairs from the People's Republic of China: Notice of Extension of Time Limit for the Preliminary Results of the Antidumping Duty Administrative Reviews

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

EFFECTIVE DATE: March 10, 2010.

FOR FURTHER INFORMATION CONTACT: Giselle Cubillos or Charles Riggle, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–1778 or (202) 482–0650, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 29, 2009, the Department of Commerce ("the Department") published the initiation of administrative reviews of the antidumping duty order on folding metal tables and chairs from the People's Republic of China ("PRC"). *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Review*, 74 FR 37690 (July 29, 2009). These reviews cover the periods June 1, 2007, through May 31, 2008, and June 1, 2008, through May 31, 2009.[1] The preliminary results of these reviews are currently due no later than March 2, 2010.

As explained in the memorandum from the Deputy Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5, through February 12, 2010. Thus, all deadlines in this segment of the proceeding have been extended by seven days. The revised deadline for the preliminary results of these reviews are now March 9, 2010. *See* Memorandum to the Record from Ronald Lorentzen, DAS for Import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm," dated February 12, 2010.

Extension of Time Limit for Preliminary Results of Review

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended ("the Act"), the Department shall make a preliminary determination in an administrative review of an antidumping duty order within 245 days after the last day of the anniversary month of the date of publication of the order. The Act further provides, however, that the Department may extend that 245-day period to 365 days if it determines it is not practicable to complete the review within the foregoing time period.

The Department finds that it is not practicable to complete the preliminary results of the administrative reviews of folding metal tables and chairs from the PRC within this time limit. Specifically, additional time is needed to determine the appropriate surrogate country and surrogate values with which to value factors of production. Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time period for completion of the preliminary results of these reviews, which are currently due on March 9, 2010, by 60 days. Therefore, the preliminary results are now due no later than May 8, 2010.

This notice is published in accordance with sections 751(a)(3)(A) and 777(i) of the Act.

Dated: March 3, 2010.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–5031 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–DS–S

[1] On June 30, 2008, Feili requested that the Department conduct an administrative review of their sales for the period June 1, 2007, through May 31, 2008, and in addition, requested that the Department defer the initiation of the review for one year in accordance with 19 CFR 351.213(c). Consequently, on July 29, 2009, the Department initiated reviews for Feili covering both the 2007-08 and 2008-09 review periods.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–891]

Hand Trucks and Certain Parts Thereof from the People's Republic of China: Final Results of Expedited Five-year (Sunset) Review of Antidumping Duty Order

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

SUMMARY: On November 2, 2009, the Department of Commerce (the Department) initiated a sunset review of the antidumping duty order on hand trucks and certain parts thereof (hand trucks) from the People's Republic of China (PRC) pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act). On the basis of a notice of intent to participate and an adequate substantive response filed on behalf of one domestic interested party, and the lack of a response from respondent interested parties, the Department conducted an expedited (120-day) sunset review of this antidumping duty order. As a result of this sunset review, the Department finds that revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping at the levels identified below in the "Final Results of Sunset Review" section of this notice.

EFFECTIVE DATE: March 10, 2010.

FOR FURTHER INFORMATION: David Cordell or Scott Hoefke, AD/CVD Operations, Office 7, or Dana Mermelstein, 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) 482–0408, (202) 482–4947 or (202) 482–1391, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 2, 2009, the Department initiated a sunset review of the antidumping duty order on hand trucks from the PRC pursuant to section 751(c) of the Act. *See Initiation of Five-year ("Sunset") Reviews*, 74 FR 56593 (November 2, 2009). The Department received a notice of intent to participate from the domestic interested parties, Gleason Industrial Products, Inc. and Precision Products, Inc. (collectively, Gleason) within the deadline specified in 19 CFR 351.218(d)(1)(i).

Gleason claimed interested party status under section 771(9)(C) of the Act as a U.S manufacturer and producer of the subject merchandise. On November 24, 2009, the Department received a complete substantive response from Gleason within the 30-day deadline specified in 19 CFR 351.218(d)(3)(i). The Department received no substantive responses from respondent interested parties. As a result, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), the Department has conducted an expedited sunset review of this order.

As explained in the memorandum from the Deputy Assistant Secretary for Import Administration, the Department has exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5, through February 12, 2010. Thus, all deadlines in this segment of the proceeding have been extended by

seven days. The revised deadline for the final results of this review is now March 9, 2010. *See* Memorandum to the Record from Ronald Lorentzen, DAS for import Administration, regarding "Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm," dated February 12, 2010.

Scope of the Order

The merchandise subject to this antidumping duty order consists of hand trucks manufactured from any material, whether assembled or unassembled, complete or incomplete, suitable for any use, and certain parts thereof, namely the vertical frame, the handling area and the projecting edges or toe plate, and any combination thereof.

A complete or fully assembled hand truck is a hand–propelled barrow consisting of a vertically disposed frame having a handle or more than one handle at or near the upper section of the vertical frame; at least two wheels at or near the lower section of the vertical frame; and a horizontal projecting edge or edges, or toe plate, perpendicular or angled to the vertical frame, at or near the lower section of the vertical frame. The projecting edge or edges, or toe plate, slides under a load for purposes of lifting and/or moving the load.

That the vertical frame can be converted from a vertical setting to a horizontal setting, then operated in that horizontal setting as a platform, is not a basis for exclusion of the hand truck from the scope of this order. That the vertical frame, handling area, wheels, projecting edges or other parts of the hand truck can be collapsed or folded is not a basis for exclusion of the hand truck from the scope of the order. That other wheels may be connected to the vertical frame, handling area, projecting edges, or other parts of the hand truck, in addition to the two or more wheels located at or near the lower section of the vertical frame, is not a basis for exclusion of the hand truck from the scope of the order. Finally, that the hand truck may exhibit physical characteristics in addition to the vertical frame, the handling area, the projecting edges or toe plate, and the two wheels at or near the lower section of the vertical frame, is not a basis for exclusion of the hand truck from the scope of the order.

Examples of names commonly used to reference hand trucks are hand truck, convertible hand truck, appliance hand truck, cylinder hand truck, bag truck, dolly, or hand trolley. They are typically imported under heading 8716.80.50.10 of the Harmonized Tariff Schedule of the United States (HTSUS), although they may also be imported under heading 8716.80.50.90. Specific parts of a hand truck, namely the vertical frame, the handling area and the projecting edges or toe plate, or any combination thereof, are typically imported under heading 8716.90.50.60 of the HTSUS. Although the HTSUS subheadings are provided for convenience and customs purposes, the Department's written description of the scope is dispositive.

Excluded from the scope are small two–wheel or four–wheel utility carts specifically designed for carrying loads like personal bags or luggage in which the frame is made from telescoping tubular materials measuring less than 5/8 inch in diameter; hand trucks that use motorized operations either to move the hand truck from one location to the next or to assist in the lifting of items placed on the hand truck; vertical carriers designed specifically to transport golf bags; and wheels and tires used in the manufacture of hand trucks. The written description remains dispositive.

Analysis of Comments Received

All issues raised in this case are addressed in the Issues and Decision Memorandum from John M. Andersen, Acting Deputy Assistant Secretary for AD/CVD Operations, Import Administration, to Carole Showers, Acting Deputy Assistant Secretary for Import Administration, dated March 2, 2010 (Decision Memorandum), which is hereby adopted by this notice. The issues discussed in the Decision Memorandum include the likelihood of continuation or recurrence of dumping and the magnitude of the margin likely to prevail if the order was revoked. Parties can find a complete discussion of all issues raised in this sunset review and the corresponding recommendations in this public memorandum, which is on file in room 1117 of the main Department building.

In addition, a complete version of the Decision Memorandum can be accessed directly on the Internet at http://ia.ita.doc.gov/frn/. The paper copy and electronic version of the Decision Memorandum are identical in content.

Final Results of Sunset Review

The Department has determined that revocation of the antidumping duty order on hand trucks from the PRC would likely lead to continuation or recurrence of dumping at the following percentage weighted–average margins:

Manufacturers/ Exporters/Producers	Weighted–Average Margin (Percent)
Qingdao Taifa Group Co., Ltd.	26.49 percent
True Potential Co.	33.68 percent
Qingdao Huatian Hand Truck Co., Ltd.	46.48 percent
Shandong Machinery Import & Export Group Corp.	32.76 percent
Qingdao Future Tool Inc.	32.76 percent
PRC–wide rate	383.60 percent

This notice serves as the only reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

The Department is issuing and publishing these results and this notice in accordance with sections 751(c), 752, and 777(i)(1) of the Act.

Dated: March 2, 2010.

Carole Showers,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–5111 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XU31

Incidental Takes of Marine Mammals During Specified Activities; Replacement and Repair of Fur Seal Research Observation Towers and Walkways on St. Paul Island, Alaska

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

ACTION: Notice; proposed Incidental Harassment Authorization; request for comments.

SUMMARY: NMFS has received an application from the NMFS, Alaska Region (NMFS AKR) for an Incidental Harassment Authorization (IHA) to take small numbers of marine mammals, by Level B harassment, incidental to conducting replacement and repair of northern fur seal research observation towers and walkways on St. Paul Island,

Alaska, from April to June and December, 2010. NMFS has reviewed the application, including all supporting documents, and determined that it is adequate and complete. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to NMFS AKR to take, by Level B harassment only, marine mammals incidental to specified activities within the specified geographic region.

DATES: Comments and information must be received no later than April 9, 2010.

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 20910–3225. The mailbox address for providing email comments is *PR1.0648–XU31@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.

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* 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 address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Howard Goldstein or Jolie Harrison, Office of Protected Resources, NMFS, 301–713–2289.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization to take small numbers of marine mammals by harassment 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), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth to achieve the least practicable adverse impact. 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 established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by 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].

16 USC 1362(18).

Section 101(a)(5)(D) establishes a 45–day time limit for NMFS review of an application followed by a 30–day public notice and comment period for any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Summary of Request

On February 2, 2010, NMFS received a letter from NMFS AKR requesting an IHA to authorize the take, by Level B harassment, of small numbers of northern fur seals (Callorhinus ursinus) incidental to conducting replacement and repair operations for fur seal research observation towers and walkways on St. Paul Island, Alaska.

NMFS is currently contracting demolition, repair, and select replacement of northern fur seal observation towers and walkways. The original timing restrictions for this project would have allowed human presence and work on the rookeries only until April 20, 2010, which would have made the incidental take of northern fur seals unlikely. However, the proposed construction season has been extended to the first week of June in order to provide flexibility in the construction schedule to complete the replacement and repair of the observation towers and walkways during a single winter and spring season. NMFS AKR has identified a need to authorize the incidental taking of northern fur seals hauling out on St. Paul Island during their intermittent and early season presence through early June.

The purpose of the replacement and repair operations is to provide safe access for fur seal researchers into the dense breeding aggregations of northern fur seals. Safe access for researchers is required because northern fur seals exhibit strong site fidelity, tenacity, and high levels of aggression within dense aggregations. In addition, non-territorial fur seals are sensitive to human presence within and near breeding areas as a result of visual, auditory, and olfactory stimuli. The observation towers and walkways provide elevated access to observe and count breeding and resting fur seals, reducing stimuli that influence fur seal behavior. Additional information on the construction project is contained below and in the IHA application, which is available upon request (see **ADDRESSES**).

Description of the Proposed Specified Activities

NMFS AKR is currently contracting demolition, repair and select replacement of northern fur seal research infrastructure on St. Paul Island, Alaska. The objective of this work is to repair 47 fur seal observation towers and their associated walkways within fur seal breeding areas around the island. Prior to the replacement phase of the project, old towers and walkways will need to be demolished. The replacement work will occur at the Reef rookery (i.e., breeding area), if funding is available in future years it will occur at other sites. Seven observation towers will be replaced at the Reef rookery, and the long term plan is to replace and repair the remaining 40 towers at the other rookeries around the island (depending on funding).

Construction crews will be using hand carpentry techniques, possibly supplemented with small gasoline generators, and pneumatic tools. Most construction sites are inaccessible to

vehicles with the exception of all-terrain vehicles and equipment or snow machines, if conditions allow. Crews will be primarily accessing the immediate worksites by foot. The proposed action includes summer and fall construction restrictions to protect northern fur seals from disturbances during the breeding and pup rearing period. Repair and replacement activities will include human presence within the fur seal breeding areas and use of all-terrain and four-wheel drive vehicles to transport personnel, equipment, and materials. Construction crews will use hand and power tools, gas-powered generators, and air compressors. Construction crews will need to demolish and remove old towers and walkways prior to replacement of new structures. Large boulders or uneven terrain will be altered to facilitate construction or access to areas where new foundations are to be placed.

NMFS AKR biologists will begin daily marine mammal monitoring for the presence of fur seals on April 20, 2010 and record the number and response of northern fur seals to the proposed actions until June 7, 2010. Construction activities will cease and demobilization will begin if the incidental taking of northern fur seals is predicted to exceed that authorized in the IHA prior to June 1, 2010, otherwise all activities will be completed on the rookeries by June 7, 2010.

Additional details regarding the proposed action can be found in the IHA application and Draft Environmental Assessment (EA).

Proposed Dates, Duration, and Location of Specified Activity

The research walkways and towers will be repaired and replaced on St. Paul Island, Alaska from January 4, 2010, through June 7, 2010, and again in December, 2010 if necessary and authorized. The proposed dates of the authorization will be from April 20 to June 7, 2010, and December 1 to 31, 2010, which is during the presence of fur seals at the location of the specified activity. See below for information regarding when northern fur seals arrive (i.e., when incidental take starts occurring).

Description of Marine Mammals and Habitat Affected in the Proposed Activity Area

Several marine mammal species are known to or could occur in the Bering Sea off the Alaska coastline (see Table 1 below). The northern fur seal is the only species of marine mammal managed by NMFS that may be present in the project area during the construction project. Northern fur seals are not listed as threatened or endangered under the Endangered Species Act (ESA), but are designated as depleted under the MMPA. Other marine mammal species managed by NMFS that inhabit the Bering Sea, but are not anticipated to occur in the Bering Sea project area during the replacement and repair activities, are listed in Table 1 (below). Polar bears and Pacific walrus also occur in the Bering Sea, but they are not addressed further, since they are managed under the jurisdiction of the U.S. Fish and Wildlife Service (USFWS).

The marine mammals that occur in the proposed action area belong to four taxonomic groups: mysticetes (baleen whales), odontocetes (toothed whales), pinnipeds (seals, sea lions, and walrus), and carnivores (polar bears). Table 1 below outlines the marine mammal species and their habitat in the region of the proposed activity area.

TABLE 1. THE HABITAT AND CONSERVATION STATUS OF MARINE MAMMALS INHABITING THE PROPOSED SSTUDY AREA IN THE U.S. BERING SEA OFF OF ALASKA.

Species	Habitat	ESA[1]
Mysticetes		
Bowhead whale (*Balaena mysticetus*)	Pack ice and coastal	EN
North Pacific right whale (*Eubalaena japonica*)	Coastal and shelf	EN
Gray whale (*Eschrichtius robustus*)	Coastal and lagoons	NL
Humpback whale (*Megaptera novaeangliae*)	Mainly nearshore waters and banks	EN
Minke whale (*Balaenoptera acutorostrata*)	Shelf and coastal	NL
Sei whale (*Balaenoptera borealis*)	Primarily offshore and pelagic	EN
Fin whale (*Balaenoptera physalus*)	Slope, mostly pelagic	EN
Blue whale (*Balaenoptera musculus*)	Pelagic and coastal	EN
Odontocetes		
Killer whale (*Orcinus orca*)	Widely distributed	NL
Beluga whale (*Delphinapterus leucas*)	Coastal, ice edges	NL
Baird's beaked whale (*Berardius bairdii*)	Pelagic	NL
Stejneger's beaked whale (*Mesoplodon stejnegeri*)	Likely pelagic	NL
Harbor porpoise (*Phocoena phocoena*)	Coastal, inland waters	NL
Dall's porpoise (*Phocoenoides dalli*)	Slope, offshore waters	NL
Pinnipeds		
Northern fur seal (*Callorhinus ursinus*)	Pelagic, breeds coastally	NL

TABLE 1. THE HABITAT AND CONSERVATION STATUS OF MARINE MAMMALS INHABITING THE PROPOSED SSTUDY AREA IN THE U.S. BERING SEA OFF OF ALASKA.—Continued

Species	Habitat	ESA[1]
Steller sea lion (*Eumetopias jubatus*)	Mostly pelagic, high relief	EN
Bearded seal (*Erignathus barbatus*)	Ice	NL
Spotted seal (*Phoca largha*)	Pack ice	Proposed T (Southern DPS) NL (Okhotsk and Bering DPSs)
Ringed seal (*Phoca hispida*)	Landfast and pack ice	NL
Ribbon seal (*Histriophoca fasciata*)	Landfast and pack ice	NL
Pacific harbor seal (*Phoca vitulina richardsi*)	Coastal	NL
Pacific Walrus (*Odobenus rosmarus divergens*)	Ice, coastal	NL
Carnivores Polar bear (*Ursus maritimus marinus*)	Ice, coastal	T

[1] U.S. Endangered Species Act: EN = Endangered, T = Threatened, NL = Not listed

Not all of these species (listed in Table 1 above) are expected to be harassed from the described proposed activities. Because the activities are occurring on land, only northern fur seals are expected to be disturbed by the project.

Northern fur seals (*Callorhinus ursinus*) are likely to be found within the activity area. Northern fur seals are seasonal residents on St. Paul Island, and may be found on the breeding and resting areas around the island from late April until early December.

Adult males are the most likely group of northern fur seals to be encountered on St. Paul during the spring of 2010. By June 1, 2010, NMFS estimates about 50 percent of the maximum count of adult males will be on all the St. Paul Island breeding areas of 4,976 adult male northern fur seals. NMFS' estimate includes territorial males, and non-territorial males.

In addition, NMFS estimates intermittent arrival and departure of few sub-adult males during the winter and spring. Most sub-adult male seals begin arriving during the last week of May resulting in a few tens to a hundred seals at any of the hauling grounds on St. Paul Island (Gentry, 1981)

Northern Fur Seal

Northern fur seals occur from southern California north to the Bering Sea and west to the Okhotsk Sea and Honshu Island, Japan. During the summer breeding season, most of the worldwide population is found on the Pribilof Islands in the southern Bering Sea, with the remaining animals on rookeries in Russia, on Bogoslof Island in the southern Bering Sea, and on San Miguel Island off Southern California (Lander and Kajimura, 1982; NMFS, 1993). This species may temporarily haul-out onto land at other sites in Alaska, British Columbia, and on islets along the coast of the continental U.S., but generally do so outside of the breeding season (Fiscus, 1983).

Northern fur seals are colonial breeding pinnipeds that exhibit strong site fidelity and currently breed on a few islands in the North Pacific Ocean and Bering Sea. Adult male fur seals, about three to five times larger than females, arrive at rookeries prior to the late June/July breeding season and defend territories within the rookery. Beginning in mid-June the rookeries are occupied by breeding females, who within a few days give birth and begin nursing their single pup. Lactating females cycle between on shore attendance and at-sea foraging trips during the nursing period (July to November).

NMFS designated the Pribilof Islands northern fur seal population depleted on June 17, 1988 (53 FR 17888) because it declined to less than 50 percent of levels observed in the late 1950s and no compelling evidence suggested that the northern fur seal carrying capacity of the Bering Sea had changed substantially since the late 1950s. Towell and Ream (2008) report that the 2008 pup production estimate for St. Paul Island was 6.6 percent less than the estimate in 2006. The 2008 pup production estimate for St. George Island was 6.4 percent greater than the estimate in 2006. Since the depleted designation in 1988 pup production on St. Paul Island has declined by 40 percent (171,610 pups born to 102,674) and on St. George Island by 27 percent (24,280 pups born to 18,160).

Male northern fur seals arrive on all of their breeding islands in reverse proportion to their age. That is, the oldest seals arrive first followed by progressively younger seals. Thus adult males nine years old and older arrive as early as late April and persist intermittently at first and then permanently (for territorial males) for the duration of their tenure on the island which generally ranges for about 30 to 60 days (Gentry, 1998). All non-territorial males (i.e., younger than 7 years old) arrive on the island and cycle between fasting and resting on shore and foraging trips at sea from June through November (Sterling and Ream, 2004). Fur seals can be observed on and near St. Paul Island in nearly every month of the year, but the probability of encountering a hauled-out fur seal in any month from December until April is highly uncertain and near zero for any particular day.

Two separate stocks of northern fur seals are recognized within U.S. waters, an Eastern Pacific stock and a San Miguel Island stock. The most recent estimate for the number of fur seals in the Eastern Pacific stock, based on pup counts from 2002 on Sea Lion Rock, from 2006 on the Pribilof Islands, and from 2005 on Bogoslof Island is 665,500 animals. The minimum population estimate is 654,437 animals; this estimate includes the first pup counts on Bogoslof Island in more than 5 years and does not indicate population increase.

NMFS anticipates that no northern fur seals will be injured, seriously injured,

or killed during the replacement and repair activities with incorporation of the described proposed mitigation and monitoring measures. Because of the proposed mitigation and monitoring requirements discussed in this document, NMFS and NMFS AKR believes it is highly unlikely that the proposed activities would have the potential to injure (Level A harassment), or cause serious injury, or mortality of northern fur seals; however, they may temporarily leave or avoid the area where the proposed construction activities may occur, thus resulting in Level B harassment. NMFS AKR has requested the incidental take of 579 adult male northern fur seals (9,785 times) and 1,000 sub-adult northern male fur seals (one time) or 1,579 total individual northern fur seals for the proposed action. The requested take is approximately 0.24 percent of the estimated minimum (654,437) Eastern Pacific stock. NMFS has determined that the number of requested incidental takes for the proposed action is small relative to population estimates of northern fur seals.

Further information on the biology and local distribution of these species and others in the region can be found in NMFS AKR's application, which is available upon request (see **ADDRESSES**), and the NMFS Marine Mammal Stock Assessment Reports, which are available online at: *http://www.nmfs.noaa.gov/pr/species/*.

Potential Effects of Activities on Marine Mammals

All anticipated takes likely to occur incidental to the proposed construction activities would be Level B harassment (as defined in 50 CFR 216.3), involving short-term, temporary changes in behavior. Incidental harassment may result if hauled-out animals move away from the field crew personnel. For the purpose of estimating the number of pinnipeds taken by these activities, NMFS assumes that pinnipeds that move or change the direction of their movement in response to the presence of field crew personnel are taken by Level B harassment. Animals that merely raise their head and look at the field crew personnel are not considered to have been taken.

Some adult seals may depart, but NMFS AKR anticipates most will alter their activity budgets due to stimuli related construction. NMFS used the 2006 adult male counts because they were available and partitioned by section, and because the continued decline of northern fur seals provided us with a conservative (i.e., biased high) estimate. NMFS estimates about five percent of the adult males, less than one percent of sub-adult males, and no females or pups on St. Paul Island will be exposed to the proposed construction activities. NMFS anticipates sub-adult seals will be displaced from their resting areas if encountered during construction. The NMFS AKR anticipates there will be no significant impact on the species or stock of northern fur seals from the proposed construction activity on the rookeries prior to and after the breeding season.

Given the considerations noted above, and the small proportion of the total northern fur seal population potentially disturbed by the proposed construction activity, the effects of operations are expected to be limited to short-term and localized displacement (behavioral changes) within the work sites involving relatively small numbers of seals. The effects of the proposed construction operations fall within the MMPA definition of Level B harassment. The impacts of the proposed construction activities are expected to be negligible for the northern fur seal stock and populations.

Potential Effects of Activities on Marine Mammal Habitat

The NMFS AKR does not anticipate any negative impact on northern fur seal habitat from the demolition, repair, and replacement of observation towers and walkways on St. Paul Island. These structures have been located in nearly the same areas for at least 50 years at some locations and northern fur seals continue to use the habitat around the structures. The demolition and removal of condemned structures will restore some small areas of fur seal habitat. The replacement and repair of observation towers and walkways will likely result in no net change or modification to marine mammal habitat. Consequently, construction activities are anticipated to have a negligible impact on the local northern fur seal population and their habitat.

Number of Marine Mammals Expected to be Incidentally Taken by the Proposed Activity

The NMFS AKR is requesting take, by Level B harassment only, of male northern fur seals. The method of taking will be from a combination of human presence, scent, and airborne construction noise.

TABLE 2. SUMMARY OF INCIDENTAL TAKING BY HARASSMENT OF NORTHERN FUR SEALS DURING CONSTRUCTION ACTIVITIES ON ST. PAUL ISLAND

	Prior to April 25, 2010	Week 1	Week 2	Week 3	Week 4	week 5	Total
Adult Male Northern Fur Seal	0	8 seals taken 58 times	115 seals taken 811 times	232 seals taken 1,621 times	463 seals taken 3,242 times	579 seals taken 4,053 times	579 seals taken 9,785 times
Sub-adult Male Fur Seal	50 seals taken once	50 seals taken once	150 seals taken once	200 seals taken once	250 seals taken once	300 seals taken once	1,000 seals taken once

Most adult male northern fur seals will be incidentally taken by harassment multiple times. NMFS AKR anticipates approximately 230 of the 579 adult males will be taken once. These single takes by harassment are of the estimated non-territorial adult males predicted to be present and will likely depart due to the noise, presence or scent of the construction activities on the rookery. NMFS estimates the remaining 349 adult male northern fur seals are territorial at Reef rookery on St. Paul Island during the five week period beginning late April, 2010 and will not depart. NMFS predicts these territorial males may change the time spent in certain behaviors due to the presence, noise, or scent due to construction activities on the rookery.

The number of incidental takes by harassment was derived from 2006 adult male counts from the National Marine Mammal Laboratory (NMML) from Reef rookery (Fowler *et al.*, 2006) and was

corrected based on the timing of arrival curve from Gentry (1998). Rookeries are divided into sections allowing easier tabulation of counts and the maximum counts in each section have been divided by the percentage estimated on land for each week in Tables 3a to 3e (below). NMFS summed the daily take estimates into weekly bins (Table 3a to 3e) because few animals were predicted on land in late April and early May, but those few animals would likely to be taken repeatedly during the week and every subsequent week. Table 3 shows fractional daily taking within each section, summed for the week, and rounded up into Table 2. NMFS estimates an additional 1,000 sub-adult male seals may be encountered during the construction or repair activities at Reef or other rookeries (Table 2).

TABLE 3A. ESTIMATED DAILY TAKE OF ADULT MALE NORTHERN FUR SEALS ON REEF ROOKERY FOR THE LAST WEEK OF APRIL. ESTIMATE BASED ON ONE PERCENT OF THE MAXIMUM 2006 BULL COUNTS.

Class Bull	Section										
	1	2	3	4	5	6	7	8	9	10	11
2	0.13	0.26	0.27	0.1	0.22	0.21	0.05	0.27	0.22	0.11	0.03
3	0.48	0.81	0.63	0.46	0.67	0.7	0.01	0.66	0.37	0.28	0.04
5	0.08	0.27	0.4	0.47	0.31	0.13	0.15	0.31	0.34	0.72	1.42

Total Taking by Harassment Week 1: 57.9

TABLE 3B. ESTIMATED DAILY TAKE OF ADULT MALE NORTHERN FUR SEALS ON REEF ROOKERY FOR THE FIRST WEEK OF MAY. ESTIMATE BASED ON 10 PERCENT OF THE MAXIMUM 2006 BULL COUNTS.

Class Bull	Section										
	1	2	3	4	5	6	7	8	9	10	11
2	1.3	2.6	2.7	1	2.2	2.1	0.5	2.7	2.2	1.1	0.3
3	4.8	8.1	6.3	4.6	6.7	7	0.1	6.6	3.7	2.8	0.4
5	0.8	2.7	4	4.7	3.1	1.3	1.5	3.1	3.4	7.2	14.2

Total Taking by Harassment Week 2: 810.6

TABLE 3C. ESTIMATED DAILY TAKE OF ADULT MALE NORTHERN FUR SEALS ON REEF ROOKERY FOR THE SECOND WEEK OF MAY. ESTIMATE BASED ON 20 PERCENT OF THE MAXIMUM 2006 BULL COUNTS.

Class Bull	Section										
	1	2	3	4	5	6	7	8	9	10	11
2	2.6	5.2	5.4	2	4.4	4.2	1	5.4	4.4	2.2	0.6
3	9.6	16.2	12.6	9.2	13.4	14	0.2	13.2	7.4	5.6	0.8
5	1.6	5.4	8	9.4	6.2	2.6	3	6.2	6.8	14.4	28.42

Total Taking by Harassment Week 3: 1621.2

TABLE 3D. ESTIMATED DAILY TAKE OF ADULT MALE NORTHERN FUR SEALS ON REEF ROOKERY FOR THE THIRD WEEK OF MAY. ESTIMATE BASED ON 40 PERCENT OF THE MAXIMUM 2006 BULL COUNTS.

Class Bull	Section										
	1	2	3	4	5	6	7	8	9	10	11
2	5.2	10.4	10.8	4	8.8	8.4	2	10.8	8.8	4.4	1.2
3	19.2	32.4	25.2	18.4	26.8	28	0.4	26.4	14.8	11.2	1.6
5	3.2	10.8	16	18.8	12.4	5.2	6	12.4	13.6	28.8	56.8

Total Taking by Harassment Week 4: 3242.4

TABLE 3E. ESTIMATED DAILY TAKE OF ADULT MALE NORTHERN FUR SEALS ON REEF ROOKERY FOR THE LAST WEEK OF MAY. ESTIMATE BASED ON 50 PERCENT OF THE MAXIMUM 2006 BULL COUNTS.

Class Bull	Section										
	1	2	3	4	5	6	7	8	9	10	11
2	6.5	13	13.5	5	11	10.5	2.5	13.5	11	5.5	1.5
3	24	40.5	31.5	23	33.5	35	0.5	33	18.5	14	2
5	4	13.5	20	23.5	15.5	6.5	7.5	15.5	17	36	71

Total Taking by Harassment Week 5: 4053

NMFS and NMFS AKR estimate that the incidental "take by harassment" could be up to 579 adult male northern fur seals taken 9,785 times and 1,000 sub-adult male northern fur seals taken once during the proposed action.

Proposed Mitigation

In order to issue an Incidental Take Authorization 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 on the availability of such species or stock for taking for certain subsistence uses.

Northern fur seals are the only marine mammal species managed by NMFS expected to be present in the project area during the planned construction activities. The construction season has been chosen based on the minimum likelihood of encountering breeding and nursing northern fur seals. The amount of work and weather conditions during the winter season necessitates providing some contingency arrangements for work to be completed when few if any fur seals are found on land. In addition, the outlying periods requested are prior to the arrival and after the departure of the most sensitive fur seals (i.e., adult females and unweaned pups). Gentry (1998) experimented with complete displacement in early June of territorial males from their terrestrial sites. He found that over 80 percent of adult males returned with in seven hours to their original territory site with less aggression than required to originally secure the site. Thus territorial adult males are highly resistant to disturbance at the time of year NMFS AKR is requesting authorization for incidental harassment. Some individual territorial males were so resistant to harassment that it required four to six people with poles and noisemakers to move them from their sites.

Thus, the combination of a winter and spring construction season along with incidental harassment of small numbers of adult and sub-adult male northern fur seals will minimize the potential for adverse impacts to the population and habitat. The habitat is further protected because the ground is frozen and resistant to erosion and degradation due to vehicle traffic. In addition to the mitigation described above, NMFS AKR will also limit field personnel to approaching sites cautiously, choosing a route that minimizes the potential for disturbance of pinnipeds; and after each site visit, the site will be vacated as soon as possible so that it can be re-occupied by pinnipeds that may have been disturbed. The implementation of a monitoring and mitigation program is expected by NMFS to achieve the least practicable adverse impact upon the affected species or stock.

Proposed Monitoring and Reporting

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.

NMFS AKR will begin marine mammal monitoring at Reef, Gorbatch, and Ardiguen breeding areas to identify and count northern fur seals on land, their response to the presence and absence of construction activities and the timing of arrival beginning the last week of April. In addition to counts of northern fur seals monitoring will also record the type and duration of construction activities at each site where northern fur seals are identified to evaluate the construction actions potential contribution to the responses observed. Gorbatch and Ardiguen breeding areas will provide control areas with no construction activities to compare the timing of arrival and response of male northern fur seals at Reef. NMFS AKR will consider before-after/control-impact (see Underwood, 1994) study design in the final monitoring plan, method and analysis. NMFS AKR will have monitors check the site every morning before the arrival of field crew personnel for seal presence and provide the best route. In addition, they would be able to complete a "before" count that could provide a baseline for estimating incidental take.

Information recorded by observers will include: species counts, life history stage (e.g., adult, sub-adult, pup, etc.) numbers of observed disturbances (e.g., flushed into the water; moving more than 1 m [3.3 ft], but not into the water; becoming alert and moving, but do not move more than 1 m; and changing the direction of current movement), descriptions of the disturbance behaviors and responses during construction activities, closest point of approach to field crew personnel, as well as the date, time, and weather conditions. Observations of stampeding, other unusual behaviors, numbers, or distributions of pinnipeds at St. Paul Island will be reported to NMFS' NMML so that any potential follow-up observations can be conducted by the appropriate personnel. Weather observations should be recorded during activities and observations as they have strong influence on the presence/absence and behavior of pinnipeds and propagation of human scent. In addition, any chance observations of tag-bearing pinnipeds (including carcasses) as well as any rare or unusual species of marine mammals will be reported to NMFS.

If at any time injury, serious injury, or death of any marine mammal occurs that may be a result of the proposed

construction activities, NMFS AKR will suspend construction activities and contact NMFS immediately to determine how best to proceed to ensure that another injury or death does not occur and to ensure that the applicant remains in compliance with the MMPA.

Any takes of marine mammals other than those authorized by the IHA, as well as any injuries or deaths of marine mammals, will be reported to the Alaska Regional Administrator and NMFS Office of Protected Resources, within 24 hours. NMFS AKR will submit a draft report to NMFS within 90 days of completing the replacement and repair activities. The monitoring report would contain a summary of information gathered pursuant to the monitoring and mitigation requirements set forth in the IHA, including detailed descriptions of observations of any marine mammal, by species, number, age class, and sex, whenever possible, that is sighted in the vicinity of the proposed project area; description of the animal's observed behaviors, and the activities occurring at the time. The location and time of each animal sighting will also be included. A final report must be submitted to the Regional Administrator and Chief of the Permits, Conservation, and Education Division within 30 days after receiving comments from NMFS on the draft final report. If no comments are received from NMFS, the draft final report will be considered to be the final report.

Encouraging and Coordinating Research

Coordination and collaboration with Tribal ECO will be accomplished to partner with and potentially utilize local sentinels currently implementing a long-term monitoring program on St. Paul Island. Dr. Paul Wade at the NMML has conducted work at this site related to offshore observations of killer whales, and NMFS AKR will coordinate with Dr. Wade if necessary. Northern fur seal researchers at the NMML and North Pacific Universities Marine Mammal Consortium do not begin their work until the arrival of adult females in late June, but NMFS AKR will contact the Principal Investigators to ensure their plans have not changed and whether their research may overlap with this project.

Negligible Impact and Small Numbers Analysis and Determination

The regulations at CFR 216.103 states that "negligible impact is 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."

Impacts from the proposed activities on northern fur seals and their habitat are expected to be temporary and occur to a small, localized population of marine mammals. The effects on the habitat from the proposed construction activities are not expected to have an effect on recruitment or survival rates. Due to the limited duration, and monitoring and mitigation measures described above, which include seasonal restrictions, takes will not occur during times of significance for marine mammals. The estimated incidental "take by harassment" of 579 adult male and 1,000 sub-adult male (1,579 total individuals) northern fur seals during the proposed action is approximately 0.24 percent of the estimated minimum (654,437 individuals) population of the Eastern Pacific stock.

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 NMFS AKR's proposed activities would result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the construction activities would have a negligible impact on the affected species or stocks of marine mammals.

Impact on Availability of Affected Species for Taking for Subsistence Uses

Under the MMPA, NMFS must determine that an activity would not have an unmitigable adverse impact on the subsistence needs for marine mammals. While this includes usage of both cetaceans and pinnipeds, the primary impact by construction activities is expected to be impacts from replacement and repair of fur seal research observation towers and walkways on northern fur seals. In 50 CFR 216.103, NMFS has defined unmitigable adverse impact as:

An impact resulting from the specified activity: (1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Northern fur seals are not allowed to be harvested on land by Alaska Natives outside the harvest season described at 50 CFR 216.72. And 50 CFR 216.72(c)(1) states that "no fur seal may be taken on the Pribilof Islands before June 23 of each year." Therefore there will be no impact on subsistence use of northern fur seals. Steller sea lion subsistence hunting occurs during the winter and spring on the Reef Peninsula. Steller sea lion subsistence hunting does not occur at the tower and walkway sites on Reef Rookery. Hunting effort is primarily located at Gorbatch and Ardiguen Rookeries as well as the bluffs along the east shore to the north of Reef Rookery. Other sea lion hunting areas are not typically associated with fur seal towers and walkways and therefore would not be affected.

NMFS AKR has discussed the potential overlap between the construction season and location with subsistence hunting with the Tribal Government of St. Paul Island's Ecosystem Conservation Office (Tribal ECO) staff. The NMFS AKR has ongoing communication with Steller sea lion hunters through the Tribal Government of St. Paul Island. As part of the cooperative management agreement between NMFS and the Tribal Government of St. Paul under section 119 of the MMPA, NMFS regularly communicates agency project plans and subsistence needs and activities. Most subsistence activities occur during the summer per the subsistence harvest regulations at 50 CFR 216 subpart F. Annual reports submitted to NMFS of subsistence marine mammal harvests indicate most hunting occurs at Northeast Point. Winter subsistence harvests occur at many locations surrounding St. Paul Island and are not concentrated at any locations where tower or walkway work would be conducted.

The number of individual northern fur seals likely to be impacted by construction operations is expected to be relatively low. With the proposed monitoring and mitigation measures described above, which include seasonal restrictions, the construction operations are not expected to cause seals to abandon/avoid subsistence hunting areas, directly displace subsistence users, or place physical barriers between the marine mammals and the subsistence hunters. Effects on most individual seals are expected to be limited to localized and temporary displacement (Level B harassment). The taking by harassment is not expected to result in an unmitigable adverse impact on the availability of such species for taking for subsistence uses.

Endangered Species Act (ESA)

For the reasons already described in this **Federal Register** Notice, NMFS has determined that the described proposed construction activities and the accompanying IHA are not anticipated to have the potential to adversely affect species under NMFS jurisdiction and protected by the ESA. Consequently, NMFS has determined that a Section 7 consultation is not required. The northern fur seal, which is the only species of marine mammal under NMFS jurisdiction likely to occur in the proposed action area, is not listed under the ESA.

National Environmental Policy Act (NEPA)

With its complete application, NMFS AKR prepared a draft final Environmental Assessment for Issuance of an Incidental Harassment Authorization for Replacement and Repair of Northern Fur Seal Observation Towers and Walkways on St. Paul Island, Alaska, which analyzed the direct, indirect and cumulative environmental impacts of the proposed specified activities on marine mammals including those listed as threatened or endangered under the ESA. Prior to making a final decision on the IHA application, NMFS will either prepare an independent EA, or after review and evaluation of NMFS AKR EA for consistency with regulations published by the Council on Environmental Quality (CEQ) and NOAA Administrative Order 216–6, Environmental Review Procedures for Implementing NEPA, adopt the NMFS AKR EA and make a decision of whether or not to issue a Finding of No Significant Impact (FONSI). A copy of the draft final EA will be available upon request (see **ADDRESSES**).

Preliminary Determinations

Based on NMFS AKR's application, as well as the analysis contained herein, NMFS has preliminarily determined that the impact of the described replacement and repair operations will result, at most, in a temporary modification in behavior by small numbers of northern fur seals. The effect of the proposed construction activities is expected to be limited to short-term and localized behavioral changes.

Due to the infrequency, short time-frame, and localized nature of these activities, the number of marine mammals, relative to the population size, potentially taken by harassment is expected to be small. In addition, no take by injury (Level A harassment), serious injury, and/or death is anticipated or authorized, and take by Level B harassment will be at the lowest level practicable due to incorporation of the proposed monitoring and mitigation measures mentioned previously in this document. NMFS has further preliminarily determined that the anticipated takes will have a negligible impact on the affected species or stock of marine mammals. Also, the proposed construction project is not expected to result in an unmitigable adverse impact on subsistence uses of this species.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to NMFS AKR for the harassment of small numbers (based on populations of the species and stock) of northern fur seals incidental to construction operations on St. Paul Island, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: March 2, 2010.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–5012 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XU91

Mid-Atlantic Fishery Management Council; Atlantic Mackerel, Butterfish, Atlantic Bluefish, Spiny Dogfish, Summer Flounder, Scup, Black Sea Bass, Tilefish, Surfclam, and Ocean Quahog Annual Catch Limits and Accountability Measures Omnibus Amendment

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

ACTION: Supplemental Notice of Intent to prepare an environmental assessment (EA); request for comments.

SUMMARY: The Mid-Atlantic Fishery Management Council (Council) announces its intention to prepare, in cooperation with NMFS, an EA in accordance with the National Environmental Policy Act (NEPA) to assess potential effects on the human environment of alternative measures to address the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) requirements for annual catch limits (ACLs) and accountability measures (AMs) in an Omnibus Amendment to the fishery management plans (FMPs) for Atlantic mackerel, butterfish, Atlantic bluefish, spiny dogfish, summer flounder, scup, black sea bass, tilefish, surfclams, and ocean quahogs.

This supplemental notice is to alert the interested public of the Council's intent to change the level of NEPA analysis from an Environmental Impact Statement (EIS) to an EA. In addition, this supplement announces an opportunity for the public to comment on the change.

DATES: Written comments must be received on or before 5 p.m., EST, on March 25, 2010.

ADDRESSES: Written comments may be sent by any of the following methods:

- E-mail to the following address: *0648–XU91@noaa.gov;*
- Mail or hand deliver to Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council, 800 North State Street, Suite 201, Dover, DE 19901. Mark the outside of the envelope "Omnibus Amendment: National Standard 1 Requirements Comments"; or
- Fax to (302) 674–5399.

Questions about this action may be directed to the Council office at the previously provided address, or by request to the Council by telephone (302) 674–2331.

FOR FURTHER INFORMATION CONTACT: Mr. Daniel T. Furlong, Mid-Atlantic Fishery Management Council, Room 800 North State Street, Suite 201, Dover, DE 19901, (telephone 302–674–2331).

SUPPLEMENTARY INFORMATION: On March 24, 2009, the Council announced its intention to prepare, in cooperation with NMFS, an EIS in accordance with NEPA to assess potential effects on the human environment of alternative measures to address the new Magnuson-Stevens Act requirements for ACLs and AMs (74 FR 12314). The Council has been in the process of developing an Omnibus Amendment to the FMPs for Atlantic mackerel, butterfish, Atlantic bluefish, spiny dogfish, summer flounder, scup, black sea bass, tilefish, surfclams, and ocean quahogs to address ACL and AM requirements since 2008.

During the development that has occurred to date for the Omnibus Amendment, three public scoping hearings have been conducted, and the Council has conducted numerous Fishery Management Action Team (FMAT) Omnibus Amendment Committee, and full Council meetings, wherein approaches and potential alternatives have been discussed. These discussions have included public participation. The development process

has made clear that the action of the Omnibus Amendment will be confined to a description of process and the preparation of an EIS no longer appears to be necessary. Rather, the Council will develop an EA; if, during the development of the EA or at such time that the analysis indicates a Finding of No Significant Impact (FONSI) statement cannot be supported, the Council will re-initiate development of an EIS. A public hearing draft of the Omnibus Amendment is expected to be available mid–2010, and the Council will conduct several public hearings on the draft once it is completed.

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

Dated: March 5, 2010.

Alan D. Risenhoover,

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

[FR Doc. 2010–5183 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XU93

Notice of Intent to Prepare an Environmental Assessment for a Proposed Rule to Revise Marine Mammal Special Exception Permit Requirements

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

ACTION: Notice of Intent to prepare environmental assessment.

SUMMARY: The National Marine Fisheries Service (NMFS) announces its intent to prepare an Environmental Assessment (EA) to analyze the potential environmental impacts of a proposed rule to revise Federal regulations implementing the Section 104 permit provisions of the Marine Mammal Protection Act (MMPA; 16 U.S.C. 1361 *et seq.*). NMFS proposes changes to the regulations to clarify existing permitting procedures and to codify procedures currently being implemented through agency policy. By this notice, NMFS requests public participation in the scoping process that will help identify alternatives and determine the scope of environmental issues to be addressed in the EA. This notice also provides information on how to participate in the scoping process.

ADDRESSES: Written comments must be postmarked by May 10, 2010, and should be mailed to: P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910–3226. Comments may also be submitted by facsimile to (301)713–0376, or by email to *mmpermitregs.comments@noaa.gov*. Please include "Permit Regulations NOI" in the subject line of the email. The facsimile must be confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

FOR FURTHER INFORMATION CONTACT: Amy Sloan or Jennifer Skidmore, (301)713–2289.

SUPPLEMENTARY INFORMATION: NMFS is the Federal agency responsible for management of cetaceans and pinnipeds, except walrus. NMFS Office of Protected Resources administers a program that issues permits to various individuals and institutions to take marine mammals in lands and waters under U.S. jurisdiction, and to U.S. citizens operating in international waters. These permits are issued pursuant to the provisions of the MMPA and NMFS regulations governing the taking and importing of marine mammals (50 CFR part 216), and in accordance with agency policy. For threatened and endangered marine mammal species, permits are also governed by the requirements of the Endangered Species Act (ESA; 16 U.S.C. 1531 *et seq.*) and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

Permits provide an exemption to the statutory take prohibitions to facilitate bona fide scientific research or enhance the survival and propagation of marine mammals, and to allow for import, public display, and commercial and educational photography of marine mammals as provided for in the MMPA. The MMPA and the ESA prohibit "takes" of marine mammals, and threatened and endangered species, respectively. Under the MMPA, "take" is defined as to "harass, hunt, capture, collect or kill, or attempt to harass, hunt, capture, collect or kill any marine mammal." The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." The MMPA further defines two levels of harassment. Level A harassment includes actions with a potential to injure a marine mammal or marine mammal stock in the wild. Level B harassment includes actions with a potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns.

Many activities, including photography, aerial and vessel-based surveys, tagging and marking procedures, attachment of scientific instruments, and collection of tissue samples require closely approaching or capturing animals and may result in harassment or other acts prohibited under the MMPA and ESA except where allowed by permit.

The statutory requirements for permits to allow import, public display, research, enhancement, and commercial and educational photography on marine mammals are described in Section 104 of the MMPA. Section 10 of the ESA describes the requirements for permits for scientific purposes or to enhance the propagation or survival of listed species. In addition to the requirements of section 10 of the ESA, NMFS must comply with section 7 of the ESA in issuing permits. According to Section 7 of the ESA, NMFS must ensure that any action it authorizes (such as by permit) is not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat. Information requested of permit applicants is used to evaluate compliance with issuance criteria and in analyses of environmental impacts required under Section 7 of the ESA and by the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*).

NMFS issuance of permits is governed by the procedural requirements of NEPA and the Administrative Procedure Act (APA; 5 U.S.C. 551 *et seq.*). NEPA requires Federal agencies to integrate environmental values into their decision making process by considering the environmental impacts of their proposed actions, such as permit issuance, and reasonable alternatives to those actions. The APA governs procedures related to imposition of permit sanctions, and requirements for NMFS to maintain records related to determinations on applications.

In 2007, NMFS published an Advance Notice of Proposed Rulemaking (ANPR) (72 FR 52339; Sep. 13, 2007) soliciting comments from the public regarding changes being considered to the NMFS permit regulations, including criteria for issuance of scientific research and enhancement permits. NMFS sought public comment to inform efforts to further streamline and clarify general permitting requirements, simplify procedures for transferring marine mammal parts for research, consider application of the General Authorization to research involving level A harassment for non-ESA listed species,

and develop a cycle for submission and processing of applications for permits.

Some commenters indicated that the ANPR was too general to allow for meaningful comment. Others provided suggestions for modifications or expressed support for or opposition to changes proposed in the ANPR. Based on comments received, and an internal scoping process, NMFS has developed more specific proposed revisions, additions, and restructuring to form the basis of one or more alternatives to be evaluated in an EA for a Proposed Rule to revise NMFS marine mammal permit application procedures and permit requirements. This internal scoping summary document contains proposed regulatory language but does not represent a preferred alternative. Rather, it indicates where NMFS believes changes to the permit regulations are needed. The internal scoping summary document and comments on the ANPR are available at *https://www.nmfs.noaa.gov/pr/permits/mmpa__regulations.htm*.

NMFS is preparing an EA to evaluate the potential environmental impacts of promulgating revised regulations governing permit application submission, review, and decision procedures including issuance criteria, penalties and permit sanctions, and permit conditions related to reporting, permit modifications, and restrictions. The purpose of the proposed revisions to the regulations is to improve their utility by clarifying, reorganizing, and updating the regulatory language. These improvements are needed to enhance readability, compliance, and enforcement.

This notice initiates a public scoping period that will inform the structure of alternatives and relevant information considered in the EA. The number and structure of the alternatives analyzed in the EA will be determined based on information gathered during scoping. NMFS is seeking public comments on the following:

(1) *New and revised definitions.* NMFS is considering a number of new definitions and revision of some existing definitions to clarify terms related to permit application submission, review, and decision procedures and permit terms and conditions.

(2) *Restructuring and re-ordering some sections.* NMFS is considering consolidating some sections of Subparts B (Prohibitions), C (General Exceptions), and D (Special Exceptions) of the regulations, reordering the regulations to parallel the structure of the MMPA, and adding sections on the Marine Mammal Inventory, public display, and photography permits. For example, NMFS proposes consolidation of all marine mammal parts collection and transfer regulations into sections within subpart C, rather than the current distribution across multiple subparts.

(3) *Revisions and additions to application and permit requirements.* NMFS is considering substantial revisions and additions to the sections specific to permits for scientific research and enhancement, commercial and educational photography, and public display. For example, NMFS proposes insertions describing permit requirements for educational and commercial photography, which do not have specific regulations and are currently processed according to regulations for scientific research and enhancement.

(4) *Factors to consider in evaluating significance of impacts.* NMFS seeks comment from persons affected by or otherwise interested in the marine mammal permitting process related to how proposed regulatory changes may affect marine mammals and their environment, as well as on potential impacts on the regulated public.

NMFS will consider all comments received during the comment period. All hardcopy submissions must be unbound, on paper no larger than 8 1/2 by 11 inches (216 by 279 mm), and suitable for copying and electronic scanning. NMFS requests that you include in your comments: (1) Your name and address; and (2) Any background documents to support your comments, as you feel necessary. A draft EA will be made available for public review concurrent with publication of a notice of proposed rulemaking.

Dated: March 4, 2010.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–5142 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XR52

Marine Mammals; File No. 14534

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

ACTION: Notice; receipt of amended application.

SUMMARY: Notice is hereby given that Ned Cyr, Director, NOAA Office of Science and Technology, Silver Spring, MD, has submitted a revised application for a permit to conduct research on marine mammals in the Pacific Ocean.

DATES: Written, telefaxed, or e-mail comments must be received on or before April 9, 2010.

ADDRESSES: The application and related documents are available for review by selecting "Records Open for Public Comment" from the "Features" box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov*, and then selecting File No. 14534 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

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562) 980–4001; fax (562) 980–4018.

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 Carrie Hubard, (301) 713–2289.

SUPPLEMENTARY INFORMATION: On September 11, 2009, notice was published (74 FR 46745) of a request for a permit under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 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 (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

The original application is a request for a five-year permit to conduct a research program involving studies of sound production, diving and other

behavior, and responses to sound of marine mammals, including endangered species. The results would be integrated with related studies and directly contribute to conservation management for sound producers and regulatory agencies by identifying characteristics of target species that are critical for passive monitoring, detection, and/or density estimation and by demonstrating how specific sounds, including simulated military sonar, may evoke behavioral responses in marine mammals. The experimental design involves temporarily attaching individual recording tags to measure vocalization, behavior, and physiological parameters as well as sound exposure. Behavior will be measured before, during, and after carefully controlled exposures of sound in conventional playback experiments. Tagged subjects will be exposed to received sound levels up to 180 dB re: 1µPa. This study will involve various activities that could take animals by harassment, including close approaches, attachment of tags, and sound exposure. Small fragments of sloughed skin, which often remain attached to retrieved tags, would be used for genetic analyses. Target species include beaked whales and other odontocetes, key baleen whales, and pinniped species for whom such data have not been previously obtained; other marine species may be incidentally impacted. Please refer to the tables in the application for the numbers of marine mammals, by species and stock, that are proposed for this permit. The research will be focused in the waters within the U.S. Navy's Southern California Range Complex, and primarily near the vicinity of San Clemente Island.

The applicant has revised the application to (1) increase the number of Risso's dolphins (*Grampus griseus*), bottlenose dolphins (*Tursiops truncatus*), Pacific white-sided dolphins (*Lagenorhynchus obliquidens*), and northern elephant seals (*Mirounga angustirostris*) that may be harassed by close approach, focal follow, tag attachment, and sound exposure, to include these species as focal animals in the overall objectives; (2) increase the number of requested "tagless" playbacks for some cetacean species, such as blue whales (*Balaenoptera musculus*) and fin whales (*B. physalus*) and the social pelagic delphinids, but not for the more solitary and deep-diving beaked whale species, to increase data obtained on behavioral responses; (3) modify the proposed action area slightly northward to 35° 0' N; the longitude boundaries remain as before (from 116° 0' to 127° 0' W); and (4) clarify tagging and playback protocols and mitigation for when dependent calves are present.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: March 3, 2010.

Tammy C. Adams,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–5014 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XU85

Marine Mammals; File No. 15261

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Paul Ponganis, Ph.D., University of California at San Diego, La Jolla, CA 92093, has applied in due form for a permit to conduct research on leopard seals (*Hydrurga leptonyx*) in Antarctica.

DATES: Written, telefaxed, or e-mail comments must be received on or before April 9, 2010.

ADDRESSES: The application and related documents are available for review by selecting "Records Open for Public Comment" from the "Features" box on the Applications and Permits for Protected Species (APPS) home page, *https://apps.nmfs.noaa.gov*, and then selecting File No. 15261 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

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562) 980–4001; fax (562) 980–4018.

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 email to *NMFS.Pr1Comments@noaa.gov*. Please include the File No. in the subject line of the email 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: Kate Swails or Amy Sloan, (301) 713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

Dr. Ponganis proposes to study the foraging behavior of leopard seals at Cape Washington, Antarctica. Backpack digital cameras and time depth recorders would be deployed on up to five leopard seals annually over five years (no more than ten seals total) to document diving and foraging behavior near the emperor penguin colony, and, for the first time, construct time-activity budgets and prey intake rates of these seals. The action could result in the incidental harassment of one leopard seal annually. The applicant requested incidental mortality of up to one leopard seal over a five-year period.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: March 4, 2010.

P. Michael Payne,

Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–5148 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XT21

Marine Mammals; File No. 555–1870

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of permit amendment.

SUMMARY: Notice is hereby given that James T. Harvey, Ph.D., Moss Landing Marine Laboratories, 8272 Moss Landing Road, Moss Landing, CA 95039, has been issued a major amendment to Permit No. 555–1870–00.

ADDRESSES: The permit amendment and related documents are available for review upon written request or by appointment in the following offices:

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

FOR FURTHER INFORMATION CONTACT: Amy Sloan or Tammy Adams, (301)713–2289.

SUPPLEMENTARY INFORMATION: On December 8, 2009, notice was published in the **Federal Register** (74 FR 64686) that a request for an amendment to Permit No. 555–1870–00 to conduct research on harbor seals (*Phoca vitulina*) had been submitted by the above-named applicant. One project in the requested permit amendment (increasing the number of animals taken in the wild) has been issued and another project in the requested amendment (temporary captivity of wild seals) has been denied under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The permit amendment (Permit No. 555–1870–01) authorizes an increase in the number of harbor seal pups taken annually in California by capture, sedation, tagging, and sampling from 40 seals (20 males and 20 females) to 70 seals (35 males and 35 females). The request to bring up to six seals into temporary captivity for a pilot study to assess the efficacy of a modified sedation protocol for the surgical implantation of subcutaneous tag implants was denied. The facility proposed did not meet minimum standards for space as required by Animal Welfare Act regulations for the humane handling, care and treatment of marine mammals. Therefore, the applicant could not demonstrate that the activity proposed was humane and did not present any unnecessary risks to the health and welfare of the marine mammals (50 CFR 216.34(1)(a)).

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Dated: February 24, 2010.

Tammy C. Adams,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2010–5144 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV01

Fisheries of the South Atlantic; South Atlantic Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting of Wreckfish Shareholders for the South Atlantic region to discuss draft Amendment 20 to the Snapper Grouper Fishery Management Plan (FMP) which considers changes to the Wreckfish Individual Fishing Quota (IFQ) program.

SUMMARY: The South Atlantic Fishery Management Council will hold a meeting of Wreckfish Shareholders for the South Atlantic region. See **SUPPLEMENTARY INFORMATION**.

DATES: The meeting will take place March 29–30, 2010. The meeting will be held from 1 p.m. until 5 p.m. on March 29, 2010 and 8:30 a.m. until 12 noon on March 30, 2010.

ADDRESSES: The meeting will be held at the office of the South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366 or toll free (866) SAFMC–10; fax: (843) 769–4520. Persons interested in listening to the discussions may call (877) 774–6707, PIN ι 294.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer, South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; telephone: (843) 571–4366 or toll free: (866) SAFMC–10; fax: (843) 769–4520; email: kim.iverson@safmc.net.

SUPPLEMENTARY INFORMATION: The meeting is being convened to gather input from Wreckfish Shareholders on changes the Council is considering for the current ITQ program in Amendment 20 to the Snapper Grouper FMP. Some of the changes considered include implementing a cost recovery program, re-issuing unused quota, and implementing an Annual Catch Limit (ACL) for the wreckfish stock.

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the council office (see **ADDRESSES**) 3 days prior to the meetings.

Note: The times and sequence specified in this agenda are subject to change.

Dated: March 5, 2010.

William D. Chappell,

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

[FR Doc. 2010–5088 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XV00

Gulf of Mexico Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will convene a meeting of the Ad Hoc Data Collection Advisory Panel.

DATES: The meeting will convene at 1 p.m. on Monday, March 29, 2010 and conclude by 4:30 p.m. on Tuesday, March 30, 2010.

ADDRESSES: The meeting will be held at the Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607; telephone: (813) 348–1630.

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; Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630 x235.

SUPPLEMENTARY INFORMATION: The Ad Hoc Data Collection Advisory Panel will meet to discuss the development of general criteria for electronic reporting systems to improve accuracy and timeliness of data collected in Gulf of Mexico fisheries. On the first day of the meeting, the Ad Hoc Data Collection Advisory Panel will review electronic reporting systems, potential management benefits, consider challenges to implementation, and other requirements for the development of electronic reporting systems. The Advisory Panel will also discuss quality standards for self reported data with a review of existing Atlantic Coastal Cooperative Statistics Program (ACCSP) and Marine Recreational Information Program (MRIP) data Standards. On the second day, overviews of existing and pilot electronic reporting systems will be presented to the Advisory Panel. The Advisory Panel will review and discussing existing systems in place for commercial and recreational fisheries. The meeting will conclude with a discussion of minimum criteria and standards for electronic reporting systems for Gulf of Mexico fisheries for commercial and for-hire fisheries. The Advisory Panel will discuss issues related to data management and acquisition including: what data are needed to improve management, frequency of reported data, integration with existing data systems, and mechanisms for electronic reporting. The recommendations made by Ad Hoc Data Collection Advisory Panel will be presented to the Council at its April 12 - 15, 2010 meeting in Galveston, TX.

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

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Tina O'Hern at the Council (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: March 5, 2010.

William D. Chappell,

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

[FR Doc. 2010–5087 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XU99

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Salmon Amendment Committee (SAC) will hold a meeting to develop draft alternatives and plan analyses for an amendment to the Pacific Coast Salmon Fishery Management Plan (FMP) to address the Magnuson-Stevens Act (MSA) requirements for annual catch limits (ACL) and accountability measures (AM). This meeting of the SAC is open to the public.

DATES: The meeting will be held Thursday, April 1, 2010, from 8:30 a.m. to 4:30 p.m.

ADDRESSES: The meeting will be held at the Pacific Council Office, Large Conference Room, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384; telephone: (503) 820–2280.

FOR FURTHER INFORMATION CONTACT: Mr. Chuck Tracy, Salmon Management Staff Officer, Pacific Fishery Management Council; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The reauthorized MSA established new requirements to end and prevent overfishing through the use of ACLs and AMs. Federal FMPs must establish mechanisms for ACLs and AMs by 2010 for stocks subject to overfishing and by 2011 for all others, with the exceptions of stocks managed under an international agreement or stocks with a life cycle of approximately one year.

On January 16, 2009, NMFS published amended guidelines for National Standard 1 (NS1) of the MSA to provide guidance on how to comply with new ACL and AM requirements. The NS1 guidelines include recommendations for establishing several related reference points to ensure scientific and management uncertainty are accounted for when management measures are established.

The purpose of this meeting is to develop alternatives to address those issues, and to plan analyses that will be used to evaluate those alternatives in a National Environmental Policy Act (NEPA) analysis.

Although non-emergency issues not contained in the meeting agenda may come before the SAC for discussion, those issues may not be the subject of formal action during these meetings. 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 intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Ms. Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: March 5, 2010.

William D. Chappell,

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

[FR Doc. 2010–5086 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XU98

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting of the North Pacific Fishery Management Council's Crab Plan Team (CPT).

SUMMARY: The Crab Plan Team will meet in Seattle, WA.

DATES: The meeting will be held March 29 - April 1, 2010, from 9 a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the Alaska Fishery Science Center, 7600 Sand Point Way N.E. Bldg 4, Seattle, WA 98115.

Council address: North Pacific Fishery Management Council, 605 W. 4th Avenue, Suite 306, Anchorage, AK 99501–2252.

FOR FURTHER INFORMATION CONTACT: Diana Stram; telephone: (907) 271–2809.

SUPPLEMENTARY INFORMATION: The Plan Team will address the following issues: Review Essential Fish Habitat (EFH) designations by species; review time series revision and strata; review net selectivity results and model sensitivity; review preliminary draft Crab Annual Catch Limits (ACLs)and rebuilding for Bristol Bay Red King Crab, snow crab, Tanner crab, Norton Sound Red King Crab, Pribilof Island Red King Crab, Pribilof Island Blue King Crab, Saint Matthew Blue King Crab, Aleutian Island Golden King Crab. The Agenda is subject to change, and the latest version will be posted at *http://www.alaskafisheries.noaa.gov/npfmc/*

Although non-emergency issues not contained in this agenda may come before this group for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council'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 Gail Bendixen at (907) 271–2809 at least 7 working days prior to the meeting date.

Dated: March 5, 2010.

William D. Chappell,

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

[FR Doc. 2010–5085 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XU97

New England Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The New England Fishery Management Council (Council) is scheduling public meetings of its Monkfish Advisory Panel and its Monkfish Committee on March 24, 2010 and March 25, 2010 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from these groups will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This Advisory Panel meeting will be held on Wednesday, March 24, 2010 at 9 a.m. and the Committee meeting will be held on Thursday, March 25, 2010 at 9 a.m.

ADDRESSES: These meetings will be held at the Holiday Inn, 31 Hampshire Street, Mansfield, MA 02048; telephone: (508) 339–2200; fax: (508) 339–1040.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Monkfish Advisory Panel and the Committee will review public comments and finalize their recommendations to the New England and Mid-Atlantic Councils for final measures to be adopted in Amendment 5, including but not limited to: biological and management reference points; specifications of catch target and management measures to achieve the targets (days-at sea, trip limits and other measures); and other modifications to the management measures currently in the plan. The committee will consider Advisory Panel recommendations in finalizing its recommendations to the New England and Mid-Atlantic Councils at their respective April meetings.

Although non-emergency issues not contained in this agenda may come before these groups for discussion, those issues may not be the subject of formal action during these meetings. 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 Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: March 4, 2010.

William D. Chappell,

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

[FR Doc. 2010–5054 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–840]

Lightweight Thermal Paper from Germany: Notice of Partial Rescission of Antidumping Duty Administrative Review

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

EFFECTIVE DATE: March 10, 2010.

FOR FURTHER INFORMATION CONTACT: Stephanie Moore or George McMahon, AD/CVD Operations, Office 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–3692 or (202) 482–1167, respectively.

SUPPLEMENTARY INFORMATION:

Background

On November 2, 2009, the Department of Commerce (the Department) published in the **Federal Register** a notice of "Opportunity to Request Administrative Review" of the antidumping duty order on lightweight thermal paper (thermal paper) from Germany for the period of review (POR), November 20, 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 30, 2009, the Department received a timely request filed on behalf of Appleton Papers Inc. (petitioner) to conduct an administrative review of Mitsubishi HiTec Paper Flensburg GmbH, Mitsubishi HiTec Paper Bielefeld GmbH, and Mitsubishi International Corp. (collectively, Mitsubishi), and Papierfabrik August Koehler AG (Koehler). On November 30, 2009, the Department also received a request filed on behalf of Koehler to conduct an administrative review of Koehler.

Pursuant to the aforementioned requests, the Department published in the **Federal Register** a notice of initiation of an administrative review of the antidumping duty order on thermal paper from Germany, covering two respondents, Mitsubishi and Koehler. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 74 FR 68229 (December 23, 2009) (*Notice of Initiation*).

Scope of the Order

The merchandise covered by this order includes certain lightweight thermal paper, which is thermal paper with a basis weight of 70 grams per square meter (g/m^2) (with a tolerance of $\pm$ 4.0 g/m^2) or less; irrespective of dimensions;[1] with or without a base coat[2] on one or both sides; with thermal active coating(s)[3] on one or both sides that is a mixture of the dye and the developer that react and form an image when heat is applied; with or without a top coat;[4] and without an adhesive backing. Certain lightweight thermal paper is typically (but not exclusively) used in point–of-sale applications such as ATM receipts, credit card receipts, gas pump receipts, and retail store receipts. The merchandise subject to these orders may be classified in the Harmonized Tariff Schedule of the United States (HTSUS) under subheadings 3703.10.60, 4811.59.20, 4811.90.8040, 4811.90.9090, 4820.10.20, and 4823.40.00.[5] Although HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of these orders is dispositive.

Partial Rescission of the 2008–2009 Administrative Review

On January 26, 2010, petitioner withdrew its request for review of Mitsubishi. Pursuant to 19 CFR § 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if the parties that requested a review withdraw the request within 90 days of the date of publication of the notice of initiation of the requested review. The instant review was initiated on December 23, 2009. See *Notice of Initiation*. The petitioner's withdrawal of request for a review of Mitsubishi falls within the 90–day deadline for rescission by the Department, and no other party requested an administrative review of this particular respondent. Therefore, in accordance with 19 CFR § 351.213(d)(1), and consistent with our practice, we are rescinding this review with respect to Mitsubishi. *See, e.g., Certain Lined Paper Products From India: Notice of Partial Rescission of Antidumping Duty Administrative Review and Extension of Time Limit for the Preliminary Results of Antidumping Duty Administrative Review*, 74 FR 21781 (May 11, 2009). The instant review will continue with respect to Koehler.

Notification to Importers

This notice serves as a 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.

Notification Regarding Administrative Protective Order

This notice serves as a final reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the disposition of proprietary information disclosed under an APO in accordance with 19 CFR § 351.305(a)(3). Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

We have been enjoined from liquidating entries of the subject merchandise produced and/or exported by Mitsubishi. Therefore, we do not intend to issue liquidation instructions to U.S. Customs and Border Protection (CBP) for such entries entered on or after November 20, 2008, until such time the preliminary injunction issued on March 17, 2009, is lifted.

This notice is issued and published in accordance with sections 751(a)(1), 751(a)(3)(A), and 777(i)(1) of the Tariff Act of 1930, as amended, and 19 CFR § 351.213(d)(4).

Dated: March 4, 2010.

John M. Andersen,

Acting Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2010–5115 Filed 3–9–10; 8:45 am]

BILLING CODE 3510–DS–S

[1] Thermal paper is typically produced in jumbo rolls that are slit to the specifications of the converting equipment and then converted into finished slit rolls. Both jumbo and converted rolls (as well as LWTP in any other form, presentation, or dimension) are covered by the scope of these orders.

[2] A base coat, when applied, is typically made of clay and/or latex and like materials and is intended to cover the rough surface of the paper substrate and to provide insulating value.

[3] A thermal active coating is typically made of sensitizer, dye, and co–reactant.

[4] A top coat, when applied, is typically made of polyvinyl acetone, polyvinyl alcohol, and/or like materials and is intended to provide environmental protection, an improved surface for press printing, and/or wear protection for the thermal print head.

[5] HTSUS subheading 4811.90.8000 was a classification used for LWTP until January 1, 2007. Effective that date, subheading 4811.90.8000 was replaced with 4811.90.8020 (for gift wrap, a non–subject product) and 4811.90.8040 (for "other" including LWTP). HTSUS subheading 4811.90.9000 was a classification for LWTP until July 1, 2005. Effective that date, subheading 4811.90.9000 was replaced with 4811.90.9010 (for tissue paper, a non–subject product) and 4811.90.9090 (for "other, including LWTP).

DEPARTMENT OF DEFENSE

Office of the Secretary

Federal Advisory Committee; U.S. Nuclear Command and Control System Comprehensive Review Committee; Charter Termination

AGENCY: Department of Defense (DoD).

ACTION: Termination of Federal advisory committee.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972, (5 U.S.C. Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and title 41 of the CFR, the Department of Defense gives notice that it is terminating the charter for the U.S. Nuclear Command and Control System Comprehensive Review Committee.

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Deputy Committee Management Officer for the Department of Defense, 703–601–6128.

Dated: March 4, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–5098 Filed 3–9–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Federal Advisory Committee; Department of Defense Wage Committee; Meeting

AGENCY: Department of Defense (DoD).

ACTION: Notice of closed meeting.

SUMMARY: Pursuant to the provisions of section 10 of Public Law 92–463, the Federal Advisory Committee Act, notice is hereby given that the Department of Defense Wage Committee will meet on April 6, 2010. The meeting is closed to the public.

DATES: The meeting will be held on Tuesday, April 6, 2010, at 10 a.m.

ADDRESSES: The meeting will be held at 1400 Key Boulevard, Level A, Room A101, Rosslyn, Virginia 22209.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the meetings may be obtained by writing to the Chairman, Department of Defense Wage Committee, 4000 Defense Pentagon, Washington, DC 20301–4000.

SUPPLEMENTARY INFORMATION: Under the provisions of section 10(d) of Public Law 92–463, the Department of Defense has determined that the meeting meets the criteria to close meetings to the public because the matters to be considered are related to internal rules and practices of the Department of Defense and the detailed wage data to be considered were obtained from officials of private establishments with a guarantee that the data will be held in confidence.

Written Statements

Members of the public who may wish to do so are invited to submit material in writing to the chairman (*see* **FOR FURTHER INFORMATION CONTACT**) concerning matters believed to be deserving of the Committee's attention.

Dated: March 4, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–5099 Filed 3–9–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Revised Non-Foreign Overseas Per Diem Rates

AGENCY: Per Diem, Travel and Transportation Allowance Committee, DoD.

ACTION: Notice of revised non-foreign overseas per diem rates.

SUMMARY: The Per Diem, Travel and Transportation Allowance Committee is publishing Civilian Personnel Per Diem Bulletin Number 266. This bulletin lists revisions in the per diem rates prescribed for U.S. Government employees for official travel in Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands and Possessions of the United States. AEA changes announced in Bulletin Number 194 remain in effect. Bulletin Number 266 is being published in the **Federal Register** to assure that travelers are paid per diem at the most current rates.

DATES: Effective March 1, 2010.

SUPPLEMENTARY INFORMATION: This document gives notice of revisions in per diem rates prescribed by the Per Diem Travel and Transportation Allowance Committee for non-foreign areas outside the continental United States. It supersedes Civilian Personnel Per Diem Bulletin Number 265. Distribution of Civilian Personnel Per Diem Bulletins by mail was discontinued. Per Diem Bulletins published periodically in the **Federal Register** now constitute the only notification of revisions in per diem rates to agencies and establishments outside the Department of Defense. For more information or questions about *per diem* rates, please contact your local travel office. The text of the Bulletin follows:

BILLING CODE 5001–06–P

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Islands and Possessions of the United States by Federal Government civilian employees.

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
**** CIVILIAN BULLETIN 266 INCLUDES PER DIEM RATE UPDATES FOR LOCATIONS IN ALASKA.***						
ALASKA						
[OTHER]						
01/01 - 12/31	100		71		171	1/1/2009
ADAK						
01/01 - 12/31	120		79		199	7/1/2003
ANCHORAGE [INCL NAV RES]						
05/01 - 09/15	181		97		278	4/1/2007
09/16 - 04/30	99		89		188	4/1/2007
BARROW						
01/01 - 12/31	159		95		254	10/1/2002
BETHEL						
01/01 - 12/31	139		87		226	1/1/2009
BETTLES						
01/01 - 12/31	135		62		197	10/1/2004
CLEAR AB						
01/01 - 12/31	90		82		172	10/1/2006
COLDFOOT						
01/01 - 12/31	165		70		235	10/1/2006
COPPER CENTER						
05/01 - 09/30	125		84		209	1/1/2009
10/01 - 04/30	95		81		176	1/1/2009
CORDOVA						
01/01 - 12/31	95		77		172	3/1/2010
CRAIG						
04/01 - 09/30	236		84		320	3/1/2010
10/01 - 03/31	151		76		227	3/1/2010
DELTA JUNCTION						
01/01 - 12/31	135		80		215	7/1/2008
DENALI NATIONAL PARK						
06/01 - 08/31	135		80		215	3/1/2010

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
**** CIVILIAN BULLETIN 266 INCLUDES PER DIEM RATE UPDATES FOR LOCATIONS IN ALASKA.***						
09/01 - 05/31	90		74		164	3/1/2010
DILLINGHAM						
04/15 - 10/15	185		83		268	1/1/2009
10/16 - 04/14	169		82		251	1/1/2009
DUTCH HARBOR-UNALASKA						
01/01 - 12/31	121		86		207	1/1/2009
EARECKSON AIR STATION						
01/01 - 12/31	90		77		167	6/1/2007
EIELSON AFB						
05/01 - 09/15	175		88		263	2/1/2009
09/16 - 04/30	75		79		154	2/1/2009
ELMENDORF AFB						
05/01 - 09/15	181		97		278	4/1/2007
09/16 - 04/30	99		89		188	4/1/2007
FAIRBANKS						
05/01 - 09/15	175		88		263	2/1/2009
09/16 - 04/30	75		79		154	2/1/2009
FOOTLOOSE						
01/01 - 12/31	175		18		193	10/1/2002
FT. GREELY						
01/01 - 12/31	135		80		215	7/1/2008
FT. RICHARDSON						
05/01 - 09/15	181		97		278	4/1/2007
09/16 - 04/30	99		89		188	4/1/2007
FT. WAINWRIGHT						
05/01 - 09/15	175		88		263	2/1/2009
09/16 - 04/30	75		79		154	2/1/2009
GLENNALLEN						
05/01 - 09/30	125		84		209	1/1/2009
10/01 - 04/30	95		81		176	1/1/2009
HAINES						
01/01 - 12/31	109		75		184	1/1/2009
HEALY						

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
**** CIVILIAN BULLETIN 266 INCLUDES PER DIEM RATE UPDATES FOR LOCATIONS IN ALASKA.***							
06/01	- 08/31	135		80		215	3/1/2010
09/01	- 05/31	90		74		164	3/1/2010
HOMER							
09/16	- 05/14	79		78		157	1/1/2009
05/15	- 09/15	167		85		252	1/1/2009
JUNEAU							
05/01	- 09/30	149		85		234	1/1/2009
10/01	- 04/30	109		80		189	1/1/2009
KAKTOVIK							
01/01	- 12/31	165		86		251	10/1/2002
KAVIK CAMP							
01/01	- 12/31	150		69		219	10/1/2002
KENAI-SOLDOTNA							
05/01	- 08/31	159		90		249	3/1/2010
09/01	- 04/30	79		82		161	3/1/2010
KENNICOTT							
01/01	- 12/31	259		94		353	1/1/2009
KETCHIKAN							
05/01	- 09/30	140		67		207	3/1/2010
10/01	- 04/30	99		63		162	3/1/2010
KING SALMON							
10/02	- 04/30	125		81		206	10/1/2002
05/01	- 10/01	225		91		316	10/1/2002
KLAWOCK							
04/01	- 09/30	236		84		320	3/1/2010
10/01	- 03/31	151		76		227	3/1/2010
KODIAK							
05/01	- 09/30	141		80		221	3/1/2010
10/01	- 04/30	99		76		175	3/1/2010
KOTZEBUE							
01/01	- 12/31	189		93		282	3/1/2010
KULIS AGS							
09/16	- 04/30	99		89		188	4/1/2007

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
**** CIVILIAN BULLETIN 266 INCLUDES PER DIEM RATE UPDATES FOR LOCATIONS IN ALASKA.***							
05/01	- 09/15	181		97		278	4/1/2007
MCCARTHY							
01/01	- 12/31	259		94		353	1/1/2009
MCGRATH							
01/01	- 12/31	165		69		234	10/1/2006
MURPHY DOME							
05/01	- 09/15	175		88		263	2/1/2009
09/16	- 04/30	75		79		154	2/1/2009
NOME							
01/01	- 12/31	150		97		247	3/1/2010
NUIQSUT							
01/01	- 12/31	180		53		233	10/1/2002
PETERSBURG							
01/01	- 12/31	100		71		171	7/1/2008
PORT ALSWORTH							
01/01	- 12/31	135		88		223	10/1/2002
SELDOVIA							
09/16	- 05/14	79		78		157	1/1/2009
05/15	- 09/15	167		85		252	1/1/2009
SEWARD							
05/01	- 09/30	174		89		263	3/1/2010
10/01	- 04/30	99		81		180	3/1/2010
SITKA-MT. EDGECUMBE							
05/01	- 09/30	119		75		194	3/1/2010
10/01	- 04/30	99		73		172	3/1/2010
SKAGWAY							
10/01	- 04/30	99		63		162	3/1/2010
05/01	- 09/30	140		67		207	3/1/2010
SLANA							
10/01	- 04/30	99		55		154	2/1/2005
05/01	- 09/30	139		55		194	2/1/2005
SPRUCE CAPE							
05/01	- 09/30	141		80		221	3/1/2010

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
**** CIVILIAN BULLETIN 266 INCLUDES PER DIEM RATE UPDATES FOR LOCATIONS IN ALASKA.***							
10/01	- 04/30	99		76		175	3/1/2010
ST. GEORGE							
01/01	- 12/31	129		55		184	6/1/2004
TALKEETNA							
01/01	- 12/31	100		89		189	10/1/2002
TANANA							
01/01	- 12/31	150		97		247	3/1/2010
TOGIAK							
01/01	- 12/31	100		39		139	10/1/2002
TOK							
05/01	- 09/30	129		76		205	3/1/2010
10/01	- 04/30	99		73		172	3/1/2010
UMIAT							
01/01	- 12/31	350		35		385	10/1/2006
VALDEZ							
05/01	- 09/30	179		91		270	3/1/2010
10/01	- 04/30	119		85		204	3/1/2010
WASILLA							
05/01	- 09/30	151		89		240	1/1/2009
10/01	- 04/30	96		83		179	1/1/2009
WRANGELL							
10/01	- 04/30	99		63		162	3/1/2010
05/01	- 09/30	140		67		207	3/1/2010
YAKUTAT							
01/01	- 12/31	105		76		181	1/1/2009
AMERICAN SAMOA							
AMERICAN SAMOA							
01/01	- 12/31	139		75		214	8/1/2009
GUAM							
GUAM (INCL ALL MIL INSTAL)							
01/01	- 12/31	159		80		239	7/1/2009
HAWAII							

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
**** CIVILIAN BULLETIN 266 INCLUDES PER DIEM RATE UPDATES FOR LOCATIONS IN ALASKA.***						
[OTHER]						
01/01 - 12/31	115		104		219	5/1/2009
CAMP H M SMITH						
01/01 - 12/31	177		106		283	5/1/2008
EASTPAC NAVAL COMP TELE AREA						
01/01 - 12/31	177		106		283	5/1/2008
FT. DERUSSEY						
01/01 - 12/31	177		106		283	5/1/2008
FT. SHAFTER						
01/01 - 12/31	177		106		283	5/1/2008
HICKAM AFB						
01/01 - 12/31	177		106		283	5/1/2008
HONOLULU						
01/01 - 12/31	177		106		283	5/1/2008
ISLE OF HAWAII: HILO						
01/01 - 12/31	115		104		219	5/1/2009
ISLE OF HAWAII: OTHER						
01/01 - 12/31	180		108		288	5/1/2009
ISLE OF KAUAI						
01/01 - 12/31	198		115		313	5/1/2009
ISLE OF MAUI						
01/01 - 12/31	169		104		273	5/1/2009
ISLE OF OAHU						
01/01 - 12/31	177		106		283	5/1/2008
KEKAHA PACIFIC MISSILE RANGE FAC						
01/01 - 12/31	198		115		313	5/1/2009
KILAUEA MILITARY CAMP						
01/01 - 12/31	115		104		219	5/1/2009
LANAI						
01/01 - 12/31	229		124		353	5/1/2009
LUALUALEI NAVAL MAGAZINE						
01/01 - 12/31	177		106		283	5/1/2008

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
**** CIVILIAN BULLETIN 266 INCLUDES PER DIEM RATE UPDATES FOR LOCATIONS IN ALASKA.***						
MCB HAWAII						
01/01 - 12/31	177		106		283	5/1/2008
MOLOKAI						
01/01 - 12/31	159		98		257	5/1/2009
NAS BARBERS POINT						
01/01 - 12/31	177		106		283	5/1/2008
PEARL HARBOR						
01/01 - 12/31	177		106		283	5/1/2008
SCHOFIELD BARRACKS						
01/01 - 12/31	177		106		283	5/1/2008
WHEELER ARMY AIRFIELD						
01/01 - 12/31	177		106		283	5/1/2008
MIDWAY ISLANDS						
MIDWAY ISLANDS						
01/01 - 12/31	125		45		170	5/1/2009
NORTHERN MARIANA ISLANDS						
[OTHER]						
01/01 - 12/31	55		72		127	10/1/2002
ROTA						
01/01 - 12/31	129		91		220	5/1/2006
SAIPAN						
01/01 - 12/31	121		98		219	6/1/2007
TINIAN						
01/01 - 12/31	138		71		209	7/1/2008
PUERTO RICO						
[OTHER]						
01/01 - 12/31	62		57		119	10/1/2002
AGUADILLA						
01/01 - 12/31	75		64		139	11/1/2007
BAYAMON						
01/01 - 12/31	195		82		277	10/1/2007
CAROLINA						

LOCALITY	MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
**** CIVILIAN BULLETIN 266 INCLUDES PER DIEM RATE UPDATES FOR LOCATIONS IN ALASKA.***						
01/01 - 12/31	195		82		277	10/1/2007
CEIBA						
05/01 - 11/30	155		57		212	8/1/2006
12/01 - 04/30	185		57		242	8/1/2006
FAJARDO [INCL ROOSEVELT RDS NAVSTAT]						
12/01 - 04/30	185		57		242	8/1/2006
05/01 - 11/30	155		57		212	8/1/2006
FT. BUCHANAN [INCL GSA SVC CTR, GUAY						
01/01 - 12/31	195		82		277	10/1/2007
HUMACAO						
12/01 - 04/30	185		57		242	8/1/2006
05/01 - 11/30	155		57		212	8/1/2006
LUIS MUNOZ MARIN IAP AGS						
01/01 - 12/31	195		82		277	10/1/2007
LUQUILLO						
05/01 - 11/30	155		57		212	8/1/2006
12/01 - 04/30	185		57		242	8/1/2006
MAYAGUEZ						
01/01 - 12/31	109		77		186	11/1/2007
PONCE						
01/01 - 12/31	139		83		222	11/1/2007
SABANA SECA [INCL ALL MILITARY]						
01/01 - 12/31	195		82		277	10/1/2007
SAN JUAN & NAV RES STA						
01/01 - 12/31	195		82		277	10/1/2007
VIRGIN ISLANDS (U.S.)						
ST. CROIX						
04/15 - 12/14	135		92		227	5/1/2006
12/15 - 04/14	187		97		284	5/1/2006
ST. JOHN						
04/15 - 12/14	163		98		261	5/1/2006
12/15 - 04/14	220		104		324	5/1/2006
ST. THOMAS						

LOCALITY		MAXIMUM LODGING AMOUNT (A)	+	MEALS AND INCIDENTALS RATE (B)	=	MAXIMUM PER DIEM RATE (C)	EFFECTIVE DATE
**** CIVILIAN BULLETIN 266 INCLUDES PER DIEM RATE UPDATES FOR LOCATIONS IN ALASKA.***							
04/15	- 12/14	240		105		345	5/1/2006
12/15	- 04/14	299		111		410	5/1/2006
WAKE ISLAND							
WAKE ISLAND							
01/01	- 12/31	152		16		168	5/1/2009

Dated: March 4, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–5094 Filed 3–9–10; 8:45 am]

BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Grant Exclusive Patent License; Distilled Solutions, LLC

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Department of the Navy hereby gives notice of its intent to grant to Distilled Solutions, LLC a revocable, nonassignable, exclusive license to practice in the United States, the Government-owned invention described in U.S. Patent No. 6,893,540, entitled "High Temperature Peltier Effect Water Distiller," issued May 17, 2005, Navy Case No. 82,363.

DATES: Anyone wishing to object to the grant of this license must file written objections along with supporting evidence, if any, not later than March 25, 2010.

ADDRESSES: Written objections are to be filed with the Naval Surface Warfare Center Panama City, 110 Vernon Ave., Code CDL, Panama City, FL 32407–7001.

FOR FURTHER INFORMATION CONTACT: Mr. James Shepherd, Patent Counsel, Naval Surface Warfare Center Panama City, 110 Vernon Ave., Panama City, FL 32407–7001, telephone 850–234–4646, fax 850–235–5497, or *james.t.shepherd@navy.mil.*

Authority: 35 U.S.C. 207, 37 CFR part 404.

Dated: March 2, 2010.

A.M. Vallandingam,

Lieutenant Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2010–5089 Filed 3–9–10; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

Process for Requesting a Variance From Vegetation Standards for Levees and Floodwalls

AGENCY: U.S. Army Corps of Engineers, DoD.

ACTION: Extension of public comment period.

SUMMARY: In the February 9, 2010 issue of the **Federal Register** (75 FR 6364), the U.S. Army Corps of Engineers (Corps), published its proposed update to its current process for requesting a variance from vegetation standards for levees and floodwalls for public comment. In that notice, the Corps stated that written comments must be submitted on or before March 11, 2010. Instructions for submitting comments are provided in the February 9, 2010, **Federal Register** notice. In response to several requests, the Corps has decided to extend the public comment period to April 25, 2010.

FOR FURTHER INFORMATION CONTACT: Douglas J. Wade, Headquarters, Engineering and Construction Community of Practice, Washington, DC, at 202–761–4668.

SUPPLEMENTARY INFORMATION: None.

Dated: March 5, 2010.

John W. Hunter,

Engineering and Construction, Headquarters, U.S. Army Corps of Engineers.

[FR Doc. 2010–5126 Filed 3–9–10; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF ENERGY

Ultra-Deepwater and Unconventional Natural Gas and Other Petroleum Resources Research and Development Program 2010 Annual Plan

AGENCY: Department of Energy, Office of Fossil Energy.

ACTION: Notice of report availability.

SUMMARY: The Office of Fossil Energy announces the availability of the *2010 Annual Plan* for the Ultra-Deepwater and Unconventional Natural Gas and Other Petroleum Resources Research and Development Program on the DOE Web site at *http://management.energy.gov/FOIA/1480.htm* or in print form (*see* "Contact" below).

The *2010 Annual Plan* is in compliance with the *Energy Policy Act of 2005, Subtitle J, Section 999B(e)(3)* which requires the publication of this plan and all written comments in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Elena Melchert, U.S. Department of Energy, Office of Oil and Natural Gas, Mail Stop FE–30, 1000 Independence Avenue, SW., Washington, DC 20585 or phone: 202–586–5600 or e-mail to *UltraDeepwater@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

Executive Summary [Excerpted From the 2010 Annual Plan p. 3]

This document is the *2010 Annual Plan* for the Ultra-Deepwater and Unconventional Natural Gas and Other Petroleum Resources Research and Development Program established pursuant to Title IX, Subtitle J (Subtitle J) of the Energy Policy Act of 2005 (EPAct). Subtitle J is reproduced in Appendix A.

As required by Subtitle J, the Department of Energy (DOE) contracted with a consortium (Program Consortium) to administer three program elements identified in EPAct: ultra-deepwater architecture and technology, unconventional natural gas and other petroleum resources exploration and production technology, and technology challenges of small producers. A fourth program element of complementary research identified in EPAct is being conducted by the National Energy Technology Laboratory (NETL). NETL is also responsible for review and oversight of the Program Consortium.

In 2006, NETL awarded a contract to the Research Partnership to Secure Energy for America (RPSEA) to function as the Program Consortium.

The *2007 Annual Plan*, the first annual plan, resulted in a total of 15 solicitations from which 43 projects were selected. The *2008 Annual Plan* resulted in the selection of 29 projects. Implementation of the *2009 Annual Plan* includes 7 solicitations issued by the Program Consortium in October 2009, with selections anticipated in early 2010.

As further required by Subtitle J, in September 2009, two Federal advisory committees, the Ultra-Deepwater Advisory Committee and the Unconventional Resources Technology Advisory Committee, began their respective reviews of the draft *2010 Annual Plan.* In October 2009, the two advisory committees provided their recommendations.

Section 999B(e)(3) of EPAct requires DOE to publish all written comments received regarding the annual plan. Accordingly, the Program Consortium's 2010 draft Annual Plan is included here as Appendix B, and the comments and recommendations provided by the two Federal advisory committees are included here as Appendix C. No other written comments were received.

The *2010 Annual Plan* provides a comprehensive outline of the research activities planned for 2010. The primary focus of these activities is to fill in any technology gaps not adequately addressed by the projects and solicitations to date. A highlight of *2010 Annual Plan* is the attention that is being given to technology transfer.

Technology transfer is important to the success of this research program. Subtitle J requires 2.5% of the amount of each award to be designated for technology transfer activities. The Federal advisory committees have recommended that more information on

technology transfer be included in future annual plans. In response, the *2010 Annual Plan* describes the structure for the overall technology transfer program.

Subtitle J provides that the Ultra-Deepwater and Unconventional Natural Gas and Other Petroleum Research Fund be funded at $50-million-per-year, with funds generated from Federal lease royalties, rents, and bonuses paid by oil and gas companies. Seventy-five percent of these funds are obligated to the Program Consortium's contract to execute the three program elements. After allocations for contract management by NETL and program administration by the Program Consortium, the amount to be invested in research activities by the Program Consortium totals $31.88 million per year.

Under the Stage-Gate approach applied to prior years' activities, all Program Consortium administered projects are fully funded to the completion of the appropriate decision point identified in each contract, which may include multiple stages. If a decision is made to move to the next stage or decision point or to gather additional data, additional funding will be provided from available funds.

The NETL Strategic Center for Natural Gas and Oil is responsible for management of the consortium's contract as part of its review and oversight function. Complementary research and development (R&D) is being carried out by NETL's Office of Research and Development. Planning and analysis related to the Program, including benefits assessment and technology impacts analysis, is being carried out by NETL's Office of Systems, Analysis, and Planning.

Subtitle J contains a general sunset provision for Title IX, Subtitle J, of September 30, 2014.

Issued in Washington, DC, on February 22, 2010.

Christopher A. Smith,

Deputy Assistant Secretary, Office of Oil and Natural Gas, Office of Fossil Energy.

[FR Doc. 2010–5083 Filed 3–9–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Energy Information Administration

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Agency Information Collection Activities: Proposed Collection; Comment Request.

SUMMARY: The EIA is soliciting comments on the proposed three-year extension of EIA Form EIA–914 Monthly Natural Gas Production Report.

DATES: Comments must be filed by May 10, 2010. If you anticipate difficulty in submitting comments within that period, contact the person listed below as soon as possible.

ADDRESSES: Send comments to Ms. Rhonda Green at Department of Energy, Energy Information Administration, Reserves and Production Division, 1999 Bryan Street, Suite 1110, Dallas, Texas 75201–6801. To ensure receipt of the comments by the due date, submission by e-mail (*rhonda.green@eia.doe.gov*) or FAX 214–720–6155 is recommended. Alternatively, Ms. Green may be contacted by telephone at 214–720–6161.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of any forms and instructions should be directed to Ms. Rhonda Green at the contact information listed above. The proposed forms and instructions are also available on the Internet at: *http://www.eia.doe.gov/oil_gas/natural_gas/survey_forms/nat_survey_forms.html.*

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Energy Administration Act of 1974 (Pub. L. No. 93–275, 15 U.S.C. 761 *et seq.*) and the DOE Organization Act (Pub. L. No. 95–91, 42 U.S.C. 7101 *et seq.*) require the EIA to carry out a centralized, comprehensive, and unified energy information program. This program collects, evaluates, assembles, analyzes, and disseminates information on energy resource reserves, production, demand, technology, and related economic and statistical information. This information is used to assess the adequacy of energy resources to meet near and longer-term domestic demands.

The EIA, as part of its effort to comply with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35), provides the general public and other Federal agencies with opportunities to comment on collections of energy information conducted by or in conjunction with the EIA. Any comments received help the EIA to prepare data requests that maximize the utility of the information collected, and to assess the impact of collection requirements on the public. Also, the EIA will later seek approval by the Office of Management and Budget (OMB) under section 3507(a) of the Paperwork Reduction Act of 1995.

Currently a sample of operators of natural gas wells report on the Form EIA–914. From a universe of about 9,300 active operators, a cut-off sample is selected of 243 largest natural gas producers by state or area, known to have produced at least 20 million cubic feet (10 million cubic feet in Oklahoma) of natural gas per day in 2009. Using information collected on Form EIA–914, EIA estimates and disseminates timely and reliable monthly natural gas production data for Texas (onshore and offshore) and Louisiana (onshore and offshore), New Mexico, Oklahoma, Wyoming, the Federal Offshore Gulf of Mexico, Other States (onshore and offshore for the remaining gas producing States with Alaska excluded), and the lower 48 States. This collection is essential to the mission of the DOE in general and the EIA in particular because of the increasing demand for natural gas in the United States and the requirement for accurate and timely natural gas production information necessary to monitor the United States natural gas supply and demand balance. These estimates are essential to the development, implementation, and evaluation of energy policy and legislation. Data are disseminated through the *EIA Natural Gas Monthly* and *EIA Natural Gas Annual* Web site. Secondary publications that use the data include EIA's *Short-Term Energy Outlook, Annual Energy Outlook, Monthly Energy Review,* and *Annual Energy Review.*

II. Current Actions

Currently EIA asks operators to resubmit if actual or corrected data vary more than plus or minus four percent (4%) from the data previously reported. The proposed change would ask that operators resubmit any change in previously reported data. This will make the instructions consistent with the way operators actually report now, *i.e.,* without regard to a four percent difference threshold on revision submissions.

III. Request for Comment

Prospective respondents and other interested parties should comment on the actions discussed in item II. The following guidelines are provided to assist in the preparation of comments.

As a Potential Respondent to the Request for Information

A. Is the proposed collection of information necessary for the proper performance of the functions of the agency and does the information have practical utility?

B. What actions could be taken to help ensure and maximize the quality, objectivity, utility, and integrity of the information to be collected?

C. Are the instructions and definitions clear and sufficient? If not, which instructions need clarification?

D. Can the information be submitted by the respondent by the due date?

E. Public reporting burden for this collection is estimated to average 3 hours per respondent monthly. The estimated burden includes the total time necessary to provide the requested information. In your opinion, how accurate is this estimate?

F. The agency estimates that the only cost to a respondent is for the time it will take to complete the collection. Will a respondent incur any start-up costs for reporting, or any recurring annual costs for operation, maintenance, and purchase of services associated with the information collection?

G. What additional actions could be taken to minimize the burden of this collection of information? Such actions may involve the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

H. Does any other Federal, State, or local agency collect similar information? If so, specify the agency, the data element(s), and the methods of collection.

As a Potential User of the Information To Be Collected

A. Is the proposed collection of information necessary for the proper performance of the functions of the agency and does the information have practical utility?

B. What actions could be taken to help ensure and maximize the quality, objectivity, utility, and integrity of the information disseminated?

C. Is the information useful at the levels of detail to be collected?

D. For what purpose(s) would the information be used? Be specific.

E. Are there alternate sources for the information and are they useful? If so, what are their weaknesses and/or strengths?

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of the form. They also will become a matter of public record.

Statutory Authority: Section 13(b) of the Federal Energy Administration Act of 1974, Pub. L. 93–275, codified at 15 U.S.C. 772(b).

Issued in Washington, DC, March 4, 2010.

Stephanie Brown,

Director, Statistics and Methods Group, Energy Information Administration.

[FR Doc. 2010–5082 Filed 3–9–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13526–001]

Bowersock Mills and Power Company; Notice of Application Tendered for Filing With the Commission; Intent To Waive Stage I and Stage II Pre-Filing Consultation Requirements and Scoping; Soliciting Additional Study Requests; and Establishing Procedural Schedule for Licensing

March 3, 2010.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original Major License.

b. *Project No.:* 13526–001.

c. *Date Filed:* February 8, 2010.

d. *Applicant:* Bowersock Mills Power Company (Bowersock).

e. *Name of Project:* Bowersock Mills and Power Company Expanded Kansas River Hydropower Project.

f. *Location:* The project would be located on the Kansas River in Douglas County, Kansas. The project would not affect Federal lands.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Sarah Hill-Nelson, The Bowersock Mills and Power Company, P.O. Box 66, Lawrence, Kansas 66044; (785)-766–0884.

i. *FERC Contact:* Monte TerHaar, (202) 502–6035, or via e-mail at *monte.terhaar@ferc.gov.*

j. *Cooperating agencies:* Federal, State, local, and Tribal agencies with jurisdiction and/or special expertise with respect to environmental issues that wish to cooperate in the preparation of the environmental document should follow the instructions for filing such requests in item l below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of the environmental document cannot also intervene. *See* 94 FERC ¶ 61,076 (2001).

k. Pursuant to Section 4.32(b)(7) of 18 CFR of the Commission's regulations, if any resource agency, Indian Tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete analysis of the application on its merit, the resource agency, Indian Tribe, or person must file a request for a study with the Commission not later than 60 days from the date of filing of the application, and serve a copy of the request on the applicant.

l. Deadline for filing requests for cooperating agency status and additional studies: April 9, 2010.

All documents may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the "e-Filing" link. For a simpler method of submitting text only comments, click on "Quick Comment". For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

m. This application is not ready for environmental analysis at this time.

n. *Project Description:* The existing Bowersock dam and powerhouse currently operates under an exemption (Project No. 2644) as a small hydropower project of 5 megawatts (MW) or less. The proposed project would consist of the existing Bowersock dam and two powerhouses; the existing powerhouse on the South bank of the Kansas River, and a proposed powerhouse on the North bank of the Kansas River. The proposed project would have a total capacity of 6.012 MW and generate an estimated 33 gigawatt-hours annually. The electricity produced by the project would be sold to a local utility.

The proposed project would consist of the following:

(1) The existing 665-foot-long, 17-foot-high timber-crib Bowersock Dam; (2) a 120-foot-long gated spillway with seven gates; (3) raising the existing flashboards from 4 feet high to 5.5 feet high; (4) an existing 4.3-mile-long reservoir, having a normal water surface elevation of 813.5 feet mean sea level; (5) an existing South powerhouse, containing seven turbine/generator units having an installed capacity of 2.012 MW; (6) a proposed North powerhouse with four turbine/generator units, having an

installed capacity of 4.6 MW; (7) a proposed 20-foot-wide roller gate; (8) a new intake flume with trashracks; (9) a new 150-foot-long recreational boat portage located along the north bank of the Kansas River; (10) a new 765-foot-long, 12-kilovolt (kV) transmission line connecting to an existing 535-foot-long 2.3-kV transmission line; and (8) appurtenant facilities.

The project would be operated in a run-of-river mode, where water levels in the reservoir would be maintained near the top of the flash boards. To avoid potential flooding of upstream lands, the project would incorporate a 20-foot-wide roller gate designed to release flows up to 2,600 cfs. In addition, the flashboards would be designed to collapse during periods of high inflows when the water surface elevation rises 6 inches above the top of the flashboards.

o. A copy of the application 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, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item (h) above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

p. With this notice we intend to waive stage I and stage II pre-filing consultation requirements. On October 6, 2009 Bowersock filed a pre-application document and request for waiver of stage I and stage II consultation. As required by sections 5.3(d)(2) of the Commission's regulations, on September 24, 2009 Bowersock published notice in a local paper (the Lawrence Daily Journal) of its request to waive consultation which specified that comments should be filed with the Commission. The application includes letters from the U.S. Fish and Wildlife Service and the Kansas Department of Wildlife and Parks, both indicating that there is sufficient information available to make a recommendation for licensing the project and that no further studies are necessary. Commission staff reviewed the application and comments received and determined that Bowersock's application adequately addresses the issues such that no additional agency consultation is necessary.

q. With this notice we intend to waive scoping. Based on a review of the application filed by Bowersock, resource agency consultation letters, and comments filed to date, Commission staff intends to prepare a single environmental assessment (EA). The EA will assess the potential effects of project construction and operation on geology and soils, aquatic, terrestrial, threatened and endangered species, recreation and land use, aesthetic, and cultural and historic resources. Commission staff determined that the issues that need to be addressed in its EA have been adequately identified during the pre-filing period for the application, which includes a public meeting and site visit conducted by Bowersock on August 13, 2009, and no new issues are likely to be identified through additional scoping.

r. *Procedural Schedule:* The application will be processed according to the following Hydro Licensing Schedule. Revisions to the schedule will be made as appropriate.

Milestone	Target date
Additional study requests and cooperating agency request due.	April 9, 2010.
Notice of Acceptance, Intervenors, and Ready for Environmental Analysis issued.	April 23, 2010.
Recommendations, preliminary terms & conditions, and fishway prescriptions due.	June 22, 2010.
Commission issues EA	August 20, 2010.
Comments on EA due.	September 20, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–5040 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13616–000]

Free Flow Power Qualified Hydro 23, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

March 3, 2010.

On November 5, 2009, Free Flow Power Qualified Hydro 23, LLC (FFP Qualified Hydro 23) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Felts Mills Hydroelectric Project No. 13616, to be located at an existing partially breached dam at river mile 19.2, on the Black River, in Jefferson County, New York.

The proposed project would consist of: (1) A new 18.5-foot-high by 292-foot-long concrete gravity dam, a refurbish 5-foot-high by 520-foot-long auxiliary dam, and a new 6-foot-high by 1,000-foot-long earthen embankment; (2) a new 140-acre impoundment with a normal water surface elevation of 589 feet mean sea level; (3) an new 54-foot-long by 74-foot-wide powerhouse to contain two new turbine-generator units for a total installed capacity of 5.0 megawatts; (4) a new 2.6-mile-long, 23-kilovolt transmission line; and (5) appurtenant facilities. The proposed project would operate in a run-of-river mode and generate an estimated average annual generation of 40,000 megawatt-hours.

FFP Qualified Hydro 23: Ramya Swaminathan, FFP Qualified Hydro 23, LLC., 33 Commercial Street, Gloucester, MA 01930, (978) 283–2822.

FERC Contact: Michael Watts, (202) 502–6123.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "eFiling" link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the "eLibrary" link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13616) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–5041 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13630–000]

Lewis County Development Corporation; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

March 3, 2010.

On November 16, 2009, Lewis County Development Corporation (Lewis County Corp) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Croghan Dam Hydroelectric Project No. 13630, to be located at the existing Croghan Dam, on the on the Beaver River, in Lewis County, New York.

The proposed project would consist of: (1) An existing concrete gravity dam structure consisting of an 11.5-foot-high by 120-foot-long section, and a 9.5-foot-high by 103-foot-long section; (2) an existing approximately 121-acre impoundment with a normal water surface elevation of 817.7 feet mean sea level; (3) a new 75-foot-long by 35-foot-wide powerhouse; (4) two new turbine generator units for a total installed capacity of 450 kilowatts; (5) a new approximately 360-foot-long, 13.2-kilovolt transmission line; and (6) appurtenant facilities. The proposed project would operate in run-of-river mode and generate an estimated average annual generation of 2,773 megawatt-hours.

Lewis County Corp: Larry Dolhof, Lewis County Development Corporation, P.O. Box 704, Lyons Falls, NY 13368, (315) 348–4066.

FERC Contact: Michael Watts, (202) 502–6123.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "eFiling" link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp*. More information about this project can be viewed or printed on the "eLibrary" link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp*. Enter the docket number (P–13630) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–5042 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12779–005]

Pacific Gas and Electric Company; Notice of Intent To File License Application, Filing of Draft Application, Request for Waivers of Integrated Licensing Process Regulations Necessary for Expedited Processing of a Hydrokinetic Pilot Project License Application, and Soliciting Comments

March 3, 2010.

a. *Type of Filing:* Notice of Intent to File a License Application for an Original License for a Hydrokinetic Pilot Project.

b. *Project No.:* 12779–005.

c. *Date Filed:* March 1, 2010.

d. *Submitted By:* Pacific Gas and Electric Company.

e. *Name of Project:* Humboldt WaveConnect Pilot Project.

f. *Location:* The project would be located in the Pacific Ocean west of the City of Eureka in Humboldt County, California within California State waters.

g. *Filed Pursuant to:* 18 CFR 5.3 of the Commission's regulations.

h. *Applicant Contact:* Mr. Brian McDonald, Director—Renewable Resource Development, Pacific Gas and Electric Company, 77 Beale Street, MC B5Q–542, San Francisco, CA 94105–1814, telephone: (415)–973–2005.

i. *FERC Contact:* Kenneth Hogan (202) 502–8434.

j. Pacific Gas and Electric Company (PG&E) has filed with the Commission: (1) A notice of intent (NOI) to file an application for an original license for a hydrokinetic pilot project and a draft license application with monitoring plans; (2) a request for waivers of the integrated licensing process regulations necessary for expedited processing of a hydrokinetic pilot project license application; (3) a proposed process plan and schedule; (4) a request to be designated as the non-Federal representative for section 7 of the Endangered Species Act consultation; and (5) a request to be designated as the non-Federal representative for section 106 consultation under the National Historic Preservation Act (collectively the pre-filing materials).

k. With this notice, we are soliciting comments on the pre-filing materials listed in paragraph j above, including the draft license application and monitoring plans. All comments should be sent to the address above in paragraph h. In addition, all comments (original and eight copies) must be filed with the Commission at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. All filings with the Commission must include on the first page, the project name (Humboldt WaveConnect Pilot Project) and number (P–12779–005), and bear the heading "Comments on the proposed Humboldt WaveConnect Pilot Project." Any individual or entity interested in submitting comments on the pre-filing materials must do so by April 30, 2009.

Comments may be filed electronically via the Internet in lieu of paper. The Commission strongly encourages electronic filings. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-filing" link.

l. With this notice, we are approving PG&E's request to be designated as the non-Federal representative for section 7 of the Endangered Species Act (ESA) and its request to initiate consultation under section 106 of the National Historic Preservation Act; and recommending that it begin informal consultation with: (a) The U.S. Fish and Wildlife Service and the National Marine Fisheries Service as required by section 7 of ESA; and (b) the California State Historic Preservation Officer, as required by section 106, National Historical Preservation Act, and the implementing regulations of the Advisory Council on Historic Preservation at 36 CFR 800.2.

m. This notice does not constitute the Commission's approval of PG&E's request to use the Pilot Project Licensing Procedures. Upon its review of the project's overall characteristics relative to the pilot project criteria, the draft license application contents, any comments filed, and PG&E's response to any additional information requests by the Commission, the Commission will determine whether there is adequate information to conclude the pre-filing

process and approve the use the Pilot Project Licensing Procedures.

n. The proposed Humboldt WaveConnect Pilot Project would consist of: (1) Wave energy conversion (WEC) buoys including multi-point catenary moorings and anchors; (2) marker buoys, navigation lights, and environmental monitoring instruments; (3) five 9-mile-long submarine electrical cables extending underground onshore to; (4) land-based power conditioning equipment; (5) a 2,025-feet-long 12kV aboveground transmission line; and (6) appurtenant facilities. The estimated annual generation of the proposed project would be 43,800 megawatt-hours.

o. A copy of the draft license application and all pre-filing materials are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site (*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, contact FERC Online Support at *FERCONlineSupport@ferc.gov* or toll free at 1–866–208–3676, of for TTY, (202) 502–8659.

p. Pre-filing process schedule. The pre-filing process will be conducted pursuant to the following tentative schedule. Revisions to the schedule below may be made based on staff's review of the draft application and any comments received.

Milestone	Date
Comments on pre-filing materials due.	April 30, 2010.
Issuance of Notice of Site Visit/Meetings.	May 7, 2010.
Site Visit & Public Meetings/Technical Conference.	June 8–9, 2010.

q. Register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filing and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–5044 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1895–078]

City of Columbia, SC; Notice of Application for Amendment of License and Soliciting Comments, Motions To Intervene, and Protests

March 1, 2010.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amendment of License.

b. *Project No.:* 1895–078.

c. *Date Filed:* January 8, 2010.

d. *Applicant:* City of Columbia, South Carolina.

e. *Name of Project:* Columbia Project.

f. *Location:* The project is located on the Broad and Congaree Rivers in Richland County, South Carolina.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* John J. Dooley, Director of Utilities, City of Columbia, 1136 Washington Street, Columbia, South Carolina 29201, (803) 545–3240.

i. *FERC Contact:* Any questions on this notice should be addressed to Mr. Steven Sachs at (202) 502–8666 or *Steven.Sachs@ferc.gov.*

j. *Deadline for filing comments and or motions:* April 2, 2010.

Please include the project number (P–1895) on any comments or motions filed. All documents (an original and eight copies) must be filed with: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

Motions to intervene, protests, comments and recommendations may be filed electronically via the Internet in lieu of paper filings, *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov*) under the "e-filing" link. The Commission strongly encourages electronic filings.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

k. *Description of Request:* The City of Columbia, South Carolina proposes to amend Article 404 of the project's license. Article 404 requires the licensee to maintain a reservoir surface elevation no less than 1 foot below full pool (153.55 feet msl) between March 1 and May 31 and no less than two feet below full pool the remainder of the year. The licensee proposes to modify Article 404 such that the reservoir elevation must be maintained no less than two feet below full pool the entire year.

l. *Location of the Application:* A copy of the licensee's filing is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 502–8371. This filing may also be viewed on the Commission's Web site at *http://ferc.gov* using the "eLibrary" link. Enter the docket number excluding the last three digits in the docket number field to access the document. You may also register online at *http://www.ferc.gov/docsfiling/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, call toll-free at 1–866–208–3372 or e-mail *ferconlinesupport@ferc.gov,* or for TTY, call (202) 502–8659. A copy is also available for inspection and reproduction at the address listed in item (h) above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

n. *Comments, Protests, or Motions to Intervene:* Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application (*see* item (j) above).

o. Any filing must bear in all capital letters the title "COMMENTS", "PROTEST", "MOTION TO INTERVENE", or "RECOMMENDATIONS", as applicable, and the Project Number of the particular application to which the filing refers.

p. *Agency Comments:* Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–4999 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13631–000]

Main Mill Street Investments, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

March 1, 2010.

On November 16, Main Mill Street Investments, LLC (Main Mill Street Investments) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Imperial Mill Dam Hydroelectric Project No. 13631, to be located at the existing Imperial Mill Dam, on the on the Saranac River, in Clinton County, New York.

The proposed project would consist of: (1) An existing 21-foot-high by 205-foot-long concrete and masonry dam; (2) an existing 68-acre impoundment; (3) an existing 77-foot-long by 26-foot-wide powerhouse; (4) two new turbine generator units for a total installed capacity of 1.7 megawatts; (5) a new 50-foot-long, 46-kilovolt transmission line; and (6) appurtenant facilities. The proposed project would operate in run-of-river mode and generate an estimated average annual generation of 10,000 megawatt-hours.

Main Mill Street Investments: Rex Jacobsma, Main Mill Street Investments, LLC., 1508 Olive Street, Paso Robles, CA 93446, (805) 239–3090.

FERC Contact: Michael Watts, (202) 502–6123.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "eFiling" link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the "eLibrary" link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13631) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–4998 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13627–000]

Hydro Energy Technologies, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

March 1, 2010.

On November 6, 2009, Hydro Energy Technologies, LLC (Hydro Energy Technologies) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Harpersfield Dam Hydroelectric Project No. 13627, to be located at the existing Harpersfield Dam, on the Grand River, in Ashtabula County, Ohio.

The proposed project would consist of: (1) An existing 8.5-foot-high by 330-foot-long gravity dam; (2) a existing 36-acre impoundment with a storage capacity of 250 acre feet.; (3) an existing filtration plant to be converted into a powerhouse and installed with three new turbine-generator units for a total installed capacity of 390 kilowatts; (4) a new 150-foot-long, 480-volt transmission line; and (5) appurtenant facilities. The proposed project would operate in a run-of-river mode and generate an estimated average annual generation of 2,200 megawatt-hours.

Hydro Energy Technologies: Anthony J. Marra Jr., President, Hydro Energy Technologies, LLC., 33 Commercial Street, Gloucester, MA 01930, (978) 283–2822.

FERC Contact: Michael Watts, (202) 502–6123.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "eFiling" link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the "eLibrary" link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.*

Enter the docket number (P–13627) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–4997 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13614–000]

Free Flow Power Qualified Hydro 22, LLC; Notice of Preliminary Permit Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Competing Applications

March 1, 2010.

On November 05, 2009, Free Flow Power Qualified Hydro 22, LLC (FFP Qualified Hydro 22) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act, proposing to study the feasibility of the Great Bend Hydroelectric Project No. 13614, to be located at an existing partially breached dam at river mile

21.7, on the Black River, in Jefferson County, New York.

The proposed project would consist of: (1) A new 19-foot-high by 272-foot-long concrete gravity dam; (2) a new 220-acre impoundment with a normal water surface elevation of 609 feet mean sea level; (3) an new 54-foot-long by 74-foot-wide powerhouse to contain two new turbine-generator units for a total installed capacity of 5.0 megawatts; (4) a new 3.8-mile-long, 23-kilovolt transmission line; and (5) appurtenant facilities. The proposed project would operate in a run-of-river mode and generate an estimated average annual generation of 24,500 megawatt-hours.

FFP Qualified Hydro 22: Ramya Swaminathan, FFP Qualified Hydro 22, LLC., 33 Commercial Street, Gloucester, MA 01930, (978) 283–2822.

FERC Contact: Michael Watts, (202) 502–6123.

Deadline for filing comments, motions to intervene, competing applications (without notices of intent), or notices of intent to file competing applications: 60 days from the issuance of this notice. Comments, motions to intervene, notices of intent, and competing applications may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the "eFiling" link. If unable to be filed electronically, documents may be paper-filed. To paper-file, an original and eight copies should be mailed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. For more information on how to submit these types of filings please go to the Commission's Web site located at *http://www.ferc.gov/filing-comments.asp.* More information about this project can be viewed or printed on the "eLibrary" link of Commission's Web site at *http://www.ferc.gov/docs-filing/elibrary.asp.* Enter the docket number (P–13614) in the docket number field to access the document. For assistance, call toll-free 1–866–208–3372.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–4996 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13351–000]

Marseilles Land and Water Company; Notice of Application Ready for Environmental Analysis and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions

March 3, 2010.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original Major License.

b. *Project No.:* P–13351–000.

c. *Date filed:* December 30, 2008.

d. *Applicant:* Marseilles Land and Water Company.

e. *Name of Project:* Marseilles Lock and Dam Project.

f. *Location:* On the Illinois River, in the town of Marseilles, La Salle County, Illinois. This project would not occupy any Federal lands.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Lee W. Mueller, Architect and Vice President, Marseilles Land & Water Company, 4132 S. Rainbow Blvd., #247, Las Vegas, NV 89103, (702) 367–7302.

i. *FERC Contact:* Steve Kartalia, (202) 502–6131 or *Stephen.kartalia@ferc.gov.*

j. Deadline for filing comments, recommendations, terms and conditions, and prescriptions is 60 days from the issuance of this notice; reply comments are due 105 days from the issuance date of this notice.

All documents may be filed electronically via the Internet. *See* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the "eFiling" link. For a simpler method of submitting text only comments, click on "Quick Comment." For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application has been accepted and is now ready for environmental analysis.

l. *Project Description:* The Marseilles Lock and Dam Project would utilize the head created by the existing 24-foot-high Army Corps of Engineers (Corps) Marseilles Lock and Dam and two existing Corps headgate structures and would consist of: (1) The existing north and south headraces in which a portion of the south headrace would be filled in and joined to the existing north headrace which would be deepened to accommodate the flow from both headraces leading to; (2) a new intake structure and forebay leading to; (3) a new powerhouse containing four generating units with a total installed capacity of 10.26 megawatts (MW); (4) a new tailrace discharging water back to the Illinois River; (5) a new underground transmission line; and (6) appurtenant facilities.

The project would operate in a run-of-river mode.

m. A copy of the application 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, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

All filings must (1) Bear in all capital letters the title "COMMENTS", "REPLY COMMENTS", "RECOMMENDATIONS," "TERMS AND CONDITIONS," or "PRESCRIPTIONS;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Each filing must be accompanied by proof of service on all persons listed on the service list prepared by the Commission in this

proceeding, in accordance with 18 CFR 4.34(b), and 385.2010.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. Public notice of the filing of the initial development application, which has already been given, established the due date for filing competing applications or notices of intent. Under the Commission's regulations, any competing development application must be filed in response to and in compliance with public notice of the initial development application. No competing applications or notices of intent may be filed in response to this notice.

o. A license applicant must file no later than 60 days following the date of issuance of this notice: (1) A copy of the water quality certification; (2) a copy of the request for certification, including proof of the date on which the certifying agency received the request; or (3) evidence of waiver of water quality certification.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–5039 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

March 2, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER98–4109–006; ER03–175–010; ER03–394–008; ER03–427–008; ER04–170–010; ER07–265–013; ER08–100–012; ER09–1453–003; ER99–3426–012; ER01–1178–007.

Applicants: El Dorado Energy, LLC; Termoelectrica U.S., LLC; Elk Hills Power, LLC; Mesquite Power, LLC; MxEnergy Electric Inc.; Sempra Energy Solutions LLC; Sempra Energy Trading LLC; Gateway Energy Services Corporation; San Diego Gas & Electric Company; Sempra Generation.

Description: Triennial Update of Sempra Energy Market-Based Rate Sellers—Southwest Region.

Filed Date: 03/01/2010.

Accession Number: 20100301–5224.

Comment Date: 5 p.m. Eastern Time on Friday, April 2, 2010.

Docket Numbers: ER99–2992–014; ER02–2509–013; ER94–389–037.

Applicants: Tenaska Power Services Co., Kiowa Power Partners, L.L.C., Tenaska Gateway Partners, Ltd.

Description: Updated Market Power Analysis of Tenaska Power Services Co., *et al.*

Filed Date: 03/01/2010.

Accession Number: 20100301–5216.

Comment Date: 5 p.m. Eastern Time on Friday, April 2, 2010.

Docket Numbers: ER00–3251–024; ER98–1734–021; ER01–1919–018; ER01–513–030; ER99–2404–017.

Applicants: Exelon New Boston LLC, Commonwealth Edison Company, PECO Energy Company, Exelon West Medway LLC, Exelon Wyman LLC, Exelon Framingham LLC, Exelon New England Power Marketing, LP, Exelon Generation Company, LLC, Exelon Energy Company.

Description: Exelon Updated Market Power Analysis for SPP Region.

Filed Date: 03/01/2010.

Accession Number: 20100301–5212.

Comment Date: 5 p.m. Eastern Time on Friday, April 2, 2010.

Docket Numbers: ER02–862–013.

Applicants: Entergy Power Ventures, L.P.

Description: Entergy Power Ventures, LP requests for Category 1 Seller designation in the Southwest Power Pool region etc.

Filed Date: 03/01/2010.

Accession Number: 20100302–0203.

Comment Date: 5 p.m. Eastern Time on Monday, March 22, 2010.

Docket Numbers: ER03–1284–011; ER05–1202–011; ER08–1225–009; ER09–1321–005.

Applicants: Blue Canyon Windpower II LLC, Cloud County Wind Farm, LLC, Blue Canyon Windpower LLC, Blue Canyon Windpower V LLC.

Description: Updated Market Power Analysis of Blue Canyon Windpower LLC, *et al.*

Filed Date: 02/26/2010.

Accession Number: 20100226–5194.

Comment Date: 5 p.m. Eastern Time on Tuesday, April 27, 2010.

Docket Numbers: ER05–1232–024; ER07–1358–014.

Applicants: J.P. Morgan Ventures Energy Corporation, BE Louisiana LLC.

Description: J.P. Morgan Ventures Energy Corporation *et al.* Updated Market Power Analysis and Order 697 Compliance Filing.

Filed Date: 03/01/2010.

Accession Number: 20100301–5201.

Comment Date: 5 p.m. Eastern Time on Friday, April 2, 2010.

Docket Numbers: ER07–312–006.

Applicants: Dogwood Energy LLC.

Description: Market Power Update of Dogwood Energy LLC.

Filed Date: 03/01/2010.

Accession Number: 20100301–5208.

Comment Date: 5 p.m. Eastern Time on Friday, April 2, 2010.

Docket Numbers: ER07–1106–007.

Applicants: ArcLight Energy Marketing, LLC.

Description: Updated Market Power Analysis of ArcLight Energy Marketing, LLC.

Filed Date: 02/26/2010.

Accession Number: 20100226–5192.

Comment Date: 5 p.m. Eastern Time on Tuesday, April 27, 2010.

Docket Numbers: ER08–656–007.

Applicants: Shell Energy North America (U.S.), L.P.

Description: Updated Market Power Analysis for the Southwest Power Pool Region of Shell Energy North America (U.S.), L.P.

Filed Date: 03/01/2010.

Accession Number: 20100301–5211.

Comment Date: 5 p.m. Eastern Time on Friday, April 2, 2010.

Docket Numbers: ER08–1397–003.

Applicants: Elkhorn Ridge Wind, LLC.

Description: Updated Market Power Analysis for the Southwest Power Pool Region of Elkhorn Ridge Wind, LLC.

Filed Date: 03/01/2010.

Accession Number: 20100301–5209.

Comment Date: 5 p.m. Eastern Time on Friday, April 2, 2010.

Docket Numbers: ER09–1370–001.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc. submits compliance filing re the Interim Large Generator Interconnection Agreement.

Filed Date: 03/01/2010.

Accession Number: 20100302–0206.

Comment Date: 5 p.m. Eastern Time on Monday, March 22, 2010.

Docket Numbers: ER09–1397–000; ER09–1397–001.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc. submits their response to FERC's 2/5/2010 requests for Additional Information concerning its 12/10/09 filing.

Filed Date: 02/25/2010.

Accession Number: 20100301–0066.

Comment Date: 5 p.m. Eastern Time on Thursday, March 18, 2010.

Docket Numbers: ER09–1716–001.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits an executed Interim Large Generator Interconnection Agreement

with Western Farmers Electric Cooperative.

Filed Date: 03/01/2010.

Accession Number: 20100302–0209.

Comment Date: 5 p.m. Eastern Time on Monday, March 22, 2010.

Docket Numbers: ER10–316–001.

Applicants: Midwest Independent Transmission System Operator, Inc.

Description: Midwest Independent Transmission System Operator, Inc resubmits Sheet 421 in compliance with FERC's 1/28/10 Order.

Filed Date: 03/01/2010.

Accession Number: 20100302–0205.

Comment Date: 5 p.m. Eastern Time on Monday, March 22, 2010.

Docket Numbers: ER10–352–001.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits compliance filing.

Filed Date: 03/01/2010.

Accession Number: 20100302–0207.

Comment Date: 5 p.m. Eastern Time on Monday, March 22, 2010.

Docket Numbers: ER10–392–001.

Applicants: Allegheny Energy Supply Company LLC.

Description: Allegheny Energy Supply Company, LLC submits Original Sheet 2C *et al.* to its FERC Electric Tariff, Second Revised Volume 1.

Filed Date: 02/26/2010.

Accession Number: 20100301–0064.

Comment Date: 5 p.m. Eastern Time on Friday, March 19, 2010.

Docket Numbers: ER10–454–001.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits a revised executed Interim Large Generator Interconnection Agreement with Oklahoma Gas & Electric Co *et al.*

Filed Date: 03/02/2010.

Accession Number: 20100302–0208.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 23, 2010.

Docket Numbers: ER10–715–003.

Applicants: Llano Estacodo Wind, LLC.

Description: Llano Estacado Wind, LLC submits updated market power analysis to support the continued allowance of market-based rates.

Filed Date: 03/01/2010.

Accession Number: 20100302–0201.

Comment Date: 5 p.m. Eastern Time on Friday, April 2, 2010.

Docket Numbers: ER10–719–001.

Applicants: Matched LLC.

Description: Matched LLC submits an amended Asset Appendix and Substitute Original Sheet No. 1.

Filed Date: 03/01/2010.

Accession Number: 20100301–0129.

Comment Date: 5 p.m. Eastern Time on Monday, March 22, 2010.

Docket Numbers: ER10–790–000.

Applicants: El Cajon Energy, LLC.

Description: El Cajon Energy, LLC submits Original Sheet 1 *et al.* to its FERC Electric Tariff, Original Volume 1 to be effective 4/10/10.

Filed Date: 02/26/2010.

Accession Number: 20100301–0097.

Comment Date: 5 p.m. Eastern Time on Friday, March 19, 2010.

Docket Numbers: ER10–813–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits revised pages to its Open Access Transmission Tariff intended to implement a rate change for Southwestern Power Administration pricing zone under the SPP Tariff.

Filed Date: 03/01/2010.

Accession Number: 20100302–0202.

Comment Date: 5 p.m. Eastern Time on Monday, March 22, 2010.

Docket Numbers: ER10–814–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits an executed Large Generator Interconnection Agreement with Northwest Energy Center, LLC.

Filed Date: 03/01/2010.

Accession Number: 20100302–0204.

Comment Date: 5 p.m. Eastern Time on Monday, March 22, 2010.

Take notice that the Commission received the following electric securities filings:

Docket Numbers: ES09–59–002.

Applicants: National Grid USA.

Description: Revised Exhibits for Amendment to Section 204 Application of National Grid USA.

Filed Date: 03/01/2010.

Accession Number: 20100301–5221.

Comment Date: 5 p.m. Eastern Time on Monday, March 22, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–5058 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 2

March 4, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP95–408–076, RP91–160–035.

Applicants: Columbia Gas Transmission, LLC.

Description: Columbia Gas Transmission, LLC Report on Refunds of Environmental Insurance Recoveries.

Filed Date: 02/09/2010.

Accession Number: 20100209–5052.

Comment Date: 5 p.m. Eastern Time on Monday, 8, 2010.

Docket Numbers: RP09–1008–001.

Applicants: Gulf Crossing Pipeline Company, LLC.

Description: Gulf Crossing Pipeline Company, LLC submits Substitute Original Sheet No 1307A to FERC Gas Tariff, Original Volume No 1, to be effective 3/1/10.

Filed Date: 03/02/2010.

Accession Number: 20100303–0235.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP09–1009–001.

Applicants: Texas Gas Transmission. LLC.

Description: Texas Gas Transmission, LLC submits Substitute Original Sheet 3799A to its FERC Gas Tariff, Third Revised Volume 1, to be effective 3/1/10.

Filed Date: 03/02/2010.

Accession Number: 20100303–0234.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP09–1010–001.

Applicants: Gulf South Pipeline Company, LP.

Description: Gulf South Pipeline Company, LP submits Original Volume 1 to FERC Electric Gas Tariff, Sixth Revised Volume 1, to be effective 3/1/2010.

Filed Date: 03/02/2010.

Accession Number: 20100303–0233.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before 5 p.m. Eastern time on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest 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.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–5060 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

March 2, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP10–422–000.

Applicants: Sea Robin Pipeline Company, LLC.

Description: Sea Robin Pipeline Company, LLC submits Ninth Revised Sheet 5 *et al.* to its FERC Gas Tariff, Second Revised Volume 1, to be effective 4/1/10.

Filed Date: 03/01/2010.

Accession Number: 20100301–0093.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–423–000.

Applicants: Florida Gas Transmission Company, LLC.

Description: Florida Gas Transmission Company, LLC submits Twentieth Revised Sheet 7 *et al.* to its FERC Gas Tariff, Fourth Revised Volume 1, to be effective 4/1/10.

Filed Date: 03/01/2010.

Accession Number: 20100301–0094.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–424–000.

Applicants: Northern Natural Gas Company.

Description: Petition of Northern Natural Gas Company for a limited waiver of tariff provision.

Filed Date: 03/01/2010.

Accession Number: 20100301–0134.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–425–000.

Applicants: Panhandle Eastern Pipe Line Company, LP.

Description: Panhandle Eastern Pipe Line Company, LP submits Twenty-Sixth Revised Sheet No. 4 *et al.* to FERC Gas Tariff, Third Revised Volume No. 1, to be effective 4/1/10.

Filed Date: 03/01/2010.

Accession Number: 20100301–0133.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–426–000.

Applicants: Trunkline Gas Company, LLC.

Description: Trunkline Gas Company, LLC submits Twenty-Third Revised Sheet No. 10 *et al.* to FERC Gas Tariff, Third Revised Volume No. 1, to be effective 4/1/10.

Filed Date: 03/01/2010.

Accession Number: 20100301–0130.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–427–000.

Applicants: Southwest Gas Storage Company.

Description: Southwest Gas Storage submits Twenty-Ninth Revised Sheet No. 5 to FERC Gas Tariff, First Revised Volume No. 1, to be effective 4/1/10.

Filed Date: 03/01/2010.

Accession Number: 20100301–0131.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–428–000.

Applicants: Gulf Crossing Pipeline Company, LLC.

Description: Gulf Crossing Pipeline Co, LLC submits First Revised Sheet No. 656 *et al.* to FERC Gas Tariff, Original Volume No. 1, to be effective 4/1/10.

Filed Date: 03/01/2010.

Accession Number: 20100301–0132.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed dockets(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–5065 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

March 4, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP10–454–000.

Applicants: El Paso Natural Gas Company.

Description: El Paso Natural Gas Co submits Fortieth Revised Sheet No. 1 *et al.* to FERC Gas Tariff, Second Revised Volume No. 1A.

Filed Date: 03/02/2010.

Accession Number: 20100303–0207.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–462–000.

Applicants: Gulf Crossing Pipeline Company LLC.

Description: Gulf Crossing Pipeline Company, LLC submits amendments to negotiated rate letter agreements with Enterprise Products Operating LLC re the Gulf Crossing Project.

Filed Date: 03/02/2010.

Accession Number: 20100303–0217.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–463–000.

Applicants: Rockies Express Pipeline LLC.

Description: Rockies Express Pipeline, LLC submits Seventeenth Revised Sheet 10 to its FERC Gas Tariff, Second Revised Volume 1, to be effective 3/3/10.

Filed Date: 03/02/2010.

Accession Number: 20100303–0218.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–465–000.

Applicants: Gulf South Pipeline Company, LP.

Description: Gulf South Pipeline Co, LP submits Third Revised Sheet No. 11 *et al.* to FERC Gas Tariff, Sixth Revised Volume No. 1.

Filed Date: 03/02/2010.

Accession Number: 20100303–0219.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–467–000.

Applicants: Dauphin Island Gathering Partners.

Description: Dauphin Island Gathering Partners submits Eighth Revised Sheet 6 *et al.* to its FERC Gas Tariff, First Revised Volume 1 to be effective 4/1/10.

Filed Date: 03/01/2010.

Accession Number: 20100303–0232.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–468–000.

Applicants: CenterPoint Energy Gas Transmission Company.

Description: CenterPoint Energy Gas Transmission Company submits amended negotiated rate agreements etc.

Filed Date: 03/01/2010.

Accession Number: 20100303–0231.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–469–000.

Applicants: CenterPoint Energy Gas Transmission Company.

Description: CenterPoint Energy Gas Transmission Company submits an amended negotiated rate agreement between Marabou Midstream Services, LP.

Filed Date: 03/01/2010.

Accession Number: 20100303–0230.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

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.

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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. 2010–5064 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 2

March 3, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP06–298–010.

Applicants: Public Service Commission of New York v. *National Fuel Gas Supply Corporation.*

Description: National Fuel Gas Supply Corporation submits its Semi-Annual Report of Operational Sales of Gas for 7/1/09–12/31/09.

Filed Date: 01/28/2010.

Accession Number: 20100128–5133.

Comment Date: 5 p.m. Eastern Time on Monday, March 8, 2010.

Docket Numbers: RP10–254–001.
Applicants: East Tennessee Natural Gas, LLC.
Description: East Tennessee Natural Gas, LLC submits FERC Gas tariff, Third Revised Volume 1 and Ninth Revised Sheet 394, to be effective 3/9/10.
Filed Date: 01/20/2010.
Accession Number: 20100120–0221.
Comment Date: 5 p.m. Eastern Time on Monday, March 8, 2010.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before 5 p.m. Eastern time on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest 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.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–5063 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 1

March 3, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP10–429–000.
Applicants: Dominion Transmission, Inc.
Description: Dominion Transmission, Inc submits Eleventh Revised Sheet No. 36 et al. to FERC Gas Tariff, Third Revised Volume No. 1.
Filed Date: 02/26/2010.
Accession Number: 20100226–0038.
Comment Date: 5 p.m. Eastern Time on Wednesday March 10, 2010.

Docket Numbers: RP10–430–000.
Applicants: Eastern Shore Natural Gas Company.
Description: Report of Eastern Shore Natural Gas Company.
Filed Date: 03/01/2010.
Accession Number: 20100301–5225.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–431–000.
Applicants: Millennium Pipeline Company, LLC.
Description: Annual Report Pursuant to GTC 54.3 of Tariff Reporting Operational Transactions for Calendar Year 2009.
Filed Date: 03/01/2010.
Accession Number: 20100301–5226.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–432–000.
Applicants: Empire Pipeline, Inc.
Description: Annual Report of Empire Pipeline, Inc. pursuant to GT&C Section 23.5—Compressor Fuel Factors and Other Gas for Transporter's Use.
Filed Date: 03/01/2010.
Accession Number: 20100301–5227.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–433–000.
Applicants: Columbia Gas Transmission, LLC.
Description: Columbia Gas Transmission, LLC submits Third Revised Sheet No. 37 to FERC Gas Tariff, Third Revised Volume No. 1.
Filed Date: 03/01/2010.
Accession Number: 20100302–0213.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–434–000.
Applicants: Columbia Gas Transmission, LLC.
Description: Columbia Gas Transmission, LLC submits the FTS Service Agreement with CI McKown and Son, Inc.
Filed Date: 03/01/2010.
Accession Number: 20100302–0214.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–435–000.
Applicants: Central Kentucky Transmission Company.
Description: Central Kentucky Transmission Company submits Ninth Revised Sheet No. 6 to FERC Gas Tariff, Original Volume No. 1, to be effective 4/1/2010.
Filed Date: 03/01/2010.
Accession Number: 20100302–0242.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–436–000.
Applicants: MarkWest Pioneer, L.L.C.
Description: MarkWest Pioneer, LLC submits Third Revised Sheet No 5 to FERC Gas Tariff, Original Volume No 1, to be 4/1/2010.
Filed Date: 03/01/2010.
Accession Number: 20100302–0241.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–437–000.
Applicants: Viking Gas Transmission Company.
Description: Viking Gas Transmission Company submits an amendment to a non conforming transportation service agreement, to be effective 4/1/2010.
Filed Date: 03/01/2010.
Accession Number: 20100302–0240.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–438–000.
Applicants: Kinder Morgan Interstate Gas Trans. LLC.
Description: Kinder Morgan Interstate Gas Transmission LLC submits Eighteenth Revised Sheet No 4G *et al.* to FERC Gas Tariff, Fourth Revised Volume No 1A, to be effective 3/1/2010.
Filed Date: 03/01/2010.
Accession Number: 20100302–0239.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–439–000.
Applicants: Williston Basin Interstate Pipeline Comp.
Description: Williston Basin Interstate Pipeline Company submits its Annual Fuel and Electric Power Reimbursement Adjustment pursuant to Section 38 of its FERC Gas Tariff, Second Revised Volume 1.
Filed Date: 03/01/2010.
Accession Number: 20100302–0238.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–440–
Applicants: Cheniere Creole Trail Pipeline, L.P.
Description: Cheinere Creole Trail Pipeline, LP submits Second Revised Sheet 5 to Original Volume 1, to be effective 4/1/2010.
Filed Date: 03/01/2010.
Accession Number: 20100302–0243.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–441–000.
Applicants: Millennium Pipeline Company, LLC.
Description: Millennium Pipeline Company, LLC submits Second Revised Sheet No. 7 to FERC Gas Tariff, Original Volume No. 1, to be effective 4/1/2010.

Filed Date: 03/01/2010.
Accession Number: 20100302–0237.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–442–000.
Applicants: ANR Storage Company
Description: ANR Storage Company submits Fifth Revised Sheet 0 *et al.* to FERC Gas Tariff, Original Volume 1.
Filed Date: 03/01/2010.
Accession Number: 20100302–0236
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–443–000.
Applicants: Cimarron River Pipeline, LLC
Description: Cimarron River Pipeline, LLC submits Second Revised Sheet No. 17 to FERC Gas Tariff, Original Volume No 1.
Filed Date: 03/01/2010
Accession Number: 20100302–0235.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–444–000.
Applicants: Equitrans, L.P.
Description: Equitrans, LP submit Twenty-Seventh Revised Sheet No. 5 *et al.* to FERC Gas Tariff, Original Volume No. 1.
Filed Date: 03/01/2010.
Accession Number: 20100302–0234.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–445–000.
Applicants: Northern Border Pipeline Company.
Description: Northern Border Pipeline Company submits Seventh Revised Sheet 303A *et al.* to FERC Gas Tariff, First Revised Volume 1, to be effective 3/31/10.
Filed Date: 03/01/2010.
Accession Number: 20100302–0252.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–446–000.
Applicants: Guardian Pipeline, LLC
Description: Guardian Pipeline, LLC submits Fourteenth Revised Sheet No. 6 *et al.* to FERC Gas Tariff, Original Volume No. 1.
Filed Date: 03/01/2010.
Accession Number: 20100302–0233.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–447–000.
Applicants: Energy West Development, Inc.
Description: West Development, Inc submits Sixth Revised Sheet 3 *et al.* of its FERC Gas Tariff, Volume 1, to be effective 4/1/2010.
Filed Date: 03/01/2010.
Accession Number: 20100302–0232.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–448–000.
Applicants: Blue Lake Gas Storage Company.
Description: Blue Lake Gas Storage Co submits Third Revised Sheet No. 0 *et al.* to FERC Gas Tariff, First Revised Volume No. 1.
Filed Date: 03/01/2010.
Accession Number: 20100302–0231.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–449–000.
Applicants: Kern River Gas Transmission Company.
Description: Kern River Gas Transmission Company submits Second Revised Second Twentieth Revised Sheet 5 et al. of its FERC Gas Tariff, Second Revised Volume 1, to be effective 4/1/2010.
Filed Date: 03/01/2010.
Accession Number: 20100302–0230.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–450–000.
Applicants: Columbia Gulf Transmission Company.
Description: Columbia Gulf Transmission Company submits Fifty-First Revised Sheet 18 *et al.* to its FERC Gas Tariff, Second Revised Volume 1, to be effective 11/1/2010.
Filed Date: 03/01/2010.
Accession Number: 20100302–0229.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–451–000.
Applicants: ANR Pipeline Company
Description: ANR Pipeline Company submits Second Revised Sheet 10A *et al.* to its FERC Gas Tariff, Second Revised Volume 1 to be effective 4/1/10.
Filed Date: 03/01/2010.
Accession Number: 20100302–0246.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–452–000.
Applicants: Gulf Crossing Pipeline Company LLC.
Description: Gulf Crossing Pipeline Co, LLC submits First Revised Sheet No. 101 to FERC Gas Tariff, Original Volume No. 1.
Filed Date: 03/02/2010.
Accession Number: 20100302–0245.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–453–000.
Applicants: Texas Gas Transmission, LLC.
Description: Texas Gas Transmission, LLC submits the Non-Conforming Service Agreement, Sixth Revised Sheet No. 99A to FERC Gas Tariff, Third Revised Volume No. 1.
Filed Date: 03/02/2010.
Accession Number: 20100302–0244.
Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

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. 2010–5062 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings No. 2

March 2, 2010.

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP10–71–001.

Applicants: High Island Offshore System, LLC.

Description: High Island Offshore System, LLC request that the Commission permit HIOS to keep the posted 0.84% Company Use charge in effect, and remove the refund condition pursuant to the 10/23/09 filing.

Filed Date: 12/22/2009.

Accession Number: 20091222–4020.

Comment Date: 5 p.m. Eastern Time on Friday, March 5, 2010.

Docket Numbers: RP04–274–022.

Applicants: Kern River Gas Transmission Company.

Description: Motion for Extension of Time, Kern River Gas Transmission Company.

Filed Date: 03/01/2010.

Accession Number: 20100301–5012.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–21–003.

Applicants: Florida Gas Transmission Company, LLC.

Description: Florida Gas Transmission Company, LLC submits Sub Nineteenth Revised Sheet No. 7 et al to FERC Gas Tariff, Fourth Revised Volume No. 1.

Filed Date: 03/01/2010.

Accession Number: 20100301–0135.

Comment Date: 5 p.m. Eastern Time on Monday, March 15, 2010.

Docket Numbers: RP10–270–001.

Applicants: Discovery Gas Transmission LLC.

Description: Discovery Gas Transmission, LLC submits Fourth Revised Sheet N0. 42 *et al.* to FERC Gas Tariff Original Volume No. 1, to be effective 4/1/10.

Filed Date: 02/26/2010.

Accession Number: 20100226–0025.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 10, 2010.

Any person desiring to protest this filing must file in accordance with Rule 211 of the Commission's Rules of Practice and Procedure (18 CFR 385.211). Protests to this filing 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. Such protests must be filed on or before 5 p.m. Eastern time on the specified comment date. Anyone filing a protest must serve a copy of that document on all the parties to the proceeding.

The Commission encourages electronic submission of protests in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest 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.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–5061 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

March 1, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–226–002.

Applicants: Clean Currents, LLC.

Description: Change in Status of Clean Currents, L.L.C.

Filed Date: 02/26/2010.

Accession Number: 20100226–5058.

Comment Date: 5 p.m. Eastern Time on Friday, March 19, 2010.

Docket Numbers: ER10–783–001.

Applicants: Carolina Power & Light Company.

Description: Carolina Power & Light Company submits Substitute Original Sheet 78 *et al.* to its FERC Electric Tariff, Fourth Revised Volume 3—Service Agreement 315 to be effective 3/1/10.

Filed Date: 02/26/2010.

Accession Number: 20100301–0063.

Comment Date: 5 p.m. Eastern Time on Friday, March 19, 2010.

Docket Numbers: ER10–795–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc request for waiver of tariff provisions and expedited treatment.

Filed Date: 02/25/2010.

Accession Number: 20100225–0205.

Comment Date: 5 p.m. Eastern Time on Thursday, March 18, 2010.

Docket Numbers: ER10–796–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits Large Generator Interconnection Agreement among SES Solar One, LLC *et al.*

Filed Date: 02/25/2010.

Accession Number: 20100225–0206.

Comment Date: 5 p.m. Eastern Time on Thursday, March 18, 2010.

Docket Numbers: ER10–797–000.

Applicants: PacifiCorp.

Description: PacifiCorp submits Small Generator Interconnection Agreement with the United States Department of Interior Bureau of Reclamation designated as Service Agreement 591, Seventh Revised Volume 11 etc.

Filed Date: 02/25/2010.

Accession Number: 20100226–0305.

Comment Date: 5 p.m. Eastern Time on Thursday, March 18, 2010.

Docket Numbers: ER10–798–000.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool submits Original Sheet 974AU *et al.* to its FERC Electric Tariff, Fifth Revised Volume 1, to be effective February 1, 2010.

Filed Date: 02/25/2010.

Accession Number: 20100226–0303.

Comment Date: 5 p.m. Eastern Time on Thursday, March 18, 2010.

Docket Numbers: ER10–799–000.

Applicants: New England Power Pool.

Description: New England Power Pool submits a counterpart signature page of their Agreement, etc.

Filed Date: 02/25/2010.

Accession Number: 20100226–0304.

Comment Date: 5 p.m. Eastern Time on Thursday, March 18, 2010.

Docket Numbers: ER10–800–000.

Applicants: New York Independent System Operator Inc.

Description: New York Independent System Operator, Inc submits proposed revisions to its Market Administration and Control Area Services Tariff to revise the stream turbine testing procedures etc.

Filed Date: 02/25/2010.

Accession Number: 20100226–0031.

Comment Date: 5 p.m. Eastern Time on Thursday, March 18, 2010.

Docket Numbers: ER10–801–000.

Applicants: Cleco Power LLC.

Description: Cleco Power LLC submits Original Sheet 1 *et al.* to its FERC

Electic Tariff, Fourth Revised Volume 1 to be effective 3/1/10.

Filed Date: 02/26/2010.

Accession Number: 20100226–0034.

Comment Date: 5 p.m. Eastern Time on Friday, March 19, 2010.

Docket Numbers: ER10–803–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits revised rate sheet reflecting cancellation of a letter agreement with Blythe Energy LLC, Rate Schedule FERC 440.

Filed Date: 02/26/2010.

Accession Number: 20100301–0035.

Comment Date: 5 p.m. Eastern Time on Friday, March 19, 2010.

Docket Numbers: ER10–804–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits Grand Crossing Development Wholesale Distribution Load Interconnection Facilities Agreement.

Filed Date: 02/26/2010.

Accession Number: 20100301–0036.

Comment Date: 5 p.m. Eastern Time on Friday, March 19, 2010.

Docket Numbers: ER10–805–000.

Applicants: Southern California Edison Company.

Description: Southern California Edison Company submits Standard Large Generator Interconnection Agreement etc.

Filed Date: 02/26/2010.

Accession Number: 20100301–0037.

Comment Date: 5 p.m. Eastern Time on Friday, March 19, 2010.

Docket Numbers: ER10–806–000.

Applicants: North American Energy Credit and Clearing—Contract Merchant, LLC.

Description: North American Energy Credit and Clearing—Contract Merchant, LLC submits Notice of Cancellation of its market based-rate tariff.

Filed Date: 02/26/2010.

Accession Number: 20100301–0038.

Comment Date: 5 p.m. Eastern Time on Friday, March 19, 2010.

Docket Numbers: ER10–807–000.

Applicants: North American Energy Credit and Clearing-Delivery LLC.

Description: North American Energy Credit and Clearing-Delivery LLC submits Notice of Cancellation of its market based-rate tariff.

Filed Date: 02/26/2010.

Accession Number: 20100301–0039.

Comment Date: 5 p.m. Eastern Time on Friday, March 19, 2010.

Docket Numbers: ER10–808–000.

Applicants: North American Energy Credit and Clearing—Finance LLC.

Description: North American Energy Credit and Clearing—Finance LLC submits Notice of Cancellation of their market based-rate tariff.

Filed Date: 02/26/2010.

Accession Number: 20100301–0040.

Comment Date: 5 p.m. Eastern Time on Friday, March 19, 2010.

Docket Numbers: ER10–809–000.

Applicants: Pacific Gas and Electric Company.

Description: Pacific Gas and Electric Company submits the End Use Customer Refund Adjustment compliance filing and a proposed rate change to its FERC Electric Tariff, Sixth Revised Volume 5.

Filed Date: 02/26/2010.

Accession Number: 20100301–0041.

Comment Date: 5 p.m. Eastern Time on Friday, March 19, 2010.

Docket Numbers: ER10–810–000.

Applicants: Midwest Independent Transmission System Operator Inc.

Description: Midwest Independent Transmission System Operator, Inc. submits proposed amendments to Section 38.2.5 of their Open Access Transmission, Energy and Operating Reserve Markets Tariff etc.

Filed Date: 02/26/2010.

Accession Number: 20100301–0042.

Comment Date: 5 p.m. Eastern Time on Friday, March 19, 2010.

Docket Numbers: ER10–811–000.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc. submits revisions to its Open Access Transmission Tariff and Market Administration and Control Area Services Tariff.

Filed Date: 02/26/2010.

Accession Number: 20100301–0043.

Comment Date: 5 p.m. Eastern Time on Friday, March 19, 2010.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH10–9–000.

Applicants: International Power America, Inc.

Description: International Power America, Inc.'s Notice of Change in Facts.

Filed Date: 02/02/2010.

Accession Number: 20100202–5151.

Comment Date: 5 p.m. Eastern Time on Friday, March 19, 2010.

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.

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Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–5059 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

March 3, 2010.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG10–24–000.

Applicants: El Cajon Energy, LLC.

Description: Self Certification Notice of Exempt Wholesale Generator Status of El Cajon Energy, LLC.

Filed Date: 03/03/2010.

Accession Number: 20100303–5015.

Comment Date: 5 p.m. Eastern Time on Wednesday, March 24, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER99–705–005; ER97–3583–004.

Applicants: Golden Spread Electric Cooperative, Inc.; GS Electric Generating Cooperative Inc.

Description: Golden Spread Electric Cooperative, Inc *et al.* submits an Updated Market Power Analysis.

Filed Date: 03/01/2010.

Accession Number: 20100302–0221.

Comment Date: 5 p.m. Eastern Time on Friday, April 30, 2010.

Docket Numbers: ER01–560–015; ER00–1780–011; ER00–840–012; ER01–137–010; ER01–2641–015; ER01–2690–013; ER01–557–015; ER01–559–015; ER01–596–009; ER02–1942–012; ER02–2509–010; ER02–553–013; ER02–77–013; ER02–963–013; ER03–720–014; ER05–524–008; ER09–43–002; ER94–389–034; ER98–1767–018; ER99–2992–011; ER99–3165–012.

Applicants: Big Sandy Peaker Plant, LLC, Tenaska Alabama II Partners, L.P., Tenaska Alabama Partners, L.P., Tenaska Georgia Partners, L.P., Tenaska Frontier Partners, Ltd., High Desert Power Project LLC, Tenaska Power Services Co., Wolf Hills Energy, LLC, Rolling Hills Generating L.L.C., Tenaska Washington Partners, L.P., Lincoln Generating Facility, LLC, Alabama Electric Marketing, LLC, California Electric Marketing, LLC, Crete Energy Venture, LLC, Kiowa Power Partners, L.L.C., Tenaska Gateway Partners, Ltd., Tenaska Virginia Partners, LP, University Park Energy, LLC, New Covert Generating Co., LLC, New Mexico Electric Marketing, LLC, Texas Electric Marketing, LLC.

Description: Supplement to Clarify July 30, 2009 Quarterly Report Pursuant to 18 CFR Section 35.42(d) of Alabama Electric Marketing, LLC, *et. al.*

Filed Date: 03/02/2010.

Accession Number: 20100302–5088.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 23, 2010.

Docket Numbers: ER04–1220–001.

Applicants: Caprock Wind LLC.

Description: Caprock Wind LLC submits its application requesting that the Commission make a finding that it qualifies as a Category 1 Seller in the Southwest Power Pool Region.

Filed Date: 03/01/2010.

Accession Number: 20100302–0216.

Comment Date: 5 p.m. Eastern Time on Monday, March 22, 2010.

Docket Numbers: ER05–1389–006; ER07–645–003; ER07–301–003.

Applicants: San Juan Mesa Wind Project, LLC; Sleeping Bear, LLC; Wildorado Wind, LLC.

Description: San Juan Mesa Wind Project, LLC *et al.* submits the Updated Market Power Analysis for the Southwest Power Pool Region.

Filed Date: 03/01/2010.

Accession Number: 20100302–0217.

Comment Date: 5 p.m. Eastern Time on Friday, April 30, 2010.

Docket Numbers: ER07–751–002.

Applicants: LEA POWER PARTNERS, LLC.

Description: Lea Power Partners, LLC submits the Updated Market Power Analysis and Order 697 Compliance Filing.

Filed Date: 03/01/2010.

Accession Number: 20100302–0215.

Comment Date: 5 p.m. Eastern Time on Friday, April 30, 2010.

Docket Numbers: ER10–45–001.

Applicants: Southwest Power Pool, Inc.

Description: Southwest Power Pool, Inc submits revised pages to its Open Access Transmission Tariff.

Filed Date: 03/02/2010.

Accession Number: 20100302–0222.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 23, 2010.

Docket Numbers: ER10–149–003; ER05–487–008; ER03–1332–007; ER03–1333–008; ER01–1972–011; ER09–832–006; ER10–1–002.

Applicants: Elk City Wind, LLC; FPL Energy Cowboy Wind, LLC; FPL Energy Oklahoma Wind, LLC; FPL Energy Sooner Wind, LLC; Gray County Wind Energy, LLC; NextEra Energy Power Marketing, LLC; High Majestic Wind Energy Center, LLC.

Description: NextEra Companies submits triennial market power update for the Southwest Power Pool Region with respect to each company's authority as applicable, to sell energy *et al.*

Filed Date: 03/01/2010.

Accession Number: 20100302–0218.

Comment Date: 5 p.m. Eastern Time on Friday, April 30, 2010.

Docket Numbers: ER10–607–002; ER10–608–002; ER10–609–002; ER10–610–002; ER10–611–002; ER10–612–002.

Applicants: Coalinga Cogeneration Company; Kern River Cogeneration Company; Salinas River Cogeneration Company; Mid-Set Cogeneration Company; Sycamore Cogeneration Company; Sargent Canyon Cogeneration Company.

Description: Coalinga Cogeneration Company *et al.* submits revised tariff sheets to supplement the 1/20/2010 filing.

Filed Date: 03/01/2010.

Accession Number: 20100302–0223.

Comment Date: 5 p.m. Eastern Time on Monday, March 22, 2010.

Docket Numbers: ER10–815–000.

Applicants: Avista Corporation.

Description: Avista Corp submits a non-conforming Long-Term Firm Point-to-Point Service Agreement.

Filed Date: 03/01/2010.

Accession Number: 20100302–0219.

Comment Date: 5 p.m. Eastern Time on Monday, March 22, 2010.

Docket Numbers: ER10–816–000.

Applicants: Xcel Energy Services Inc.

Description: Public Service Company of Colorado submits Second Revised Sheet 324 *et al.*

Filed Date: 03/01/2010.

Accession Number: 20100302–0220.

Comment Date: 5 p.m. Eastern Time on Monday, March 22, 2010.

Docket Numbers: ER10–818–000.

Applicants: Entergy Power, LLC.

Description: Entergy Power, LLC submits Rate Schedule No 49.

Filed Date: 03/02/2010.

Accession Number: 20100303–0201.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 23, 2010.

Docket Numbers: ER10–819–000.

Applicants: ISO New England Inc.

Description: Iso New England Inc submits letter re-reconciled tariff sheets for compliance with Order 614.

Filed Date: 03/02/2010.

Accession Number: 20100303–0202.

Comment Date: 5 p.m. Eastern Time on Tuesday, March 23, 2010.

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. 2010–5057 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM10–11–000]

Integration of Variable Energy Resources; Notice Extending Comment Period

March 3, 2010.

On February 23, 2010, Edison Electric Institute (EEI) filed a motion requesting an extension of the period in which to file comments in response to the Commission's January 21, 2010 Notice of Inquiry (NOI) in this proceeding.[1] EEI requests a fourteen-day extension of the comment period, which would result in a comment due date of April 12, 2010. Additionally, on February 26, 2010, Bonneville Power Administration (BPA) filed a motion requesting an extension of at least fourteen days.[2]

Upon consideration, notice is hereby given that the period during which interested parties may file comments in response to the Commission's NOI in this proceeding is extended by fourteen days. Comments are now due on or before April 12, 2010.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–5043 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP04–379–003]

Pine Prairie Energy Center, LLC; Notice of Intent to Prepare an Environmental Assessment for the Proposed Electric Compressor Project and Request for Comments on Environmental Issues

March 2, 2010.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Electric Compressor Project (Project) involving construction and operation of facilities by Pine Prairie Energy Center, LLC (Pine Prairie) in Evangeline Parish, Louisiana. This EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine what issues need to be evaluated in the EA. Please note that the scoping period will close on April 2, 2010.

Comments may be submitted in written form or verbally. Further details on how to submit written comments are provided in the Public Participation section of this notice.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives are asked to notify their constituents of this planned project and encourage them to comment on their areas of concern.

A fact sheet prepared by the FERC entitled "An Interstate Natural Gas Facility On My Land? What Do I Need To Know?" was attached to the project notice Pine Prairie provided to landowners. This fact sheet addresses a number of typically asked questions, and how to participate in the Commission's proceedings. It is also available for viewing on the FERC Web site (*http://www.ferc.gov*).

Summary of the Proposed Project

Pine Prairie proposes to construct and operate the Project at and near the existing Pine Prairie Energy Center (PPEC) in Evangeline Parish, Louisiana. The Project would provide Pine Prairie with additional operational flexibility, and reduce fuel costs. The Project consists of the following facilities:

- Four 5,750 horsepower (hp) electric motor driven compressors in lieu of four previously authorized, as yet unbuilt, 4,700 hp natural gas engine driven compressors; and
- Two additional 5,750 hp electric motor drive compressor units.

In support of the Project, Pine Prairie or the local electric utility would construct the following non jurisdictional electric power facilities:

- An electric substation at the existing PPEC;
- Approximately 1,200 feet of electric distribution line on poles at the PPEC;
- Approximately 2.1 miles of radial electric transmission line;
- A Tie-In to the existing electric transmission line; and
- Relocation to the north side of Ambrose Road of approximately 700 feet of electric distribution line.

The general location of the project facilities is shown in Appendix 1.[1]

Land Requirements for Construction

Construction of the proposed facilities would disturb about 34.26 acres of land for the aboveground facilities. Nonjurisdictional facilities would account for approximately 33.12 acres of disturbed land. Following construction, all of the above acres would be maintained for permanent operation of the project's facilities.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us[2] to

[1] *Integration of Variable Energy Resources,* 130 FERC ¶ 61,053 (2010).

[2] BPA indicates, however, that its preference would be for a twenty-one day extension of the comment period.

[1] The appendices referenced in this notice are not being printed in the **Federal Register.** Copies of appendices were sent to all those receiving this notice in the mail and are available at *http://www.ferc.gov* using the link called "eLibrary" or from the Commission's Public Reference Room, 888 First Street, NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[2] "We", "us", and "our" refer to the environmental staff of the Commission's Office of Energy Projects.

discover and address concerns the public may have about proposals. This process is referred to as "scoping". The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. All comments received will be considered during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

- Geology and soils;
- Land use;
- Water resources, fisheries, and wetlands;
- Cultural resources;
- Vegetation and wildlife;
- Air quality and noise;
- Endangered and threatened species; and
- Public safety.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Our independent analysis of the issues will be presented in the EA. The EA will be placed in the public record and, depending on the comments received during the scoping process, may be published and distributed to the public. A comment period will be allotted if the EA is published for review. We will consider all comments on the EA before we make our recommendations to the Commission. To ensure your comments are considered, please carefully follow the instructions in the Public Participation section below.

With this notice, we are asking agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EA. These agencies may choose to participate once they have evaluated the proposal relative to their responsibilities. Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that they will be received in Washington, DC on or before April 2, 2010.

For your convenience, there are three methods which you can use to submit your comments to the Commission. The Commission encourages electronic filing of comments and has expert eFiling staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

(1) You may file your comments electronically by using the Quick Comment feature, which is located at *http://www.ferc.gov* under the link called "*Documents and Filings*". A Quick Comment is an easy method for interested persons to submit text-only comments on a project;

(2) You may file your comments electronically by using the "eFiling" feature that is listed under the "*Documents and Filings*" link. eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file to your submission. New eFiling users must first create an account by clicking on the links called "*Sign up*" or "*eRegister*". You will be asked to select the type of filing you are making. A comment on a particular project is considered a "Comment on a Filing"; or

(3) You may file a paper copy of your comments at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1A, Washington, DC 20426.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the proposed project.

If the EA is published for distribution, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (Appendix 2).

Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an "intervenor," which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the "e-filing" link on the Commission's Web site.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site at *http://www.ferc.gov* using the "eLibrary" link. Click on the eLibrary link, click on "General Search" and enter the docket number, excluding the last three digits in the Docket Number field (i.e., CP04–379). Be sure you have selected an appropriate date range. 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. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission now offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries and direct links to the documents. Go to *http://www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *http://www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–5002 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD06–6–000]

Joint Meeting of the Nuclear Regulatory Commission and the Federal Energy Regulatory Commission; Notice of Joint Meeting of the Nuclear Regulatory Commission and the Federal Energy Regulatory Commission

March 2, 2010.

The Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission (NRC) will hold a joint meeting on Tuesday, March 16, 2010 at the headquarters of the NRC, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852. The meeting is expected to begin at 1:30 p.m. and conclude at 3:30 p.m. Eastern Standard Time.

The NRC and FERC signed a Memorandum of Agreement (MOA) in September 2010 to facilitate interactions between the two agencies on matters of mutual interest pertaining to the nation's bulk power system reliability. The March 16 meeting will continue the ongoing discussion to address grid reliability and the roles of the respective agencies in addressing this issue.

A free Webcast of this event will be made available through the NRC Web site, at *http://www.nrc.gov.* In addition, the event will be transcribed and the transcription will be made available through the NRC Web site approximately three business days after the meeting.

All interested persons are invited. Pre-registration is not required and there is no fee to attend this joint meeting. Questions about the meeting should be directed to Sarah McKinley at *Sarah.McKinley@ferc.gov* or by phone at 202–502–8004.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–5005 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of FERC Staff Attendance at the Entergy Regional State Committee Meeting

March 2, 2010.

The Federal Energy Regulatory Commission hereby gives notice that members of its staff may attend the meeting noted below. Their attendance is part of the Commission's ongoing outreach efforts.

Entergy Regional State Committee Meeting

March 18, 2010 (8:30 a.m.–5 p.m.).

Astor Crowne Plaza, 739 Canal Street, New Orleans, LA 70130, 501–223–3000

The discussions may address matters at issue in the following proceedings:

Docket No. OA07–32	Entergy Services, Inc.
Docket No. OA08–59	Entergy Services, Inc.
Docket No. EL00–66	Louisiana Public Service Commission v. Entergy Services, Inc.
Docket No. EL01–88	Louisiana Public Service Commission v. Entergy Services, Inc.
Docket No. EL05–15	Arkansas Electric Cooperative Corp. v. Entergy Arkansas, Inc.
Docket No. EL07–52	Louisiana Public Service Commission v. Entergy Services, Inc.
Docket No. EL08–51	Louisiana Public Service Commission v. Entergy Services, Inc.
Docket No. EL08–60	Ameren Services Co. v. Entergy Services, Inc.
Docket No. EL09–43	Arkansas Public Service Commission v. Entergy Services, Inc.
Docket No. EL09–61	Louisiana Public Service Commission v. Entergy Services, Inc.
Docket No. EL09–78	South Mississippi Electric Power Association v. Entergy Services, Inc.
Docket No. ER05–1065	Entergy Services, Inc.
Docket No. ER07–682	Entergy Services, Inc.
Docket No. ER07–956	Entergy Services, Inc.
Docket No. ER08–767	Entergy Services, Inc.
Docket No. ER08–1056	Entergy Services, Inc.
Docket No. ER08–1057	Entergy Services, Inc.
Docket No. ER09–636	Entergy Services, Inc.
Docket No. ER09–833	Entergy Services, Inc.
Docket No. ER09–877	Entergy Services, Inc.
Docket No. ER09–882	Entergy Services, Inc.
Docket No. ER09–1214	Entergy Services, Inc.
Docket No. ER09–1224	Entergy Services, Inc.
Docket No. ER10–736	Entergy Services, Inc.

These meetings are open to the public.

For more information, contact Patrick Clarey, Office of Energy Market Regulation, Federal Energy Regulatory Commission at (317) 4249–5937 or *patrick.clarey@ferc.gov.*

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–5001 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR10–9–000]

Enbridge Pipelines (North Dakota) LLC; Notice of Motion to Approve Modification of Approved Facilities Surcharge Settlement

March 1, 2010.

Take notice that on January 29, 2010, Enbridge Pipelines (North Dakota) LLC (Enbridge), with the support of twelve Shippers and a Connecting Pipeline, submitted a modification to the Offer of Settlement (Supplement) approved in Docket No. OR06–9–000 (The Looping Surcharge), 117 FERC ¶ 61,131 (2006).

Any person desiring to intervene and comment on this Supplement to the Settlement should submit an original and 14 copies of its comments and motion to intervene with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, no later than 5 p.m. Eastern time on March 5, 2010. Reply comments will be due no later than 5 p.m. Eastern time on March 12, 2010.

The Commission encourages electronic submission of comments and interventions in lieu of paper using the "eFiling" link at *http://www.ferc.gov.* The filings in this proceeding are 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 "eSubcription" 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.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–4994 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the Record Communications; Public Notice

March 3, 2010.

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are 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.

Docket No.	File date	Presenter or requester
Prohibited		
1. P–460–033	3–2–10	Alann Krivor.
Exempt		
1. CP09–54–000	2–18–10	Dave Swearingen [1]
2. P–13011–000	2–24–10	John Baummer [2]

[1] Record of e-mail exchange with "clarifying text."
[2] E-mail exchange clarifying "Cooperating Agency" status.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–5038 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP10–71–000]

Questar Pipeline Company; Notice of Request Under Blanket Authorization

March 2, 2010.

Take notice that on February 22, 2010, Questar Pipeline Company (Questar), 180 East 100 South, P.O. Box 45360, Salt Lake City, Utah 84145, filed in Docket No. CP10–71–000, an application, pursuant to sections 157.205 and 157.210 of the Commission's Regulations under the Natural Gas Act (NGA) as amended, to reconfigure its facilities at the existing Fidlar compressor station in Uintah County, Utah, and uprate the maximum allowable operating pressure (MAOP) on Questar's Mainline 68 in Uintah County, Utah, and Rio Blanco County, Colorado, under Questar's blanket certificate issued in Docket No. CP82–491–000,[1] all as more fully set forth in the application which is on file with the Commission and open to the public for inspection.

Questar proposes to reconfigure its facilities at the existing Fidlar compressor station (Fidlar), located at the junction of Questar's existing Main Line (ML) 103, 80, and 40 in Uintah County, Utah, and uprate Questar's ML 68 to a MAOP of 1290 psig via gas-pressure testing. Questar states that the proposed changes would result in an incremental capacity increase of approximately 25,000 Dekatherms per day and enable a dual-stage operating mode to provide greater flexibility and increased efficiencies at Fidlar. Questar further states that the proposed

[1] 20 FERC ¶ 62,580 (1982).

reconfigurations would facilitate west-to-east deliveries of natural gas volumes to Questar's affiliate, White River Hub, LLC. Questar states that its proposed reconfigurations would cost an estimated $2,736,538.

Any questions concerning this application may be directed to L. Bradley Burton, Manager, Federal Regulatory Affairs, Questar Pipeline Company, 180 East 100 South, P.O. Box 45360, Salt Lake City, Utah 84145–0360, telephone at (801) 324–2459, facsimile at (801) 324–5834, or via e-mail: *brad.burton@questar.com.*

This filing is available for review at the Commission 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 filed to access the document. For assistance, please contact FERC Online Support at FERC *OnlineSupport@ferc.gov* or call toll-free at (866)206–3676, or, for TTY, contact (202)502–8659. Comments, protests and interventions 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 intervenors to file electronically.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the NGA.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–5004 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP10–69–000]

Dominion Transmission, Inc.; Notice of Request Under Blanket Authorization

March 2, 2010.

Take notice that on February 17, 2010, Dominion Transmission, Inc. (Dominion) 120 Tredegar Street, Richmond, Virginia 23219, filed in Docket No. CP10–69–000, an application pursuant to sections 157.205, 157.208(b) and 157.210 of the Commission's Regulations under the Natural Gas Act (NGA) as amended, to construct, install, own, operate, and maintain certain natural gas pipeline and compression facilities in Lewis County, West Virginia, under Dominion's blanket certificate issued in Docket No. CP82–537–000,[1] all as more fully set forth in the application which is on file with the Commission and open to the public for inspection.

Dominion proposes to install two 3,550 HP integral Inlet Gas/Residue Gas compression units at the new Light burn Plant in Lewis County, West Virginia. Dominion states that the new compression units would be used (1) to compress inlet gas for the removal of natural gas liquids and (2) to compress the residue gas to increase the pressure which would allow the gas to be discharged through a new outlet pipeline (TL–595) and into Dominion's existing dry transmission pipeline TL–360. Dominion also proposes to construct three new pipelines in Lewis County: Lines TL–593, TL–594, and TL–595. The 16-inch diameter TL–593 pipeline would be approximately 3.55 miles in length and would draw gas from Dominion's existing wet transmission pipelines, Lines TL–514 and TL–427, into the Light burn Plant. The 16-inch diameter TL–594 suction pipeline would be approximately 0.22 mile in length and would also draw gas from Dominion's wet transmission pipelines TL–425 and TL–571 into the Lightburn Plant. The 12-inch diameter TL–595 discharge pipeline would be approximately 0.16 mile in length and would connect the outlet of the Lightburn Plant into the existing TL–360 transmission pipeline. Transmission also proposes to construct ancillary equipment necessary to operate the herein proposed facilities. Dominion further states that the proposed new facilities cost an estimated $14,367,000 to construct.

[1] 21 FERC ¶ 62,172 (1982).

Any questions concerning this application may be directed to Brad Knisley, Regulatory and Certificate Analyst, Dominion Transmission, Inc., 701 East Cary Street, Richmond, Virginia 23219 or via telephone at (804) 771–4412, facsimile (304) 357–3206, or via E-mail: *Brad.A. Knisley@dom.com.*

This filing is available for review at the Commission 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 filed to access the document. For assistance, please contact FERC Online Support at *FERC OnlineSupport@ferc.gov* or call toll-free at (866) 206–3676, or, for TTY, contact (202)502–8659. Comments, protests and interventions 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 intervenors to file electronically.

Any person or the Commission's staff may, within 60 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the regulations under the NGA (18 CFR 157.205), a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the allowed time for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the NGA.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–5003 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP07–62–000; CP07–63–000]

AES Sparrows Point LNG, LLC; Mid-Atlantic Express, LLC; Notice of Availability of the Revised Draft Final General Conformity Determination for Pennsylvania for the Proposed Sparrows Point LNG Terminal and Pipeline Project

March 1, 2010.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared this revised draft Final General Conformity Determination (GCD) for Pennsylvania to assess the potential air quality impacts associated with the construction and operation of a liquefied natural gas (LNG) import terminal and natural gas pipeline proposed by AES Sparrows Point LNG, LLC and Mid-Atlantic Express, LLC, collectively referred to as AES, in the above-referenced dockets. A separate Final General Conformity Determination was issued for Maryland on December 29, 2009.

This revised draft Final GCD was prepared to satisfy the requirements of the Clean Air Act. The FERC staff concludes that the Project will achieve conformity in Pennsylvania. If significant new comments are received by the end of the 30-day public comment period, FERC staff will issue a Final GCD to address any changes necessary and respond to comments. If no new significant comments are received, FERC staff will issue a public notice identifying this draft Final GCD as final.

Copies of this revised draft Final GCD have been mailed to the U.S. Environmental Protection Agency, Region III, the Maryland Department of Natural Resources, the Maryland Department of Environment, the Pennsylvania Department of Environmental Protection, and the Virginia Department of Environmental Quality.

The revised draft Final GCD for Pennsylvania addresses the potential air quality impacts from the construction and operation of the following LNG terminal and natural gas pipeline facilities:

- A ship unloading facility, with two berths, capable of receiving LNG ships with capacities up to 217,000 m^3;
- Three 160,000 m^3 (net capacity) full-containment LNG storage tanks;
- A closed-loop shell and tube heat exchanger vaporization system;
- Various ancillary facilities including administrative offices, warehouse, main control room, security building, and a platform control room;
- Meter and regulation station within the LNG Terminal site;
- Dredging an approximate 118 acre area in the Patapsco River to 45 feet below mean lower low water to accommodate the LNG vessels and transport of the processed dredge material to its disposal location; and
- Approximately 88 miles of 30-inch-diameter natural gas pipeline (approximately 48 miles in Maryland and 40 miles in Pennsylvania), a pig launcher and receiver facility at the beginning and ending of the pipeline, 10 mainline valves, and three meter and regulation stations, one at each of three interconnection sites at the end of the pipeline.

The revised draft Final GCD has been placed in the public files of the FERC and is available for public viewing on the FERC's Web site at *http://www.ferc.gov* using the eLibrary link. A limited number of copies of the revised draft Final GCD are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street, NE., Room 2A, Washington, DC 20426, (202) 502–8371.

Any person wishing to comment on the revised draft Final GCD may do so. To ensure that your comments are properly recorded and considered prior to issuance of the Final GCD, it is important that we receive your comments in Washington, DC on or before March 31, 2010.

For your convenience, there are three methods you can use to submit your comments to the Commission. In all instances please reference the project docket numbers (CP07–62–000 and CP07–63–000) with your submission. The Commission encourages electronic filing of comments and has dedicated eFiling expert staff available to assist you at 202–502–8258 or *efiling@ferc.gov*.

(1) You may file your comments electronically by using the Quick Comment feature, which is located on the Commission's Web site at *http://www.ferc.gov* under the link to Documents and Filings. A Quick Comment is an easy method for interested persons to submit text-only comments on a project;

(2) You may file your comments electronically by using the eFiling feature, which is located on the Commission's Web site at *http://www.ferc.gov* under the link to Documents and Filings. eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file as your submission. New eFiling users must first create an account by clicking on "Sign up" or "eRegister." You will be asked to select the type of filing you are making. A comment on a particular project is considered a "Comment on a Filing"; or

(3) You may file a paper copy of your comments at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1A, Washington, DC 20426.

Additional information about the project is available from the Commission's Office of External Affairs at (866) 208–FERC. The administrative public record for this proceeding to date is on the FERC Web site *http://www.ferc.gov*. Go to Documents & Filings and choose the eLibrary link. Under eLibrary, click on "General Search," and enter the docket number excluding the last three digits in the Docket Number field (*e.g.,* CP07–62). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at: *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY call (202) 502–8659. The eLibrary link on the FERC Web site also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–5000 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 12713–002]

Reedsport OPT Wave Park Project; Reedsport OPT Wave Park; LLC Notice of Scoping Meetings and Environmental Site Review and Soliciting Scoping Comments

March 1, 2010.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Original Minor License.

b. *Project No.:* 12713–002.

c. *Date filed:* February 1, 2010.

d. *Submitted by:* Reedsport OPT Wave Park, LLC.

e. *Name of Project:* Reedsport OPT Wave Park Project.

f. *Location:* Pacific Ocean in state waters about 2.5 miles off the coast near Reedsport, in Douglas County, Oregon. The project would occupy about 5 acres of federal lands in the Siuslaw National Forest (Oregon Dunes National Recreation Area).

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)–825(r).

h. *Applicant Contact:* Mr. Philip Pellegrino, Reedsport OPT Wave Park, LLC, 1590 Reed Road, Pennington, New Jersey 08534; (609) 730–0400.

i. *FERC Contact:* Jim Hastreiter at (503) 552–2760 or *james.hastreiter@ferc.gov.*

j. *Deadline for filing scoping comments:* May 10, 2010.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the "eFiling" link. For a simpler method of submitting text only comments, click on "Quick Comment." For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov;* call toll-free at (866) 208–3676; or, for TTY, contact (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application is not ready for environmental analysis at this time.

l. The Project facilities would include 10 OPT PowerBuoy wave-powered generating units attached to seabed anchors, tendon lines, subsurface floats, and catenary mooring lines. The PowerBuoy units would be deployed in an array of three to four rows oriented parallel to the shore and would occupy about 0.25 square mile of the Pacific Ocean. Each PowerBuoy would have a maximum diameter of 36 feet, extend 29.5 feet above the water surface, and have a draft of 115 feet.

A power/fiber optic cable would exit the bottom of each PowerBuoy, descending to the seabed in a lazy "S" shape with subsurface floats attached to the cable and a clump weight at the seabed. The 10 PowerBuoy units would be connected to a single Underwater Substation Pod (USP) via power/fiber-optic lines. The USP would be about 6 feet in diameter and 15 feet in length, and would rest on the seabed below the PowerBuoys, held in place with pre-cured concrete ballast blocks. A submarine transmission cable, buried in the seabed to a depth of 3 to 6 feet, would extend from the USP to an existing wastewater discharge pipe. The submarine cable would extend through the wastewater pipe to an underground vault, which would be constructed at the existing turn-around at the end of Sparrow Park Road, immediately inland of the sand dunes. At the vault, the subsea transmission cable would exit the effluent pipe, transition to an underground cable, and reenter the effluent pipe.

The underground transmission cable would continue within the effluent pipe eastward for approximately 3 miles, where it would connect to the Douglas Electric Cooperative transmission line at a proposed shore station. The shore station would consist of a 100- to 200-square foot building.

m. A copy of the application 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, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at 1–866–208–3676, or for TTY, (202) 502–8659. A copy is also available for inspection and reproduction at the address in item (h) above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via e-mail of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. *Scoping Process:*

The Commission intends to prepare an Environmental Assessment (EA) on the project in accordance with the National Environmental Policy Act. The EA will consider both site-specific and cumulative environmental impacts and reasonable alternatives to the proposed action.

Scoping Meetings

FERC staff will conduct one daytime scoping meeting and one evening scoping meeting. The daytime scoping meeting will focus on resource agency and non-governmental organization concerns, while the evening scoping meeting is primarily for public input. All interested individuals, organizations, and agencies are invited to attend one or both of the meetings, and to assist the staff in identifying the scope of the environmental issues that should be analyzed in the EA. The times and locations of these meetings are as follows:

Evening Scoping Meeting:

Date and Time: Wednesday, April 7, 2010, at 7 p.m. (PST),

Location: Reedsport High School, 2260 Longwood Drive, Reedsport, Oregon 97467.

Daytime Scoping Meeting:

Date and Time: Thursday, April 8, 2010, at 2 p.m. (PST),

Location: Salem Conference Center, Croisan Room, 200 Commercial Street SE., Salem, Oregon 97301.

Copies of the Scoping Document outlining the subject areas to be addressed in the EA were distributed to the parties on the Commission's mailing list. Copies of the Scoping Document will be available at the scoping meeting or may be viewed on the Web at *http://www.ferc.gov* using the "eLibrary" link [see item (m) above].

Environmental Site Review

The Applicant and FERC staff will conduct a project environmental site review beginning at 1 p.m. (PST) on April 7, 2010. All interested individuals, organizations, and agencies are invited to attend. All participants should meet at the Reedsport City Hall at 451 Winchester Avenue, Reedsport, Oregon 97467. All participants are responsible for their own transportation to the site. Please notify George Wolff, Reedsport OPT Wave Park, LLC at (609) 730–0400, ext. 238 or *gwolff@oceanpowertech.com* by March 25, 2010, if you plan to attend the environmental site review.

Objectives

At the scoping meetings, the staff will: (1) Summarize the environmental issues tentatively identified for analysis in the EA; (2) solicit from the meeting participants all available information, especially quantifiable data, on the resources at issue; (3) encourage statements from experts and the public on issues that should be analyzed in the EA, including viewpoints in opposition to, or in support of, the staff's preliminary views; (4) determine the resource issues to be addressed in the EA; and (5) identify those issues that require a detailed analysis, as well as those issues that do not require a detailed analysis.

Procedures:

The meetings are recorded by a stenographer and become part of the formal record of the Commission proceeding on the project. Individuals, organizations, and agencies with environmental expertise and concerns are encouraged to attend the meeting and to assist the staff in defining and clarifying the issues to be addressed in the EA.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–4995 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM07–10–002]

Transparency Provisions of Section 23 of the Natural Gas Act; Supplemental Notice to Form No. 552 Technical Conference

March 1, 2010.

As announced in the Notice of Technical Conference issued on February 22, 2010, a technical conference will be held on March 25, 2010, from 9 a.m. to 2 p.m. (EST) in the Commission Meeting Room at the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. The conference is open for the public to attend.

In that notice we stated on page 3 that the conference would not be webcast. However, we are now planning to webcast the conference. Set forth below is the information you will need to view the technical conference.

The webcast of the technical conference is free and registration to view the webcast is not required. Webcast viewers will not be permitted to participate during the technical conference. Anyone with Internet access interested in viewing this conference can do so by navigating to *Calendar of Events* on the FERC Web site. The events will contain a link to the applicable webcast option.

The Capitol Connection provides technical support for the webcasts and offers the option of listening to the conferences via phone-bridge for a fee. If you have any questions, visit *http://www.CapitolConnection.org* or call (703) 993–3100.

For additional information, please contact Christopher Peterson at 202–502–8933 or *Christopher.Peterson@ferc.gov* and Thomas Russo at 202–502–8792 or *Thomas.Russo@ferc.gov* of FERC's Office of Enforcement.

Kimberly D. Bose,

Secretary.

[FR Doc. 2010–4993 Filed 3–9–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0095; FRL–8810–8]

Notice of Filing of Several Pesticide Petitions 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 of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before April 5, 2010.

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 website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: 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 Biopesticides and Pollution Prevention Division (7511P), 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 a typical 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 of regulations in 40 CFR 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.

In accordance with 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 a notice of the petitions so that the public has an opportunity to comment on these requests for the establishment of regulations for residues of pesticides in or on food commodities. Further information on the petitions may be obtained through the petition summaries referenced in this unit.

New Tolerance Exemptions

1. *PP 0F7681.* (EPA–HQ–OPP–2010–0078). Marrone Bio Innovations Incorporated, 2121 Second Street, Suite B-107, Davis, CA 95618, proposes to establish an exemption from the requirement of a tolerance for residues of the microbial pesticide, *Streptomyces acidiscabies* strain RL-110^{T}, in or on all agricultural commodities. The petitioner believes no analytical method is needed because when used as proposed, *Streptomyces acidiscabies* strain RL-110^{T} will not result in residues that are of toxicological concern. Contact: Ann Sibold, (703) 305–6502, e-mail address: *sibold.ann@epa.gov*.

2. *PP 9E7635.* (EPA–HQ–OPP–2010–0055). Interregional Research Project Number 4 (IR-4), Rutgers University, 500 College Road East, Suite 201W, Princeton, NJ 08540 (on behalf of BioProdex Incorporated, 8520 NW 2 Place, Gainesville, FL 32607–1423), proposes to establish an exemption from the requirement of a tolerance for residues of the herbicide, *Tobacco Mild Green Mosaic Tobamovirus*, in or on all food commodities. The petitioner believes no analytical method is needed because *Tobacco Mild Green Mosaic Tobamovirus* occurs in fruiting vegetables, cucurbits, tobacco, and many other crops and is, therefore, indistinguishable from background levels normally present in the environment. Furthermore, since an exemption from tolerance is being requested, the petitioner has also emphasized that there is no need to analyze for residues. Contact: Jeannine Kausch, (703) 347–8920, e-mail address: *kausch.jeannine@epa.gov*.

3. *PP 9F7587.* (EPA–HQ–OPP–2010–0092). Technology Sciences Group Incorporated, 1150 18th Street NW., Suite 1000, Washington, DC 20036 (on behalf of Natural Industries Incorporated, 6223 Theall Road, Houston, TX 77066), proposes to establish an exemption from the requirement of a tolerance for residues of the mycoinsecticide, *Paecilomyces fumosoroseus* strain FE 9901, in or on vegetable and herb crops grown in greenhouses. The petitioner believes no analytical method is needed because residues of *Paecilomyces fumosoroseus* strain FE 9901 are not expected to occur as it degrades rapidly in sunlight and in high temperatures, conditions commonly found in greenhouses. Contact: Kathleen Martin, (703) 308–

2857, e-mail address: *martin.kathleen@epa.gov*.

4. *PP 9F7618*. (EPA–HQ–OPP–2010–0053). Technology Sciences Group Incorporated, 1150 18th Street NW., Suite 1000, Washington, DC 20036 (on behalf of BioWorks Incorporated, 100 Rawson Road, Suite 205, Victor, NY 14564), proposes to establish an exemption from the requirement of a tolerance for residues of the fungicide, *Trichoderma virens* strain G-41, in or on all food commodities. The petitioner believes no analytical method is needed because, as proposed, the use of *Trichoderma virens* strain G-41 would not result in residues that are of toxicological concern. Contact: Jeannine Kausch, (703) 347–8920, e-mail address: *kausch.jeannine@epa.gov*.

5. *PP 9F7623*. (EPA–HQ–OPP–2010–0099). SciReg Incorporated, 12733 Director's Loop, Woodbridge, VA 22192 (on behalf of bio-Ferm GmbH, Konrad Lorenz Strasse 20, A-3430, Tulln, Austria), proposes to establish an exemption from the requirement of a tolerance for residues of the fungicides, *Aureobasidium pullulans* strains DSM 14940 and DSM 14941, in or on all food commodities. The petitioner believes no analytical method is needed because they are submitting a petition to establish an exemption from the requirement of a tolerance. Contact: Susanne Cerrelli, (703) 308–8077, e-mail address: *cerrelli.susanne@epa.gov*.

6. *PP 9F7643*. (EPA–HQ–OPP–2010–0104). Certis USA LLC, 9145 Guilford Road, Suite 175, Columbia, MD 21046, proposes to establish an exemption from the requirement of a tolerance for residues of the microbial pesticide, *Bacillus subtilis* strain CX-9060, in or on all food commodities including residues resulting from post-harvest uses. The petitioner believes no analytical method is needed because an exemption from the requirement of a tolerance is being sought. Contact: Denise Greenway, (703) 308–8263, e-mail address: *greenway.denise@epa.gov*.

7. *PP 9F7665*. (EPA–HQ–OPP–2010–0087). Certis USA LLC, 9145 Guilford Road, Suite 175, Columbia, MD 21046, proposes to establish an exemption from the requirement of a tolerance for residues of the insecticide, *Paecilomyces fumosoroseus* var. Apopka strain 97, in or on all food commodities. The petitioner believes no analytical method is needed because the pesticide occurs naturally and would be present irrespective of treatment, and there are no residues of toxicological concern. Contact: Shanaz Bacchus, (703) 308–8097, e-mail address: *bacchus.shanaz@epa.gov*.

8. *PP 9F7670*. (EPA–HQ–OPP–2010–0065). Technology Sciences Group Incorporated, 1150 18th Street NW., Suite 1000, Washington, DC 20036 (on behalf of AMVAC Chemical Corporation, 4695 MacArthur Court, Suite 1250, Newport Beach, CA 92660–1706), proposes to establish an exemption from the requirement of a tolerance for residues of the potato sprout inhibitor, 3-decen-2-one, in or on all food commodities. The petitioner believes no analytical method is needed because the use of 3-decen-2-one would not result in residues that are of toxicological concern. Contact: Driss Benmhend, (703) 308–9525, e-mail address: *benmhend.driss@epa.gov*.

9. *PP 9F7674*. (EPA–HQ–OPP–2010–0054). Marrone Bio Innovations Incorporated, 2121 Second Street, Suite B-107, Davis, CA 95618, proposes to establish an exemption from the requirement of a tolerance for residues of the insecticide, *Chromobacterium subtsugae* strain PRAA4-1^T, in or on all food commodities. The petitioner believes no analytical method is needed because, as proposed, the use of *Chromobacterium subtsugae* strain PRAA4-1^T would not result in residues that are of toxicological concern. Contact: Jeannine Kausch, (703) 347–8920, e-mail address: *kausch.jeannine@epa.gov*.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: February 24, 2010.

Keith A. Matthews,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 2010–4804 Filed 3–9–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009-0045; FRL–8814–7]

Notice of Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; correction.

SUMMARY: EPA issued a notice in the **Federal Register** of Thursday, February 4, 2010, Vol. 75, No. 23, page 5790, FRL–8807–5, concerning the receipt of the initial notice of filing of pesticide petition (PP) *9E7651* in Docket identification No. EPA–HQ–OPP–2009–0980 proposing to establish import tolerances in 40 CFR part 180 for residues of the "insecticide" fluazifop-p-butyl in various potato commodities. This document is being issued to correct typographical error from "insecticide" to "herbicide," and to extend the comment period for an additional 30 days.

DATES: Comments must be received on or before April 9, 2010.

FOR FURTHER INFORMATION CONTACT: Michael Walsh, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–2972; e-mail address: *walsh.michael@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

The Agency included in the notice a list of those who may be potentially affected by this action. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009-0980. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

II. What Does this Correction Do?

The preamble for FR Doc. 2010–2382 published in the **Federal Register** of Thursday, February 4, 2010 (75 FR 5790) (FRL–8807–5) is corrected as follows:

On page 5792, third column, under the heading New Tolerances, paragraph 4. PP *9E7651* (EPA–HQ–OPP–2009–0980), line 6, remove the word "insecticide" and add the word "herbicide" in place thereof.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food Additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: March 1, 2010.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2010–5134 Filed 3–9–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2009–0776; FRL–8802–1]

Pesticide Product Registration Approval

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the Agency's issuance, pursuant to the provisions of section 3(c)(5) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), of a registration for the pesticide product Gonacon Immunocontraceptive Vaccine containing an active ingredient not included in any previously registered products.

FOR FURTHER INFORMATION CONTACT: Autumn Metzger, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5314; e-mail address: *metzger.autumn@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. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0776. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved label, the list of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are also available for public inspection. Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office (A–101), 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001. Such requests should: Identify the product name and registration number and specify the data or information desired.

A paper copy of the fact sheet, which provides more detail on this registration, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Rd., Springfield, VA 22161.

2. *Electronic access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr*.

II. Description of New Chemical

EPA received an application from the U.S. Department of Agriculture, Animal and Plant Health Inspection Service (USDA, APHIS), Environmental Services Unit 149, 4700 River Road, Riverdale, MD 20737, to register the pesticide product, Gonacon Immunocontraceptive Vaccine, contraceptive (EPA File Symbol 56228–GN), containing 1.0 milliliter doses in pre-packaged syringes at .03% active ingredient. This product was not previously registered.

III. Regulatory Conclusions

The application was approved on September 29, 2009, as Gonacon Immunocontraceptive Vaccine (EPA Registration Number 56228–40) for contraception of white-tailed deer. The Agency approved the application after considering all required data on risks associated with the proposed use of Mammalian Gonadotropin Releasing Hormone (GnRH), and information on social, economic, and environmental benefits to be derived from use. Specifically, the Agency has considered the nature of the chemical and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency concluded the determinations made pursuant to FIFRA section 3(c)(5) require registration of GnRH.

IV. Missing Data

Conditional data required for GonaCon consists of:

- OPPTS Harmonized Test Guideline 830.1700—Validating the method of analysis of the formulation and additional preliminary analysis.
- OPPTS Harmonized Test Guideline 830.1750—Certified Limits.

V. Response to Comments

EPA published a notice of receipt in the **Federal Register** of May 1, 2009 (74 FR 20298) (FRL–8404–9), which announced that the U.S. Department of Agriculture, Animal and Plant Health Inspection Service (USDA, APHIS), Environmental Services Unit 149, 4700 River Road, Riverdale, MD 20737, had submitted an application to register the pesticide product, Gonacon Immunocontraceptive Vaccine contraceptive. During the public comment period for this active ingredient one comment was received from a private citizen who did not oppose the manufacturing or selling of this product, but rather the hunting of animals, therefore no response was necessary.

List of Subjects

Environmental protection, Chemicals, Pests and pesticides.

Dated: March 1, 2010.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2010–5133 Filed 3–9–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0096; FRL–8811–6]

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 April 9, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the File Symbol(s) 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 Identification (ID) number and the File Symbol(s) for the application(s) 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 website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

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

FOR FURTHER INFORMATION CONTACT: The Regulatory Action Leader, Biopesticides and Pollution Prevention Division (7511P), listed in the following table:

Regulatory Action Leader	Telephone Number and E-mail Address	Mailing Address	File Symbol(s)
Driss Benmhend	(703) 308–9525 *benmhend.driss@epa.gov*	Biopesticides and Pollution Prevention Division (7511P) Office of Pesticide Programs Environmental Protection Agency 1200 Pennsylvania Ave., NW. Washington, DC 20460–0001	5481–LAI 5481–LAO 5481–LTN 5481–LTR
Susanne Cerrelli	(703) 308–8077 *cerrelli.susanne@epa.gov*	Do.	86174–E 86174–G 86174–R 86174–U
Cheryl Greene	(703) 308–0352 *greene.cheryl@epa.gov*	Do.	86865–R
Denise Greenway	(703) 308–8263 *greenway.denise@epa.gov*	Do.	70051–RNL 84888–E 84888–R
Anna Gross	(703) 305–5614 *gross.anna@epa.gov*	Do.	67986–A

Regulatory Action Leader	Telephone Number and E-mail Address	Mailing Address	File Symbol(s)
Jeannine Kausch	(703) 347–8920 *kausch.jeannine@epa.gov*	Do.	68539–I 68539–O 68539–RN 81179–E 84059–O 84059–RN
Kathleen Martin	(703) 308–2857 *martin.kathleen@epa.gov*	Do.	239–ETNE 239–ETNG 239–ETNU 73314–A 73314–T
Chris Pfeifer	(703) 308–0031 *pfeifer.chris@epa.gov*	Do.	83028–RN
Ann Sibold	(703) 305–6502 *sibold.ann@epa.gov*	Do.	84059–RR
Menyon Adams	(703) 347-8496 *adams.menyon@epa.gov*	Do.	80286-RA 80286-RT

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 associated with the File Symbol of interest and 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). If you are commenting on a docket that addresses multiple products, please indicate to which File Symbol(s) your comment applies.

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Registration Applications

EPA received applications to register pesticide products containing active ingredients not included in any previously registered products. Pursuant to the provision of section 3(c)(4) of FIFRA, EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipts of these applications does not imply a decision by the Agency on the applications.

1. *File Symbol*: 239–ETNE. *Docket Number*: EPA–HQ–OPP–2010–0094. *Applicant*: OMC Consulting, 828 Tanglewood Lane, East Lansing, MI 48823 (on behalf of The Scotts Company LLC, d/b/a The Ortho Group, P.O. Box 190, Marysville, OH 43040). *Product Name*: Phoma Tech. *Active Ingredient*: *Phoma macrostoma* strain 94–44B at 92%. *Proposed Classification/Use*: Manufacturing-use product. (K. Martin).

2. *File Symbol*: 239–ETNG. *Docket Number*: EPA–HQ–OPP–2010–0094. *Applicant*: OMC Consulting, 828 Tanglewood Lane, East Lansing, MI 48823 (on behalf of The Scotts Company LLC, d/b/a The Ortho Group, P.O. Box 190, Marysville, OH 43040). *Product Name*: Phoma H. *Active Ingredient*: *Phoma macrostoma* strain 94–44B at 92%. *Proposed Classification/Use*: Terrestrial (nonfood, residential outdoor). (K. Martin).

3. *File Symbol*: 239–ETNU. *Docket Number*: EPA–HQ–OPP–2010–0094. *Applicant*: OMC Consulting, 828 Tanglewood Lane, East Lansing, MI 48823 (on behalf of The Scotts Company LLC, d/b/a The Ortho Group, P.O. Box

190, Marysville, OH 43040). *Product Name*: Phoma P. *Active Ingredient*: *Phoma macrostoma* strain 94-44B at 92%. *Proposed Classification/Use*: Terrestrial (nonfood, residential outdoor, nurseries, greenhouses). (K. Martin).

4. *File Symbol*: 5481–LAI. *Docket Number*: EPA–HQ–OPP–2010–0064. *Applicant*: Technology Sciences Group Incorporated, 1150 18th Street NW., Suite 1000, Washington, DC 20036 (on behalf of AMVAC Chemical Corporation, 4695 Macarthur Court, Suite 1250, Newport Beach, CA 92660–1706). *Product Name*: AMV-1018 Technical. *Active Ingredient*: 3-decen-2-one at 98%. *Proposed Classification/Use*: Manufacturing-use product. (D. Benmhend).

5. *File Symbol*: 5481–LAO. *Docket Number*: EPA–HQ–OPP–2010–0064. *Applicant*: Technology Sciences Group Incorporated, 1150 18th Street NW., Suite 1000, Washington, DC 20036 (on behalf of AMVAC Chemical Corporation, 4695 Macarthur Court, Suite 1250, Newport Beach, CA 92660–1706). *Product Name*: AMV-1018 67.5 EC. *Active Ingredient*: 3-decen-2-one at 67.5%. *Proposed Classification/Use*: Potato sprout inhibitor for indoor use only. (D. Benmhend).

6. *File Symbol*: 5481–LTN. *Docket Number*: EPA–HQ–OPP–2010–0064. *Applicant*: Technology Sciences Group Incorporated, 1150 18th Street NW., Suite 1000, Washington, DC 20036 (on behalf of AMVAC Chemical Corporation, 4695 Macarthur Court, Suite 1250, Newport Beach, CA 92660–1706). *Product Name*: AMV-1018 90 EC. *Active Ingredient*: 3-decen-2-one at 90%. *Proposed Classification/Use*: Potato sprout inhibitor for indoor use only. (D. Benmhend).

7. *File Symbol*: 5481–LTR. *Docket Number*: EPA–HQ–OPP–2010–0064. *Applicant*: Technology Sciences Group Incorporated, 1150 18th Street NW., Suite 1000, Washington, DC 20036 (on behalf of AMVAC Chemical Corporation, 4695 Macarthur Court, Suite 1250, Newport Beach, CA 92660–1706). *Product Name*: AMV-1018 EP. *Active Ingredient*: 3-decen-2-one at 98%. *Proposed Classification/Use*: Potato sprout inhibitor for indoor use only. (D. Benmhend).

8. *File Symbol*: 67986–A. *Docket Number*: EPA–HQ–OPP–2009–0539. *Applicant*: Interregional Research Project Number 4 (IR-4), Rutgers University, 500 College Road East, Suite 201W, Princeton, NJ 08540 (on behalf of OmniLytics, 5450 W. Wiley Post Way, Salt Lake City, UT 84116). *Product Name*: AgriPhage CMM. *Active Ingredient*: Bacteriophage of *Clavibacter michiganensis* subsp. *michiganensis* at 0.05%. *Proposed Classification/Use*: Bactericide for use against canker on tomato. (A. Gross).

9. *File Symbol*: 68539–I. *Docket Number*: EPA–HQ–OPP–2010–0057. *Applicant*: Technology Sciences Group Incorporated, 1150 18th Street NW., Suite 1000, Washington, DC 20036 (on behalf of BioWorks Incorporated, 100 Rawson Road, Suite 205, Victor, NY 14564). *Product Name*: G-41 Technical. *Active Ingredient*: *Trichoderma virens* strain G-41 at 12.1%. *Proposed Classification/Use*: Manufacturing-use product. (J. Kausch).

10. *File Symbol*: 68539–O. *Docket Number*: EPA–HQ–OPP–2010–0057. *Applicant*: Technology Sciences Group Incorporated, 1150 18th Street NW., Suite 1000, Washington, DC 20036 (on behalf of BioWorks Incorporated, 100 Rawson Road, Suite 205, Victor, NY 14564). *Product Name*: BW240 WP. *Active Ingredient*: *Trichoderma virens* strain G-41 at 0.61%. *Proposed Classification/Use*: Preventative fungicide for control of disease organisms such as *Pythium*, *Phytophthora*, *Rhizoctonia*, and *Fusarium* on various crops. (J. Kausch)

11. *File Symbol*: 68539–RN. *Docket Number*: EPA–HQ–OPP–2010–0057. *Applicant*: Technology Sciences Group Incorporated, 1150 18th Street NW., Suite 1000, Washington, DC 20036 (on behalf of BioWorks Incorporated, 100 Rawson Road, Suite 205, Victor, NY 14564). *Product Name*: BW240 G. *Active Ingredient*: *Trichoderma virens* strain G-41 at 0.61%. *Proposed Classification/Use*: Preventative fungicide for control of disease organisms such as *Pythium*, *Phytophthora*, *Rhizoctonia*, and *Fusarium* on various crops. (J. Kausch).

12. *File Symbol*: 70051–RNL. *Docket Number*: EPA–HQ–OPP–2010–0103. *Applicant*: Certis USA LLC, 9145 Guilford Road, Suite 175, Columbia, MD 21046. *Product Name*: CX-9090. *Active Ingredient*: *Bacillus subtilis* strain CX-9060 at 25.0%. *Proposed Classification/Use*: For the control or suppression of fungal and bacterial diseases of horticultural crops. (D. Greenway).

13. *File Symbol*: 73314–A. *Docket Number*: EPA–HQ–OPP–2010–0093. *Applicant*: Technology Sciences Group Incorporated, 1150 18th Street NW., Suite 1000, Washington, DC 20036 (on behalf of Natural Industries Incorporated, 6223 Theall Road, Houston, TX 77066). *Product Name*: NoFly(tm). *Active Ingredient*: *Paecilomyces fumosoroseus* strain FE 9901 at 18%. *Proposed Classification/Use*: Greenhouse (only) for control of whiteflies, aphids, thrips, psyllids, mealybugs, leaf hoppers, plant bugs, weevils, grasshoppers, mormon crickets, locust, and beetles on all greenhouse and nursery crops including ornamentals, vegetables, and herbs. (K. Martin).

14. *File Symbol*: 73314–T. *Docket Number*: EPA–HQ–OPP–2010–0093. *Applicant*: Technology Sciences Group Incorporated, 1150 18th Street NW., Suite 1000, Washington, DC 20036 (on behalf of Natural Industries Incorporated, 6223 Theall Road, Houston, TX 77066). *Product Name*: NoFly(tm) Technical. *Active Ingredient*: *Paecilomyces fumosoroseus* strain FE 9901 at 69%. *Proposed Classification/Use*: Manufacturing-use product. (K. Martin).

15. *File Symbol*: 81179–E. *Docket Number*: EPA–HQ–OPP–2010–0056. *Applicant*: Interregional Research Project Number 4 (IR-4), Rutgers University, 500 College Road East, Suite 201W, Princeton, NJ 08540 (on behalf of BioProdex Incorporated, 8520 NW 2 Place, Gainesville, FL 32607–1423). *Product Name*: SolviNix. *Active Ingredient*: *Tobacco Mild Green Mosaic Tobamovirus* at 3%. *Proposed Classification/Use*: Post-emergent herbicide for control of tropical soda apple *(Solanum viarum*) in citrus, forestry, grass pastures, rangeland, sod-production fields, roadsides, sugarcane, temperate fruits and nuts, tropical fruits and nuts, turf, Conservation Reserve Program and other natural areas, and rights-of-way. (J. Kausch).

16. *File Symbol*: 83028–RN. *Docket Number*: EPA–HQ–OPP–2010–0080. *Applicant*: NCA Biotech Incorporated, 3406 Pomona Boulevard, Pomona, CA 91768. *Product Name*: Technical Salicylic Acid. *Active Ingredient*: Salicylic Acid at 98.7%. *Proposed Classification/Use*: Manufacturing-use product for formulation into plant growth regulator end-use products. (J. Pfeifer).

17. *File Symbol*: 84059–O. *Docket Number*: EPA–HQ–OPP–2010–0058. *Applicant*: Marrone Bio Innovations Incorporated, 2121 Second Street, Suite B-107, Davis, CA 95618. *Product Name*: MBI-203 TGAI. *Active Ingredient*: *Chromobacterium subtsugae* strain PRAA4-1^T at 100.00%. *Proposed Classification/Use*: Manufacturing-use product. (J. Kausch).

18. *File Symbol*: 84059–RN. *Docket Number*: EPA–HQ–OPP–2010–0058. *Applicant*: Marrone Bio Innovations Incorporated, 2121 Second Street, Suite B-107, Davis, CA 95618. *Product Name*: MBI-203 EP. *Active Ingredient*: *Chromobacterium subtsugae* strain PRAA4-1^T at 94.50%. *Proposed Classification/Use*: Insecticide for use in the control or suppression of many

foliar-feeding pests such as caterpillars, foliage-feeding coleopteran, aphids, whiteflies, and plant-sucking mites on ornamental plants, turf, and various edible crops. (J. Kausch).

19. *File Symbol*: 84059–RR. *Docket Number*: EPA–HQ–OPP–2010–0079. *Applicant*: Marrone Bio Innovations Incorporated, 2121 Second Street, Suite B-107, Davis, CA 95618. *Product Name*: MBI-005. *Active Ingredient*: *Streptomyces acidiscabies* strain RL-110^{T} at 100%. *Proposed Classification/Use*: Manufacturing-use product. (A. Sibold).

20. *File Symbol*: 84888–E. *Docket Number*: EPA–HQ–OPP–2010–0090. *Applicant*: Technology Sciences Group Incorporated, 712 Fifth Street, Suite A, Davis, CA 95616 (on behalf of Agrium Advanced Technologies RP Incorporated, 10 Craig Street, Brantford, Ontario Canada N3R 7J1). *Product Name*: Nivalis. *Active Ingredient*: *Typhula phacorrhiza* strain 94671 at 4.00%. *Proposed Classification/Use*: Biofungicide for turf. (D. Greenway).

21. *File Symbol*: 84888–R. *Docket Number*: EPA–HQ–OPP–2010–0090. *Applicant*: Technology Sciences Group Incorporated, 712 Fifth Street, Suite A, Davis, CA 95616 (on behalf of Agrium Advanced Technologies RP Incorporated, 10 Craig Street, Brantford, Ontario Canada N3R 7J1). *Product Name*: Nivalis Technical. *Active Ingredient*: *Typhula phacorrhiza* strain 94671 at 4.00%. *Proposed Classification/Use*: Manufacturing-use product. (D. Greenway).

22. *File Symbol*: 86174–E. *Docket Number*: EPA–HQ–OPP–2010–0100. *Applicant*: SciReg Incorporated, 12733 Director's Loop, Woodbridge, VA 22192 (on behalf of Bio-Ferm GmbH, Konrad Lorenz Strasse 20, A-3430, Tulln, Austria). *Product Name*: *Aureobasidium pullulans* strain DSM 14940 Technical. *Active Ingredient*: *Aureobasidium pullulans* strain DSM 14940 at 80%. *Proposed Classification/Use*: Manufacturing-use product. (S. Cerrelli).

23. *File Symbol*: 86174–G. *Docket Numbers*: EPA–HQ–OPP–2010–0100 and EPA–HQ–OPP–2010–0106. *Applicant*: SciReg Incorporated, 12733 Director's Loop, Woodbridge, VA 22192 (on behalf of Bio-Ferm GmbH, Konrad Lorenz Strasse 20, A-3430, Tulln, Austria). *Product Name*: Botector. *Active Ingredients*: *Aureobasidium pullulans* strain DSM 14940 at 50% and *Aureobasidium pullulans* strain DSM 14941 at 50%. *Proposed Classification/Use*: Fungicide for agricultural, commercial, and residential use on citrus, grapes, pome fruits, stone fruits, and strawberries. (S. Cerrelli).

24. *File Symbol*: 86174–R. *Docket Number*: EPA–HQ–OPP–2010–0106. *Applicant*: SciReg Incorporated, 12733 Director's Loop, Woodbridge, VA 22192 (on behalf of Bio-Ferm GmbH, Konrad Lorenz Strasse 20, A-3430, Tulln, Austria). *Product Name*: *Aureobasidium pullulans* strain DSM 14941 Technical. *Active Ingredient*: *Aureobasidium pullulans* strain DSM 14941 at 80%. *Proposed Classification/Use*: Manufacturing-use product. (S. Cerrelli).

25. *File Symbol*: 86174–U. *Docket Numbers*: EPA–HQ–OPP–2010–0100 and EPA–HQ–OPP–2010–0106. *Applicant*: SciReg Incorporated, 12733 Director's Loop, Woodbridge, VA 22192 (on behalf of Bio-Ferm GmbH, Konrad Lorenz Strasse 20, A-3430, Tulln, Austria). *Product Name*: Blossom Protect. *Active Ingredients*: *Aureobasidium pullulans* strain DSM 14940 at 32.25% and *Aureobasidium pullulans* strain DSM 14941 at 32.25%. *Proposed Classification/Use*: Fungicide for agricultural, commercial, and residential use to prevent fire blight on pome fruits. (S. Cerrelli).

26. *File Symbol*: 86865–R. *Docket Number*: EPA–HQ–OPP–2010–0082. *Applicant*: Piedmont Animal Health, 204 Muirs Chapel Road, Suite 200, Greensboro, NC 27410. *Product Name*: Resultix(tm). *Active Ingredient*: Isopropyl Myristate at 50%. *Proposed Classification/Use*: Insecticide for use against ticks on cats and dogs. (C. Greene).

27. *File Symbol*: 80286-RT. *Docket Number*: EPA-HQ-OPP-2010-0040. *Applicant*: ISCA Technologies Incorporated, 1230 Spring Street, Riverside, CA 92507. *Product Name*: ISCA TuTa MP. *Active Ingredient*: (E,Z,Z)-3,8,11-Tetradecatrienyl Acetate at 96.31%. *Proposed Classification/Use*: Manufacturing-use product. (M. Adams).

28. *File Symbol*: 80286-RA. *Docket Number*: EPA-HQ-OPP-2010-0040. *Applicant*: ISCA Technologies Incorporated, 1230 Spring Street, Riverside, CA 92507. *Product Name*: SPLAT TuTa(tm). *Active Ingredient*: (E,Z,Z)-3,8,11-Tetradecatrienyl Acetate at 0.3%. *Proposed Classification/Use*: Straight-carbon-chain Lepidoptera pheromone (SCLP) for use against tomato leafminer on all crops and in non-crop areas. (M. Adams).

List of Subjects

Environmental protection, Pesticides and pests.

Dated: March 1, 2010.

Keith A. Matthews,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 2010–4835 Filed 3–9–10; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of information collections to be submitted to OMB for review and approval under the Paperwork Reduction Act of 1995.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act of 199 (44 U.S.C. chapter 35), the FDIC hereby gives notice that it plans to submit to the Office of Management and Budget (OMB) a request for OMB review and renewal of its "Foreign Banks" information collection (OMB No. 3064–0114).

DATES: Comments must be submitted on or before April 9, 2010.

ADDRESSES: Interested parties are invited to submit written comments. All comments should refer to the name of the collection. Comments may be submitted by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/propose.html.*
- *E-mail: comments@fdic.gov.*
- *Mail:* Leneta G. Gregorie (202.898.3719), Counsel, Federal Deposit Insurance Corporation, PA1730–3000, 550 17th Street, NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the FDIC Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: For further information about the information collection discussed in this notice, please contact Leneta G. Gregorie, by telephone at (202) 898–3719 or by mail at the address identified above.

SUPPLEMENTARY INFORMATION: The FDIC is proposing to renew, without change, the following information collection.

Title: Foreign Banks.

ESTIMATED NUMBER OF RESPONDENTS AND BURDEN HOURS

FDIC collection	Hours per response	No. of respondents	Times per year	Burden hours
Application to move a branch	8	1	1	8
Application for consent to operate a noninsured branch	8	1	1	8
Application to conduct activities	8	1	1	8
Recordkeeping	120	10	1	1,200
Pledge of assets.				
Records	0.25	10	4	10
Reports	2	10	4	80
Total Burden				1,314

General Description of Collection: The collection involves information obtained in connection with applications for consent to move an insured State-licensed branch of a foreign bank (12 CFR 303.184); applications to operate as a noninsured State-licensed branch of a foreign bank (12 CFR 303.186); applications from an insured State-licensed branch of a foreign bank to conduct activities which are not permissible for a Federally-licensed branch (12 CFR 303.187); internal recordkeeping requirements for such branches (12 CFR 347.209(e)(4)); and reporting and recordkeeping requirements relating to the pledge of assets by such branches (12 CFR 347.209(e)(4) and (e)(6).

Current Action: The FDIC is proposing to renew the existing information collection without change, with the exception of an adjustment of –258 hours to reflect a slight decrease in the number of respondents.

Request for Comment

Comments are invited on: (a) Whether this collections 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 3rd day of March, 2010.

Valerie J. Best,

Assistant Executive Secretary, Federal Deposit Insurance Corporation.

[FR Doc. 2010–5123 Filed 3–9–10; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Update Listing of Financial Institutions in Liquidation.

SUMMARY: Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing. This list (as updated from time to time in the **Federal Register**) may be relied upon as "of record" notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992 issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation Web site at *http://www.fdic.gov/bank/individual/failed/banklist.html* or contact the Manager of Receivership Oversight in the appropriate service center.

Dated: March 3, 2010.

Federal Deposit Insurance Corporation.

Valerie J. Best,

Assistant Executive Secretary.

INSTITUTIONS IN LIQUIDATION

[In alphabetical order]

FDIC Ref. No.	Bank name	City	State	Date closed
4657	Amtrade International Bank of Georgia	Atlanta	GA	9/30/2002
4658	Bank of Alamo	Alamo	TN	11/08/2002
4665	Bank of Ephraim	Ephraim	UT	6/25/2004
4644	Bank of Falkner	Falkner	MS	9/29/2000
4632	Best Bank	Boulder	CO	7/23/1998
4656	Connecticut Bank of Commerce	Stamford	CT	6/26/2002
6006	Dollar Savings Bank	Newark	NJ	2/14/2004
10183	1st American State Bank of Minnesota	Hancock	MN	2/05/2010
4661	First National Bank of Blanchardville	Blanchard	WI	5/09/2003
4637	First National Bank of Keystone, The	Keystone	WV	9/01/1999
10184	George Washington Savings Bank	Orland Park	IL	2/19/2010
4663	Guaranty National of Tallahassee	Tallahassee	FL	3/12/2004
4650	Hamilton Bank	Miami	FL	1/11/2002

INSTITUTIONS IN LIQUIDATION—Continued

[In alphabetical order]

FDIC Ref. No.	Bank name	City	State	Date closed
10186	La Coste National Bank, The	La Coste	TX	2/19/2010
10185	La Jolla Bank, FSB	La Jolla	CA	2/19/2010
10187	Marco Community Bank	Marco Island	FL	2/19/2010
10000	Metropolitan Savings Bank	Pittsburgh	PA	2/02/2007
10002	Miami Valley Bank	Lakeview	OH	10/04/2007
4646	National State Bank of Metropolis, The	Metropolis	IL	12/14/2000
4654	Net First National Bank	Boca Raton	FL	3/01/2002
10001	Netbank	Alpharetta	GA	9/28/2007
4655	New Century Bank	Shelby Township	MI	3/28/2002
4653	Nextbank, N.A.	Phoenix	AZ	2/07/2002
4652	Oakwood Deposit Bank Company	Oakwood	OH	2/01/2002
4664	Reliance Bank	White Plains	NY	3/19/2004
4660	Southern Pacific Bank	Torrance	CA	2/07/2003
6004	Superior Bank	Chicago	IL	7/27/2001
6005	Universal Savings Bank	Chicago	IL	6/27/2002

[FR Doc. 2010–5125 Filed 3–9–10; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov*.

Agreement No.: 011730–003.

Title: GWF/Dole Space Charter and Sailing Agreement.

Parties: Dole Ocean Cargo Express, Inc. and Great White Fleet (US) Ltd.

Filing Party: Wade S. Hooker, Esq., 211 Central Park West, New York, NY 10024.

Synopsis: The amendment adds Colombia to the geographic scope of the agreement. The parties have requested expedited review.

Agreement No.: 011914–003.

Title: HLAG/CCNI Med-Gulf Space Charter Agreement.

Parties: Hapag-Lloyd AG and Compania Chilena de Navegacion Interoceanica.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW., Suite 900, Washington, DC 20036.

Synopsis: The amendment would expand the scope to include all countries bordering the Mediterranean Sea, adjust the amount of space chartered to CCNI, and provide future adjustments to the slot allocation within defined limits.

Agreement No.: 012032–004.

Title: CMA CGM/MSC/Maersk Line North and Central China-US Pacific Coast Two-Loop Space Charter, Sailing and Cooperative Working Agreement.

Parties: A.P. Moller-Maersk A/S, CMA CGM S.A., and Mediterranean Shipping Company S.A.

Filing Party: Wayne R. Rohde, Esq.; Sher and Blackwell LLP; 1850 M Street, NW., Suite 900; Washington, DC 20036.

Synopsis: The amendment reflects the addition of a sixth vessel to a service loop, and makes adjustments to the space allocations among the parties.

By Order of the Federal Maritime Commission.

Dated: March 5, 2010.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2010–5104 Filed 3–9–10; 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 license as a Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. Chapter 409 and 46 CFR 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573.

Non-Vessel-Operating Common Carrier—Ocean Transportation Intermediary

AA Cargo, 139 Mitchell Avenue, Suite 201, South San Francisco, CA 94080., Officer: Arben Hodza, CEO, CFO, Secretary (Qualifying Individual).

Non-Vessel-Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary

Hafen Consolidators USA, LLC, 103–01 NW 108th Avenue, Suite 11, Miami, FL 33178., Officers: Andres E. Valdano, Vice President (Qualifying Individual). Jose R. Hoppe, President.

Ocean Freight Forwarder—Ocean Transportation Intermediary

Pacific Glory USA, Inc., 5673 Old Dixie Highway, Suite 102, Forest Park, GA 30297.Officer: Kil Ra, CEO (Qualifying Individual).

Dated: March 5, 2010.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2010–5100 Filed 3–9–10; 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: 876F.

Name: S.H. Pomerance Co., Inc.

Address: Cargo Bldg. 80, JFK Int'l Airport, Room 242/244, Jamaica, NY 11430.
Date Revoked: February 16, 2010.
Reason: Failed to maintain a valid bond.

License Number: 003486F.
Name: Mozart Forwarding, Inc.
Address: 535 Seaview Avenue, Bridgeport, CT 06607.
Date Revoked: February 13, 2010.
Reason: Failed to maintain a valid bond.

License Number: 012142NF.
Name: Seaborne International, Inc. dba Seaborne Express Line.
Address: 8901 South La Cienega Blvd., Suite 101, Inglewood, CA 90301.
Date Revoked: February 6, 2010.
Reason: Failed to maintain valid bonds.

License Number: 015847N.
Name: Straightline Logistics, Inc.
Address: One Cross Island Plaza, Suite 203–G, Rosedale, NY 11422.
Date Revoked: February 13, 2010.
Reason: Failed to maintain a valid bond.

License Number: 015917N.
Name: Golden Jet-L.A., Inc. dba Golden Jet Freight Forwarders dba Golden Jet USA, Inc.
Address: 12333 S. Van Ness Avenue, Suite 201, Hawthorne, CA 90250.≤
Date Revoked: February 18, 2010.
Reason: Failed to maintain a valid bond.

License Number: 16886N.
Name: Maritrans Shipping, Ltd.
Address: 170 East Sunrise Highway, Valley Stream, NY 11581.
Date Revoked: February 15, 2010.
Reason: Failed to maintain a valid bond.

License Number: 017017NF.
Name: American Global Logistics, Inc. dba American Global Shipping.
Address: 388 2nd Avenue, Suite 160, New York, NY 10010.
Date Revoked: January 28, 2010.
Reason: Failed to maintain valid bonds.

License Number: 018033N.
Name: Adrienne Shipping Line, Inc.
Address: 525 South Douglas Street, Suite 100, El Segundo, CA 90245.
Date Revoked: February 14, 2010.
Reason: Surrendered license voluntarily.

License Number: 018281N.
Name: Sun Ocean Logistics Corp.
Address: 5250 West Century Blvd., Suite 530, Los Angeles, CA 90045.
Date Revoked: February 11, 2010.
Reason: Failed to maintain a valid bond.

License Number: 020479F.
Name: Karon Jones dba Keene Machinery and Export.
Address: 2810 Goodnight Trail, Corinth, TX 76210.
Date Revoked: February 11, 2010.
Reason: Failed to maintain a valid bond.

Sandra L. Kusumoto,
Director, Bureau of Certification and Licensing.

[FR Doc. 2010–5102 Filed 3–9–10; 8:45 am]
BILLING CODE 6730–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Issuance of Final Policy Directive

AGENCY: Administration for Children and Families.

ACTION: Notice.

SUMMARY: The Administration for Native Americans (ANA) is issuing final interpretive rules, general statements of policy and rules of agency organization, procedure, or practice relating to the following Funding Opportunity Announcements (FOAs): Social and Economic Development Strategies (hereinafter referred to as SEDS), Social and Economic Development Strategies—Special Initiative (hereinafter referred to as SEDS—SI), Native Language Preservation and Maintenance (hereinafter referred to as Language Preservation), Native Language Preservation and Maintenance—Esther Martinez Initiative (hereinafter referred to as Language—EMI), and Environmental Regulatory Enhancement (hereinafter referred to as ERE). This notice also provides information about how ANA will administer these programs.

FOR FURTHER INFORMATION CONTACT: Caroline Gary, Deputy Commissioner, (877) 922–9262, 370 L'Enfant Promenade, SW., 2nd Floor West, Washington, DC 20447.

SUPPLEMENTARY INFORMATION:

I. Background

Section 814 of the Native American Programs Act of 1974, as amended, requires ANA to provide members of the public an opportunity to comment on proposed changes in interpretive rules, general statements of policy and rules of agency organization, procedure, or practice and to give notice of the final adoption of such changes at least 30 days before the changes become effective.

ANA published a Notice of Public Comment (NOPC) in the **Federal Register** (74 FR 68849) on December 29, 2009, with proposed policy and program clarifications, modifications, and activities for the fiscal year (FY) 2010 FOAs. The public comment period was open for 30 days.

ANA received 12 comments from eight different entities: (1) Three from a Federally recognized Tribe; (2) one from an Alaska Native Village Corporation; (3) one from a Tribally controlled college; (4) one from a Hawaiian non-profit organization; (5) two from a Hawaiian University; (6) one from an individual language educator; (7) one from an Alaskan non-profit organization; and (8) two from a national non-profit for Native languages. ANA considered all of the comments received and provided responses, clarifications, and modifications in this final directive. The following paragraphs summarize the comments and our responses. The comments are grouped by the portion of the NOPC to which they apply.

II. Comments and Responses

A. Comments on SEDS and SEDS—SI FOAs

Comments: ANA received three comments in reference to the SEDS—SI FOA and the former SEDS—Alaska program announcement. One commenter said that the description of the SEDS—SI funding opportunity was insufficient to determine whether the commenter's Tribe would be eligible to apply under this new FOA. A second commenter stated that the discontinuation of SEDS—Alaska will have a detrimental impact on Alaska Native communities, and a third stated the same concerns and encouraged ANA to consider keeping that program area with an increased ceiling amount.

Responses: In response to the first comment about SEDS—SI, ANA provided this clarification: The forthcoming SEDS—SI FOA will address the same program areas of interest as SEDS and have the same eligibility criteria; the only difference between SEDS and SEDS—SI will be the funding floor and ceiling amounts.

In response to the second and third comments, ANA offered no changes. ANA acknowledges that there are many Tribes and organizations with limited capacity throughout all of the United States and its Territories. The SEDS—Alaska initiative was established in 1984 and for more than 20 years assisted Alaska Native Villages and Alaskan organizations with capacity-building projects and activities. ANA has limited funding available with which to impact its target communities, and ANA is continuously seeking ways to best

address the needs of all communities. To ensure that competition for funds is equitable, ANA must ensure an even regional distribution of funds.

B. Comments on Language Preservation and Language—EMI FOAs

Comments: ANA received three comments on the Native Language programs. One commenter expressed concern about the lack of emphasis on teacher training for the language nests in the Language—EMI FOA. One commenter said that the separation of Esther Martinez Native American Languages Preservation Act of 2006 (Esther Martinez Act) programs from other language programs will ensure that the Congressional appropriations allocated to programs identified in the Esther Martinez Act will be honored. Specifically, the commenter stated that $12 million was appropriated for the Esther Martinez Act programs with $4 million of that set aside for immersion programs. One commenter suggested that an absolute priority should be identified for language immersion schools to align with the Congressional appropriation.

Responses: In response to the first comment, ANA agrees in part. Teacher training is undoubtedly a critical component to language programs, and to address this both Native Language FOAs provide opportunities for teacher training for all types of schools and programs dedicated to preserving and maintaining Native languages. The purpose of Language—EMI is to award funds to language survival schools, language nests, and language restoration programs; however, the type of project, which could include teacher training, is open to what the applicant determines is most beneficial to the program, as long as it fulfills the three-year time requirement. For shorter term teacher training projects, applicants can apply for projects to include teacher training under the Language Preservation FOA.

The second and third comments directly relate to the Esther Martinez Act and ANA's FY 2010 appropriation. With respect to these comments, ANA agrees in part and offers clarification but no change. The appropriation language for the FY 2010 ANA budget does not specify that the entire $12 million for language programs should be allocated to Esther Martinez Act programs. Instead, the House and Senate Conference Report 111–366 to accompany P.L. 111–117 (page 1040) included the following statements:

> Within the amount provided for Native American programs, the conference agreement includes $12,000,000 for Native American language preservation activities including no less than $4,000,000 for language immersion programs as proposed in Senate Report 111–66. The House included similar language.

The FY 2010 appropriation and the instructions for Native language programs do not specify what funds should be allocated to the specific programs under the Esther Martinez Act. Rather, the recommendation is that $12 million be spent on all language programs with $4 million of that used to fund immersion programs. Immersion activities can be funded under the Language Preservation FOA or the Language—EMI FOA. The FY 2010 appropriation is not only for new awards, but also for projects that are continuing into a second or a third year. ANA has determined that suitable tracking will be completed to ensure funds are spent as appropriated by Congress.

In FY 2010, ANA identified the Language—EMI FOA as separate from the Language Preservation FOA to address the specific differences in time frames and eligibility requirements, as outlined in the Esther Martinez Act. The Esther Martinez Act program areas fund three-year projects in one of the following three categories:

Language Nest Projects: providing instruction and child care through the use of a Native American language and ensuring a Native American language is the dominant medium of instruction.

Language Survival School Projects: working toward a goal of all students achieving fluency in a Native American language and academic proficiency.

Language Restoration Programs: providing instruction in at least one Native American language and working towards the goal of increasing proficiency and fluency in that language.

C. Comment on Award Information

Comment: ANA received one comment suggesting that ANA elevate the funding range for language nest and survival schools from $100,000–$300,000 to $150,000–$500,000, which have limited funds for teacher training, curriculum development, repository building, and other activities.

Response: In response to this comment, ANA offers no change to the funding floor and ceiling for language nests and survival schools. In FY 2010, ANA increased the funding ceilings from $200,000 per budget period for implementation grants and $250,000 per budget period for immersion grants in FY 2009 to $300,000 per budget period for all language projects in FY 2010. Further increases in the funding ceiling will restrict ANA's ability to support many deserving programs. If ANA increases the funding floor and ceiling, fewer projects will be funded. For example, if ANA has $2 million for new projects in FY 2010, only four projects at $500,000 each could be funded versus more than six projects with a $300,000 ceiling.

D. Comment on Disqualification Factors

Comment: ANA received one comment requesting that ANA identify Tribally controlled colleges as separate entities from the associated Tribes.

Response: In response to this comment, ANA offers no change. In accordance with 45 CFR 1336.33, "applications from tribal components which are tribally-authorized divisions of a larger tribe must be approved by the governing body of the Tribe," thereby recognizing them as one entity.

E. Comment on Definitions

Comment: One commenter stated that the Language—EMI FOA should include definitions for "language survival schools" and "language nests" in addition to "language restoration programs."

Response: ANA offers no change in response to this comment. The NOPC identified only changes from 2009 to 2010. Definitions for both "language survival schools" and "language nests" were included in the FY 2009 program announcements; therefore, the definitions were not included as new definitions in the NOPC. All three definitions will be included in the FY 2010 Language—EMI FOA.

F. Comment on Application Evaluation Criteria

Comment: One commenter stated that tracking an impact indicator for three years after the end of the project period is difficult because there would be no grant funding to support these data collection efforts.

Response: ANA agrees in part and offers clarification but no change. The best use of ANA resources is to fund projects that are sustainable and have the potential to impact and provide benefits to the community beyond the project period. In addition, applicants should propose projects that have a clearly identified goal of what the project will achieve and how the proposed project will impact the community well into the future. Therefore, ANA is requesting that a target be set for three years after the project period; however, ANA is not requiring that data be collected or reported for the period after the project ends. It will be the grantee's decision whether to track the third indicator after the end of the project period.

G. Other Comments

Comments: One commenter suggested that a Tribe should be able to have a Family Preservation grant concurrent with a SEDS grant and another commenter stated that the proposed changes will improve the ANA program and its effectiveness in the target communities.

Responses: The first comment was not addressed by any changes identified in the NOPC; therefore, ANA declines to respond to the comment. ANA agrees with the second comment. ANA's program mission is to promote self-sufficiency and cultural preservation for Native Americans by providing social and economic development opportunities through financial assistance, training, and technical assistance to eligible Tribes and Native American communities, including American Indian, Alaska Native, Native Hawaiian, and other Native Pacific Islander organizations. ANA recognizes that to better address its mission, a simplified funding structure that reaches more of ANA's target communities is needed. The changes to the FY 2010 FOAs were developed to that end.

The 2010 FOAs will be published on the ANA Web site at *http://www.acf.hhs.gov/programs/ana//programs/program_announcements.html* and at *http://www.grants.gov.*

Dated: March 2, 2010.

Caroline Gary,

Deputy Commissioner, Administration for Native Americans.

[FR Doc. 2010–4843 Filed 3–9–10; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–10–10BU]

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 instruments, call 404–639–5960 or send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 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 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

Case Studies of Communities and States Funded under Community Activities under the Communities Putting Prevention to Work Initiative—New—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC) is the primary Federal agency for protecting health and promoting quality of life through the prevention and control of disease, injury, and disability. CDC is committed to programs that reduce the health and economic consequences of the leading causes of death and disability, thereby ensuring a long, productive, healthy life for all people.

Chronic diseases such as cancer, heart disease, and diabetes are among the leading causes of death and disability in the United States. Chronic diseases account for 70% of all deaths in the U.S., and cause major limitations in daily living for almost one out of 10 Americans. Although chronic diseases are among the most common and costly health problems, they are also among the most preventable. Adopting healthy behaviors such as eating nutritious foods, being physically active and avoiding tobacco use can prevent or control the devastating effects of these diseases.

The American Recovery and Reinvestment Act of 2009 (the "Recovery Act") allotted $650 million to the Department of Health and Human Services (HHS) to support evidence-based prevention and wellness strategies. The cornerstone of the initiative is the Communities Putting Prevention to Work (CPPW) Community Program, administered by the Centers for Disease Control and Prevention (CDC). Through this program, all states and territories, and approximately 35–45 communities, will receive cooperative agreement funding to implement evidence-based community approaches to chronic disease prevention over a 24-month period.

Funded recipients will work with partners such as local and state health departments and other governmental agencies, health centers, schools, businesses, community and faith-based organizations, academic institutions, health care, mental health/substance abuse organizations, health plans, and others to create policies, systems, and environments that promote: (1) increased levels of physical activity, improved nutrition, and decreased prevalence of overweight/obesity; and (2) decreased tobacco use and decreased exposure to secondhand smoke. Each CPPW-funded state or community will choose to emphasize prevention objectives related to physical activity and nutrition, or tobacco. Toward that end, each funded recipient has selected strategies for implementing change from each of five categories involving *m*edia, *a*ccess, *p*rice, *p*oint of purchase decision, and *s*upport services (MAPPS). Applicants for CPPW funding selected their approaches from a reference set of evidence-based strategies provided by CDC.

CDC proposes to collect information from a subset of CPPW awardees to gain insight into the factors and variables that facilitate or hinder the successful implementation of these strategies and the effective creation of the desired policy, system, and environmental changes. CDC plans to conduct intensive case studies of six CPPW-funded states and 15 CPPW-funded communities. The case study sites will be selected to include a mix of state or community characteristics related to population density, geographic region, and targeted population. Case study information will be collected by conducting personal interviews with approximately 20 key informants at each of the 21 CPPW-funded sites. Respondents at each site will include project management (5), project staff (5), community partners (5), and policy makers/community decision makers (5). Information will be collected at the beginning of the CPPW funding period and again approximately 18 months post-award. OMB approval is requested for two years.

The proposed information collection is one component of a larger evaluation

plan for states and communities that receive Recovery Act funding through the CPPW initiative. Participation is required as a condition of receiving the cooperative agreement.

The case study information to be collected will assist the Federal government, state and local governments, and communities in planning future strategies designed to promote sustainable policy, systems and environmental changes that improve public health. Understanding the key variables and contextual factors that inhibit or accelerate successful implementation of these strategies will allow states and communities to anticipate such issues in advance, adapt their environment and context so it is more supportive, or choose only strategies that seem to map well to their current environment and context. As a result of the CPPW program, powerful models of success are expected to emerge that can be replicated in other states and communities.

The long-term goals of the CPPW are to modify the environmental determinants of risk factors for chronic diseases, prevent or delay chronic diseases, promote wellness in children and adults, and provide positive, sustainable health change in communities.

There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
CPPW Awardees, Community Partners, and Community Decision Makers ..	420	1	2.5	1,050

Dated: March 3, 2010.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–5157 Filed 3–9–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–10–09CO]

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 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Increasing Adoption of CROPS by Farmers and Manufactures, New—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

There was an average of 200 tractor-related fatalities annually between 1992 and 2005 in the US, with tractor overturns accounting for 1,412 of these deaths. The majority could have been prevented with the use of a rollover protective structure (ROPS). It is estimated that about half of the 4.8 million tractors in the United States currently do not have ROPS installed. Earlier research indicated that adoption of retrofit ROPS technology for older tractors is impeded by the costs, complexity of this modification, usability and storage of the tractor after the retrofitting (installation), of a ROPS. To overcome these barriers, NIOSH designed a prototype of a cost-effective roll over protective structure (CROPS). Projected retrofit costs for CROPS are $800, compared to $1,200-$2,500 for ROPS; and the installation complexity is significantly reduced. NIOSH has CROPS prototype designs for five tractors: Ford 3000 series, Ford 4000 series, Ford 8N, Ford 4600 and Massey-Ferguson 135. However, this technology has not been transferred to the agricultural workplace, suggesting that the barriers to adoption and implementation are much more complex than previously believed.

With the assistance of State partners, the project will identify the study population—farmers in two selected States who use tractors for which a CROPS prototype has been developed by NIOSH. From this group of farmers a subset of farmers from the study population will be selected (18 in each State for a total of 36) to receive a CROPS at no charge. Each farmer will be asked to install the CROPS and provide an initial assessment of their perception of the utility and value of the device and allow others to observe the retrofit process. New York and Virginia were selected as States because of their high number of tractor roll over fatalities and established relationships with NIOSH, its partners, and access to farming communities. The State partners will schedule and arrange 18 demonstration projects within their respective States for a total of 36 tractor retrofit demonstrations. Attendance at these events is anticipated to be demonstrators, observers, community leaders and fabricators and is strictly voluntary. It is anticipated to have a minimum of 10 attendees identified and secured for each of the 36 demonstration projects. These attendees will be invited to observe installation of CROPS in the field and queried on their perception of the utility and value of the design. This will help identify barriers from and approaches for stimulating farmers to retrofit their tractors with Cost-Effective Roll-Over Protection Structures (CROPS) using stakeholder input. The surveys are expected to take about 15 minutes to complete.

There are no costs to the respondents other than their time. The total estimated annual burden hours are 753.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
Demonstrators	30	1	15/60
Demonstrators	30	1	15/60
Demonstrators	30	1	15/60
Demonstrators	30	1	3
Observers	170	1	15/60
Observers	170	1	15/60
Observers	170	1	15/60
Observers	170	1	3

Dated: March 4, 2010.

Maryam Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–5156 Filed 3–9–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Submission for OMB Review; Comment Request; Reinstatement of OMB No. 0925–0601/exp. 02/28/2010, Request for Human Embryonic Stem Cell Line To Be Approved for Use in NIH Funded Research

ACTION: Correction notice.

On March 2, 2010 the National Institutes of Health published a notice in the **Federal Register** (75 FR 9418) with a 30-day comment period seeking public comment for an information collection entitled "Request for Human Embryonic Stem Cell Line to be Approved for Use in NIH Funded Research".

In the second paragraph of the notice entitled, "Proposed Collection," the annual reporting burden reflected in the notice is corrected to read: "*Estimated Number of Respondents:* 100; *Estimated Number of Responses per Respondent:* 1; *Average Burden Hours Per Response:* 3; and *Estimated Total Annual Burden Hours Requested:* 300. The estimated annualized cost to respondents is $10,500."

All other information in the notice is correct and remains unchanged.

Dated: March 2, 2010.

Mikia Currie,

Office of Policy for Extramural Research Administration, OD, National Institutes of Health.

[FR Doc. 2010–5020 Filed 3–9–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Centers for Medicare & Medicaid Services; Delegation of Authority

Notice is hereby given that I have delegated to the Administrator, Centers for Medicare & Medicaid Services (CMS), or his or her successor, the authorities currently vested in the Secretary under section 1135 [42 U.S.C. 1320b–5] of Title XI of the Social Security Act, and as may hereafter be amended, to temporarily waive or modify requirements during certain emergencies or disasters that are related to Medicare, Medicaid, and the Children's Health Insurance Programs as they pertain to the mission of CMS.

The authorities under section 1135 [42 U.S.C. 1320b–5] of the Social Security Act, and as may hereafter be amended, may be re-delegated.

Limitations

1. The authority to make the initial decision to invoke the waiver authorities under section 1135 [42 U.S.C. 1320b–5] upon the occurrence of the two conditions precedent specified in section 1135(g) [42 U.S.C. 1320b–5(g)] is excluded from this delegation and is reserved by me.

2. The following authorities under section 1135 [42 U.S.C. 1320b–5] of the Social Security Act, and as may hereafter be amended, are excluded from this delegation of authority:

—*Section 1135(b)(7)* pertaining to sanctions and penalties that arise from noncompliance with certain requirements of regulations promulgated under section 264(c) of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) [42 U.S.C. 1320d–2 note]. The authority to waive the HIPAA regulations at 45 of the Code of Federal Regulations, Part 164 will continue to be held by me.

—*Section 1135(d)* to provide a certification and advance written notice to Congress at least two days before exercising the authority with respect to an emergency area is reserved by me.

—*Section 1135(f)* to report to Congress regarding the approaches used to accomplish the purposes described in section 1135(a) [42 U.S.C. 1320b–5] of the Social Security Act, including an evaluation of such approaches and recommendations for improved approaches should the need for such emergency authority arise in the future is reserved by me.

3. The authorities under section 1135 [42 U.S.C. 1320b–5] shall be exercised under the Department's policy on regulations and the existing delegation of authority to approve and issue regulations.

I hereby affirm and ratify any actions taken by the Administrator, CMS, or his or her subordinates, which involved the exercise of the authorities under section 1135 [42 U.S.C. 1320b–5] delegated herein prior to the effective date of this delegation of authority.

This delegation of authority is effective immediately.

Authority: 44 U.S.C. 3101.

Kathleen Sebelius,

Secretary.

[FR Doc. 2010–4992 Filed 3–9–10; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Substance Abuse Prevention; Notice of Cancellation of Meeting

Pursuant to Public Law 92–462, notice is hereby given of a cancellation of the March 8, 2010 meeting of the Substance Abuse and Mental Health Services Administration (SAMHSA) Drug Testing Advisory Board (DTAB).

Public notice was given in the **Federal Register** on February 19, 2010 (Volume

75, Number 33, and Page 7483) that the DTAB would be meeting on March 8, 2010, in the Sugarloaf and Seneca Conference Rooms, 1 Choke Cherry Road, Rockville, Maryland. The meeting was canceled due to unforeseen circumstances. An alternate date, time and location for the meeting will be announced in the **Federal Register** when arrangements have been made.

Members of the public wishing further information concerning this cancellation notice or any future meetings of the DTAB should contact the Designated Federal Official, Donna M. Bush, PhD, 1 Choke Cherry Road, Room 2–1033, Rockville, MD 20857, Telephone: 240–276–2600, FAX: 240–276–2610.

Toian Vaughn,

Committee Management Officer, Substance Abuse and Mental Health Services Administration.

[FR Doc. 2010–5076 Filed 3–9–10; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary and Alternative Medicine Announcement of Workshop on Natural Products

ACTION: Notice.

SUMMARY: As part of its strategic planning process, the National Center for Complementary and Alternative Medicine (NCCAM) invites the public to attend and observe at a Workshop on Natural Products. The purpose of this workshop is to inform the NCCAM's third strategic plan by identifying particularly promising areas with the potential to yield new information about CAM natural product treatments.

The Workshop will take place on March 26, 2010 in Bethesda, Maryland. Those interested in CAM research are particularly encouraged to attend. Seating is limited.

Background: The National Center for Complementary and Alternative Medicine (NCCAM) was established in 1998 with the mission of exploring complementary and alternative healing practices in the context of rigorous science, training CAM researchers, and disseminating authoritative information to the public and professionals.

To date, NCCAM's efforts to rigorously study CAM, to train CAM researchers, and to communicate with the public and professionals, have been guided by NCCAM's previous strategic plans, located on the NCCAM Web site at *http://nccam.nih.gov/about/plans*.

Participating: The Workshop will take place on March 26, 2010 from 8:15 a.m. to 4:30 p.m. on the NIH campus in Bethesda, Maryland.

FOR FURTHER INFORMATION CONTACT: To request more information, visit the NCCAM Web site at *http://nccam.nih.gov,* call Carina May at 301–915–9763, or e-mail *CMay@Thehillgroup.com*.

Dated: March 3, 2010.

Jack Killen,

Deputy Director, National Center for Complementary and Alternative Medicine, National Institutes of Health.

[FR Doc. 2010–5164 Filed 3–9–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Board on Radiation and Worker Health (ABRWH or Advisory Board), National Institute for Occupational Safety and Health (NIOSH)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC), announces the following meeting of the aforementioned committee:

Time and Date: 11 a.m.–3 p.m., March 31, 2010.

Place: Audio Conference Call via FTS Conferencing. The USA toll free dial in number is 1(866)659–0537 with a pass code of 9933701.

Status: Open to the public, but without a public comment period.

Background: The Advisory Board was established under the Energy Employees Occupational Illness Compensation Program Act of 2000 to advise the President on a variety of policy and technical functions required to implement and effectively manage the new compensation program. Key functions of the Advisory Board include providing advice on the development of probability of causation guidelines which have been promulgated by the Department of Health and Human Services (HHS) as a final rule, advice on methods of dose reconstruction which have also been promulgated by HHS as a final rule, advice on the scientific validity and quality of dose estimation and reconstruction efforts being performed for purposes of the compensation program, and advice on petitions to add classes of workers to the Special Exposure Cohort (SEC).

In December 2000, the President delegated responsibility for funding, staffing, and operating the Advisory Board to HHS, which subsequently delegated this authority to the CDC. NIOSH implements this responsibility for CDC. The charter was issued on August 3, 2001, renewed at appropriate intervals, most recently, August 3, 2009, and will expire on August 3, 2011.

Purpose: This Advisory Board is charged with (a) Providing advice to the Secretary, HHS, on the development of guidelines under Executive Order 13179; (b) providing advice to the Secretary, HHS, on the scientific validity and quality of dose reconstruction efforts performed for this program; and (c) upon request by the Secretary, HHS, advising the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is reasonable likelihood that such radiation doses may have endangered the health of members of this class.

Matters to be Discussed: The agenda for the conference call includes: SEC Petitions for: Canoga Avenue Facility (Los Angeles County, CA), University of Rochester Atomic Energy Project, Blockson Chemical, and Chapman Valve; NIOSH 10–Year Review of OCAS Program; OCAS Facility Records Search Methods; NIOSH Office of Compensation Analysis and Support Analysis of SEC Class Definitions; Board Subcommittee and Work Group Updates; and, OCAS SEC Petition Evaluations Update for May 2010 Board Meeting.

The agenda is subject to change as priorities dictate.

Because there is not a public comment period, written comments may be submitted. Any written comments received will be included in the official record of the meeting and should be submitted to the contact person below in advance of the meeting.

Contact Person for More Information: Theodore M. Katz, M.P.A., Executive Secretary, NIOSH, CDC, 1600 Clifton Road, NE., Mailstop E–20, Atlanta, GA 30333, Telephone: (513)533–6800, Toll Free: 1(800)CDC–INFO, E-mail *ocas@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: March 3, 2010.

Elaine L. Baker,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2010–5159 Filed 3–9–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Wellstone Muscular Dystrophy.

Date: March 18–19, 2010.

Time: 8 a.m. to 6 a.m.

Agenda: To review and evaluate grant applications.

Place: The Embassy Suites Hotel, 1250 22nd Street NW., Washington, DC 20037.

Contact Person: Raul A. Saavedra, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS, NSC; 6001 Executive Blvd., Ste. 3208, Bethesda, MD 20892–9529, 301–496–9223, *saavedrr@ninds.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. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: March 5, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–5149 Filed 3–9–10; 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 Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; Neurofibromatosis.

Date: March 18, 2010.

Time: 12 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Contact Person: Richard D. Crosland, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–594–0635, *rc218u@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 of Neurological Disorders and Stroke Special Emphasis Panel; SPOTRIAS.

Date: March 23–24, 2010.

Time: 8 a.m. to 6 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Mayflower Hotel, 1127 Connecticut Avenue, NW., Washington, DC 20036.

Contact Person: Richard D. Crosland, PhD, Scientific Review Administrator, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS/Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–594–0635, *rc218u@nih.gov*.

(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: March 3, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–5145 Filed 3–9–10; 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; Substance Abuse and Smoking Prevention.

Date: March 26, 2010.

Time: 11 a.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: Anna L. Riley, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3114, MSC 7759, Bethesda, MD 20892, 301–435–2889, *rileyann@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Review of Member Conflict Applications for BSPH.

Date: March 29, 2010.

Time: 2 p.m. to 5:30 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: Mark P. Rubert, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5218, MSC 7852, Bethesda, MD 20892, 301–435–1775, *rubertm@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Epidemiology of Diseases of Aging.

Date: March 31, 2010.

Time: 12 p.m. to 2 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call)

Contact Person: Heidi B. Friedman, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 1012A, MSC 7770, Bethesda, MD 20892, 301–379–5632, *hfriedman@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflicts: Cell Biology.

Date: April 13–14, 2010.

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: Jonathan Arias, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5170, MSC 7840, Bethesda, MD 20892, 301–435–2406, *ariasj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Vectors and Parasites.

Date: April 15–16, 2010.

Time: 8 a.m. to 4 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Virtual Meeting)

Contact Person: Rolf Menzel, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3196, MSC 7808, Bethesda, MD 20892, 301–435–0952, *menzelro@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: March 4, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–5143 Filed 3–9–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Beeson Meeting.

Date: April 28–29, 2010.

Time: 4 p.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard By Marriott Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: William Cruce, PhD, Scientific Review Officer, National Institute on Aging, Scientific Review Branch, Gateway Building 2C–212, 7201 Wisconsin Ave., Bethesda, MD 20814, 301–402–7704, *crucew@nia.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: March 4, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–5141 Filed 3–9–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel, Nursing Home Research.

Date: May 7, 2010.

Time: 8 a.m. to 12 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Jeannette L. Johnson, PhD, Scientific Review Officer, National Institutes on Aging, National Institutes of Health, 7201 Wisconsin Avenue, Suite 2C212, Bethesda, MD 20892. 301–402–7705. *JOHNSONJ9@NIA.NIH.GOV.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: March 4, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–5181 Filed 3–9–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Liver Disease Ancillary Studies.

Date: April 2, 2010.

Time: 1 p.m. to 2:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892. (Telephone Conference Call.)

Contact Person: Paul A. Rushing, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 747, 6707 Democracy Boulevard, Bethesda, MD 20892–5452. (301) 594–8895. *rushingp@extra.niddk.nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Microbiota and Immunity Program Projects.

Date: April 7, 2010.

Time: 8 a.m. to 4:45 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard Arlington Crystal City, 2899 Jefferson Davis Highway, Arlington, VA 22202.

Contact Person: Lakshmanan Sankaran, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes of Health, Room 755, 6707 Democracy Boulevard, Bethesda, MD 20892–5452. (301) 594–7799. *ls38z@nih.gov.*

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, Chronic Kidney Disease Ancillary Studies.

Date: April 12, 2010.
Time: 1 p.m. to 3 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892. (Telephone Conference Call.)
Contact Person: Robert Wellner, PhD, Scientific Review Officer, Review Branch, DEA, NIDDK, National Institutes Of Health, Room 757, 6707 Democracy Boulevard, Bethesda, MD 20892–5452. (301) 594–4721. *rw175w@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: March 3, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–5019 Filed 3–9–10; 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 Conflict: Cellular and Developmental Neuroscience.
Date: March 24, 2010.
Time: 1 p.m. to 5 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892. (Telephone Conference Call).
Contact Person: Deborah L. Lewis, PhD, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4183, MSC 7850, Bethesda, MD 20892, 301–408–9129, *lewisdeb@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 2, 2010.

Jennifer Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2010–5018 Filed 3–9–10; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Bureau of Health Professions; All Advisory Committee Meeting; Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: Bureau of Health Professions All-Advisory Committee Meeting (AACM).
Dates and Times: April 21, 2010, 8 a.m.–5 p.m.
Place: Doubletree Hotel & Executive Meeting Center, 8120 Wisconsin Avenue, Bethesda, MD 20814.
Telephone: 301–652–2000.
Status: The meeting will be open to the public.
Purpose: The purpose of the meeting is to provide a venue for the Bureau of Health Professions' (BHPr) four advisory committees [the Council on Graduate Medical Education (COGME), the Advisory Committee on Training in Primary Care Medicine and Dentistry (ACTPCMD), the Advisory Committee on Interdisciplinary, Community-Based Linkages (ACICBL), and the National Advisory Council on Nurse Education and Practice (NACNEP)] to continue their joint work on interdisciplinary education and practice, and to also discuss and identify future opportunities for collaboration.
Agenda: The AACM agenda will include updates on Bureau and Departmental priorities, discussion of the joint work on interdisciplinary education and practice, and proposals for future Advisory Committee collaboration. Agenda items are subject to change as priorities dictate.
For Further Information Contact:
Anyone interested in obtaining a roster of members, minutes of the meeting, or other relevant information can contact the Bureau of Health Professions, Office of the Associate Administrator, 5600 Fishers Lane, room 9–05, Rockville, Maryland, 20857, telephone (301) 443–5794. Information can also be found at the following Web site: *http://bhpr.hrsa.gov/.*

Dated: March 2, 2010.

Sahira Rafiullah,

Director, Division of Policy and Information Coordination.

[FR Doc. 2010–5006 Filed 3–9–10; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0107]

Expanded Access to Direct-Acting Antiviral Agents for the Treatment of Chronic Hepatitis C Infection in Patients With Unmet Medical Need; Public Hearing; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public hearing; request for comments.

SUMMARY: The Food and Drug Administration (FDA or the agency) is announcing a public hearing to obtain input on the scope and implementation of potential expanded access programs with direct-acting antiviral agents (DAAs) for the treatment of chronic hepatitis C (CHC) infection in patients with unmet medical need. This public hearing is being held to obtain comments from the public on eligibility criteria that should be used for patient enrollment in expanded access protocols involving DAAs and to elicit suggestions for designs of protocols for treatment investigational new drug applications (INDs) involving DAAs and other expanded access protocols. In addition, the agency would like public input on types of studies that should be conducted to obtain information on patients with unmet medical need including those with the greatest risk of progression of liver disease and/or the lowest predicted virologic response rates.

DATES: The public hearing will be held April 30, 2010, from 9 a.m. to 4 p.m. The meeting may be extended or may end early depending on the level of public participation. Submit written or electronic requests for oral presentations and comments by April 8, 2010 (see section III of this document for details). Written or electronic comments will be accepted after the hearing until June 25, 2010 (see section V of this document for details).

ADDRESSES: The public hearing will be held at the Hilton Hotel, 1750 Rockville Pike, Rockville, MD 20852. Additional information on parking and public transportation may be accessed at *http://*

www1.hilton.com/en_US/hi/hotel/IADMRHF-Hilton-Washington-DC-Rockville-Hotel-Executive-Meeting-Ctr-Maryland/index.do. (FDA has verified the Web site addresses throughout this document, but FDA is not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.) Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Submit electronic comments to *http://www.regulations.gov*. All comments should be identified with the docket number found in brackets in the heading of this document. Transcripts of the hearing will be available for review at the Division of Dockets Management and on the Internet at *http://www.regulations.gov* approximately 45 days after the hearing (see section VI of this document).

FOR FURTHER INFORMATION CONTACT: Susie Dill, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6183, Silver Spring, MD 20993–0002, 301–796–3437, FAX: 301–847–8753, e-mail: *AccessToDAA@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

A. CHC

In the United States, hepatitis C virus infection causes 20 percent of all cases of acute viral hepatitis and from 70 to 90 percent of all cases of hepatocellular carcinoma. An estimated 3.2 million Americans are chronically infected with hepatitis C virus. CHC currently is the leading cause in the United States for liver transplantation, and modeling suggests that without effective treatment interventions, significant increases in CHC-associated liver morbidity and/or mortality could result.

According to treatment guidelines set forth by the American Association for the Study of Liver Diseases, the current standard of care (SOC) for treatment of CHC is a pegylated interferon administered in combination with ribavirin (See Marc G. Ghany, et al., "Diagnosis, Management, and Treatment of Hepatitis C: An Update," *AASLD Practice Guidelines*, (2009), available at *http://www.aasld.org/practiceguidelines/Pages/SortablePracticeGuidelinesAlpha.aspx*). Overall, following SOC treatment, sustained virologic response (SVR) occurs in about 40 to 45 percent of patients with viral genotype 1, with lower SVR rates for blacks and human immunodeficiency virus (HIV) co-infected patients. Pegylated interferons and ribavirin are difficult to tolerate and can cause significant adverse reactions that limit treatment in many patients or result in substantial morbidity. Therefore, new drugs are needed (and many are in development) to increase SVR rates when added to an SOC, potentially to shorten the duration of interferon-based regimens, or to replace components of SOC regimens in patients who cannot tolerate interferons or ribavirin. New drugs also are needed to construct regimens in patients with decompensated cirrhosis and in patients undergoing liver transplant. One option for these patients may be early access to these developing drug products through the "expanded access" regulatory scheme.

B. Authority for Expanded Access

FDA regulations provide for treatment INDs or other access protocols for patients with serious or immediately life-threatening illnesses who have unmet medical need. See the Expanded Access to Investigational Drugs for Treatment Use Final Rule (Expanded Access Rule) (74 FR 40900, August 13, 2009). Under these regulations, a treatment IND, which permits patients access to unapproved drug products under certain circumstances prior to final agency approval, is possible when the following criteria have been met:

(1) The drug is being investigated in a controlled clinical trial under an IND designed to support a marketing application for the expanded access use, or all clinical trials of the drug have been completed;

(2) The sponsor is actively pursuing marketing approval of the drug for the expanded access use with due diligence; and

(3) There is sufficient clinical evidence of safety and effectiveness to support the treatment use (21 CFR 312.320(a)).

Alternatively, individual patient INDs and treatment access protocols for intermediate-sized populations are sometimes possible earlier in drug development (21 CFR 312.310) (IND use for treatment of individual patient by licensed physician)); 21 CFR 312.315 (IND use for treatment of patient population smaller than that typical of treatment IND). Proposed use under each of these three options also must meet the criteria set forth in 21 CFR 312.305 (requirements for all expanded access uses).

C. Expanded Access in CHC Context

Some patients with CHC who have not responded to approved treatments and/or who are at substantial risk of liver disease progression may benefit from access to new therapeutic options before approval through the Expanded Access Rule. On the other hand, receiving preapproval treatment access via a treatment protocol may have potential risks such as adverse reactions or the development of drug or drug-class resistance.

Historically, early access programs with antiretrovirals for the treatment of HIV allowed many people to gain access to life-saving drugs. For some individuals, however, early access to a drug resulted in what amounted to sequential monotherapy and the emergence of multidrug resistance. Similar to HIV treatment concerns, drug resistance and drug-class resistance are concerns for DAAs to treat CHC. Because treatment of CHC requires multiple agents to achieve acceptable SVR rates and to reduce the emergence of drug resistance to single agents or drug classes, treatment INDs that include two or more investigational agents or that allow for co-enrollment in several treatment IND programs are options to consider, particularly for previous null responders or for patients who cannot take interferon-based regimens. However, the use of multiple agents in the context of a treatment IND adds to the complexity of the implementation and design of treatment IND protocols. In light of the foregoing, FDA is soliciting advice from the public on how treatment access protocols for hepatitis C DAAs may best be designed.

II. Scope of the Public Hearing

FDA is interested in obtaining public comment on the following issues related to expanded access of DAAs for the treatment of CHC:

1. What types of patients with CHC are most appropriate for participation in DAA expanded access for CHC with regard to disease stage, previous treatment, and other disease characteristics?

2. Under what circumstances and in which populations would early access to a single DAA be appropriate?

3. Under what circumstances and in which populations would early access to multiple DAAs be appropriate?

4. How can pharmaceutical companies, government, academia, and community physicians and activists collaborate to provide for the treatment use of multiple new agents with the goal of maximizing response and reducing the emergence of drug or multidrug resistance?

5. What potential adverse reactions should be contemplated in formulating DAA treatment IND use protocols?

6. How can pharmaceutical companies, government, academia, and community physicians and activists collaborate to provide for the treatment use of multiple new agents with the goal of maximizing response and reducing adverse reactions?

7. In the course of developing DAAs for marketing, what types of studies should be conducted to best address unmet medical needs for patients with CHC including those with the greatest risk of progression of liver disease and/or the lowest predicted virologic response rates? Examples of studies that help to support clinical protocols or treatment use protocols in populations of unmet medical need may include renal and hepatic impairment studies and drug-drug interaction studies with antiretrovirals.

III. Attendance and/or Participation in the Public Hearing

The public hearing is free and seating will be on a first-come, first-served basis. Attendees who do not wish to make an oral presentation do not need to register.

If you wish to make an oral presentation during the hearing, you must register by submitting a written or electronic request by close of business on April 8, 2010, to Susie Dill (see **FOR FURTHER INFORMATION CONTACT**). You must provide your name, title, business affiliation (if applicable), address, telephone and fax numbers, e-mail address, and type of organization you represent (e.g., industry, consumer organization). You also should submit a brief summary of the presentation, including the discussion topic(s) that will be addressed and the approximate time requested for your presentation. We encourage individuals and organizations with common interests to consolidate or coordinate their presentations to allow adequate time for each request for presentation. Persons registered to make an oral presentation should check in before the hearing.

Participants should submit a copy of each presentation to Susie Dill (see **FOR FURTHER INFORMATION CONTACT**). We will file the hearing schedule, indicating the order of presentation and the time allotted to each person, with the Division of Dockets Management (see **ADDRESSES**). We will mail, e-mail, or telephone the schedule to each participant before the hearing. In anticipation of the hearing presentations moving ahead of schedule, participants are encouraged to arrive early to ensure their designated order of presentation. Participants who are not present when called risk forfeiting their scheduled time.

If you need special accommodations due to a disability, please contact Susie Dill (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance.

IV. Notice of Hearing Under 21 CFR Part 15

The Commissioner of Food and Drugs is announcing that the public hearing will be held in accordance with part 15 (21 CFR part 15). The hearing will be conducted by a presiding officer, who will be accompanied by FDA senior management from the Office of the Commissioner and the Center for Drug Evaluation and Research.

Under § 15.30(f), the hearing is informal and the rules of evidence do not apply. No participant may interrupt the presentation of another participant. Only the presiding officer and panel members may question any person during or at the conclusion of each presentation (21 CFR 15.30(e)). Public hearings under part 15 are subject to FDA's policy and procedures for electronic media coverage of FDA's public administrative proceedings (part 10 (21 CFR part 10), subpart C), (21 CFR 10.203(a)). Under § 10.205, representatives of the electronic media may be permitted, subject to certain limitations, to videotape, film, or otherwise record FDA's public administrative proceedings, including presentations by participants. The hearing will be transcribed as stipulated in § 15.30(b) (see section VI of this document for more details). To the extent that the conditions for the hearing as described in this document conflict with any provisions set out in part 15, this notice acts as a waiver of those provisions as specified in § 15.30(h).

V. Request for Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments for consideration. Persons who wish to provide additional materials for consideration should file these materials with the Division of Dockets Management. You should annotate and organize your comments to identify the specific questions identified by the topic to which they refer. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

VI. Transcripts

Please be advised that as soon as a transcript is available, it will be accessible at *http://www.regulations.gov*. It may be viewed at the Division of Dockets Management (see **ADDRESSES**). A transcript also will be available in either hardcopy or on CD–ROM, after submission of a Freedom of Information request. Written requests are to be sent to the Division of Freedom of Information (HFI–35), Office of Management Programs, Food and Drug Administration, 5600 Fishers Lane, rm. 6–30, Rockville, MD 20857.

Dated: March 2, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–5055 Filed 3–9–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

Privacy Act of 1974; Retirement of Department of Homeland Security Federal Emergency Management Agency System of Records

AGENCY: Privacy Office, DHS.

ACTION: Notice of retirement of a Privacy Act system of records notice.

SUMMARY: In accordance with the Privacy Act of 1974 the Department of Homeland Security is giving notice that it proposes to retire Department of Homeland Security Federal Emergency Management Agency U.S. Fire Administration—001 9/11 Heroes Stamp Act of 2001 System of Records, July 26, 2005.

DATES: *Effective Date:* April 9, 2010.

FOR FURTHER INFORMATION CONTACT: For general questions please contact: Delia Davis (202–646–3808), Privacy Officer, Federal Emergency Management Agency, Department of Homeland Security, Washington, DC 20472. For privacy issues please contact: Mary Ellen Callahan (703–235–0780), Chief Privacy Officer, Privacy Office, U.S. Department of Homeland Security, Washington, DC 20528.

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Homeland Security (DHS) Federal Emergency Management Agency (FEMA) U.S. Fire Administration (USFA) is giving notice that it proposes to retire DHS/FEMA/USFA—001 9/11 Heroes Stamp Act of 2001 System of Records (70 FR 43218, July 26, 2005).

This system was originally established to collect and maintain records for the purpose of determining an individual applicant's qualification for and/or compensation to benefits under the 9/11 Heroes Stamp Act of 2001. While this fund originated through legislation, all funds have now been exhausted so the program is closed pursuant to the originating legislation. The legislation stated that all funds collected through the sale of the 9/11 Heroes Stamp be distributed.

The records in the system are considered permanent Federal Government records, as 9/11 records are permanent records. NARA will not destroy the records once the system is retired and records are transferred. In accordance with the records schedule for the 9/11 Heroes Stamp Act of 2001 File System, records are transferred to NARA one year and six months after the closure of the file. All records within this system will be archived under records schedule number N1–311–04–05.

Retiring this system of records notice will have no adverse impacts on individuals, but will promote the overall streamlining and management of DHS Privacy Act systems of records.

Dated: March 1, 2010.

Mary Ellen Callahan,

Chief Privacy Officer, Department of Homeland Security.

[FR Doc. 2010–5010 Filed 3–9–10; 8:45 am]

BILLING CODE 9110–17–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control No. 1615–0037]

Agency Information Collection Activities: Form I–730, Revision of an Existing Information Collection Request; Comment Request

ACTION: 60-Day Notice of Information Collection under Review: Form I–730, Refugee/Asylee Relative Petition.

The Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until May 10, 2010.

Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to the Department of Homeland Security (DHS), USCIS, Chief, Regulatory Products Division, Clearance Officer, 111 Massachusetts Avenue, NW., Washington, DC 20529–2210. Comments may also be submitted to DHS via facsimile to 202–272–8352 or via e-mail at *rfs.regs@dhs.gov.* When submitting comments by e-mail, please make sure to add OMB Control No. 1615–0037 in the subject box.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the 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 collection of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collection of information on those who are to respond, including 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.

Overview of This Information Collection

(1) *Type of Information Collection:* Revision of an existing information collection.

(2) *Title of the Form/Collection:* Refugee/Asylee Relative Petition.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–730. U.S. Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Form I–730 will be used by an asylee or refugee to file on behalf of his or her spouse and/or children provided that the relationship to the refugee/asylee existed prior to their admission to the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 86,400 responses at 35 minutes (.583) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 50,371 annual burden hours.

If you need a copy of the information collection instrument, please visit the Web site at: *http://www.regulations.gov/.*

We may also be contacted at: USCIS, Regulatory Management Division, 111 Massachusetts Avenue, NW., Washington, DC 20529–2210, Telephone number 202–272–8377.

Dated: March 5, 2010.

Sunday Aigbe,

Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services.

[FR Doc. 2010–5140 Filed 3–9–10; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS-R9-ES-2010-N044] [92220-1113-0000-F5]

Proposed Information Collection; OMB Control Number 1018-0094; Federal Fish and Wildlife Permit Applications and Reports—Native Endangered and Threatened Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (Fish and Wildlife Service) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act 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 November 30, 2010. We 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.

DATES: To ensure that we are able to consider your comments on this IC, we must receive them by May 10, 2010.

ADDRESSES: Send your comments on the IC to Hope Grey, Information Collection Clearance Officer, Fish and Wildlife Service, MS 222–ARLSQ, 4401 North Fairfax Drive, Arlington, VA 22203 (mail); or *hope_grey@fws.gov* (e-mail).

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Hope Grey by mail or e-

mail (see ADDRESSES) or by telephone at (703) 358–2482.

SUPPLEMENTARY INFORMATION:

I. Abstract

Our Endangered Species Program uses information that we collect on permit applications to determine the eligibility of applicants for permits requested in accordance with the criteria in various Federal wildlife conservation laws, including:

- Endangered Species Act (16 U.S.C. 1531 et seq.).
- Migratory Bird Treaty Act (16 U.S.C. 703 et seq.).
- Lacey Act (16 U.S.C. 3371 et seq.).
- Bald and Golden Eagle Protection Act (16 U.S.C. 668).
- Marine Mammal Protection Act (16 U.S.C. 1374).

Service regulations implementing these statutes and treaties are in Chapter I, Subchapter B of Title 50 of the Code of Federal Regulations (CFR). These regulations stipulate general and specific requirements that when met allow us to issue permits to authorize activities that are otherwise prohibited. This IC includes the following permit application forms and the reporting requirements for each permit:

(1) FWS Form 3-200-54 - Enhancement of Survival Permits Associated with Safe Harbor Agreements and Candidate Conservation Agreements with Assurances.

(2) FWS Form 3-200-55 - Permits for Scientific Purposes, Enhancement of Propagation or Survival (i.e, Recovery) and Interstate Commerce.

(3) FWS Form 3-200-56 - Incidental Take Permits Associated with a Habitat Conservation Plan.

II. Data

OMB Control Number: 1018-0094.

Title: Federal Fish and Wildlife Permit Applications and Reports—Native Endangered and Threatened Species.

Service Form Number(s): 3-200-54, 3-200-55, and 3-200-56.

Type of Request: Extension of a currently approved collection.

Affected Public: Individuals/households, businesses, State and local agencies, private organizations, and scientific and research institutions.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion for application forms and notifications; annually for reports.

Estimated Annual Nonhour Burden: $64,450 for fees associated with permit applications.

Activity	Number of annual respondents	Number of annual responses	Completion time per response	Annual burden hours
3-200-54 – permit application	11	11	3 hours	33
3-200-54 – annual report	64	64	8 hours	512
3-200-54 – notification of incidental take	1	1	1 hour	1
3-200-54 – notification of change in landowner	1	1	1 hour	1
2-200-55 – permit application	579	579	4 hours	2,316
3-200-55 – annual report	1,034	1,034	8 hours	8,272
3-200-55 – notification of escape of living wildlife	1	1	1 hour	1
3-200-56 – permit application	60	60	3 hours	180
3-200-56 – annual report	748	748	10 hours	7,480
Totals	2,499	2,499		18,796

III. Request for Comments

We invite comments concerning this IC on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit 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 us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: February 26, 2010.

Hope Grey,

Information Collection Clearance Officer, Fish and Wildlife Service.

FR Doc. 2010–5030 Filed 3–9–10; 8:45 am

BILLING CODE 4310–55–S

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2009–N231; 10120–1113–0000–F5]

Endangered Wildlife and Plants; Permits

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability of a permit application; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), invite the public to comment on an application for a permit amendment, which would allow Service employees and their designated agents to conduct enhancement of survival activities for a plant that was recently added to the List of Endangered and Threatened Plants (*Phyllostegia hispida*). The Endangered Species Act of 1973, as amended (Act), requires that we solicit public comment on this permit application involving endangered species.

DATES: To ensure consideration, please send your written comments by April 9, 2010.

ADDRESSES: Program Manager, Endangered Species, Ecological Services, U.S. Fish and Wildlife Service, 911 NE 11th Avenue, Portland, OR 97232–4181.

FOR FURTHER INFORMATION CONTACT: Linda Belluomini, Fish and Wildlife Biologist, at the above address or by telephone (503–231–6131) or fax (503–231–6243).

SUPPLEMENTARY INFORMATION: The following applicant has applied for a recovery permit to conduct certain activities with an endangered species under section 10(a)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*). We are soliciting review of and comment on this

application by local, State, and Federal agencies and the public.

Permit No. TE–702631

Applicant: Regional Director, Region 1, U.S. Fish and Wildlife Service, Portland, Oregon.

The permittee requests a permit amendment to allow Service employees, and their designated agents to remove/reduce to possession *Phyllostegia hispida* (no common name), a plant endemic to the island of Molokai, Hawaii. The purpose of these activities is to artificially propagate this species to enhance its chances of survival.

Public Comments

We are soliciting public review and comment on this recovery permit application. 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.

Please refer to the permit number for the application when submitting comments. All comments and materials we receive in response to this request will be available for public inspection, by appointment, during normal business hours at the above address.

Dated: January 20, 2010.

Cynthia U. Barry,

Regional Director, Region 1, U.S. Fish and Wildlife Service.

[FR Doc. 2010–4883 Filed 3–9–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–ES–2010–N047; 80221–1112–0000–F2]

San Diego County Water Authority Natural Communities Conservation Program/Habitat Conservation Plan, San Diego and Riverside Counties, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of corrected public meeting dates.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), advise the public of corrections to meeting dates we previously announced in error in the **Federal Register** on March 4, 2010. That previous notice announced the availability of a draft environmental impact report (EIR)/environmental impact statement (EIS), receipt of incidental take permit application, and notice of public meetings for the San Diego County Water Authority's (Water Authority/Applicant) draft Natural Communities Conservation Plan (NCCP)/Habitat Conservation Plan (HCP) prepared in application to us for an incidental take permit under the Endangered Species Act of 1973, as amended (Act).

DATES: *Comments:* Please send written comments on or before June 2, 2010.

Meetings: Two public meetings have been scheduled for the EIR, and we will accept comments for the EIS at these meetings. These public meetings will be held on the following dates:

1. March 17, 2010, 7 p.m. to 9 p.m., San Diego, CA.

2. March 18, 2010, 7 p.m. to 9 p.m., Escondido, CA.

ADDRESSES: *Comments:* Please send written comments to Mr. Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011. You may also submit comments by facsimile to (760) 431–5902.

Information and comments related specifically to the draft EIR and the California Environmental Quality Act should be submitted to Mr. Bill Tippets, San Diego County Water Authority, 4677 Overland Avenue, San Diego, CA 92123.

Meetings: The correct public meeting locations are:

1. *San Diego:* San Diego County Water Authority, 4677 Overland Avenue, San Diego, CA 92123.

2. *Escondido:* Escondido City Hall, Mitchell Room, 201 North Broadway, Escondido, CA 92025.

FOR FURTHER INFORMATION CONTACT: Ms. Karen A. Goebel, Assistant Field Supervisor, at the Carlsbad Fish and Wildlife Office address above; telephone (760) 431–9440.

SUPPLEMENTARY INFORMATION: We advise the public of corrected meeting dates we previously announced in error in the **Federal Register** on March 4, 2010 (75 FR 9921). See **DATES** and **ADDRESSES** for corrected meeting dates and locations.

The Applicant is requesting a permit to incidentally take 37 animal species and seeking assurances for 27 plant species (including 19 federally listed species) during the term of the proposed 55-year permit. The permit is needed to authorize take of listed animal species due to construction, operations, and maintenance activities in the approximately 992,000-acre (401,450-hectare) Plan Area in western San Diego County and south-central Riverside County, California. We are requesting public comment on the Draft NCCP/HCP, Draft Implementing Agreement, and Draft EIR/EIS. For more background information on the application, and where to obtain documents for review, see our March 4, 2010, notice.

Reasonable Accommodation

The public meetings are physically accessible to people with disabilities. Please make requests for specific accommodations to Bill Tippetts, San Diego County Water Authority, at (858) 522–6784, at least 5 working days prior to the meeting date.

Authority

We provide this notice under section 10(a) of the Act and Service regulations for implementing the National Environmental Policy Act of 1969 (40 CFR 1506.6). We will evaluate the application, associated documents, and comments submitted thereon to prepare a Final EIS. A permit decision will be made no sooner than 30 days after the publication of the Final EIS and completion of the Record of Decision.

Ken McDermond,

Deputy Regional Director, Pacific Southwest Region, Sacramento, California.

[FR Doc. 2010–5280 Filed 3–9–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNM915000L14200000.BJ0000]

Notice of Filing of Plats of Survey, NM

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of filing of Plats of Survey.

SUMMARY: The plats of survey described below are scheduled to be officially filed in the New Mexico State Office, Bureau of Land Management (BLM), Santa Fe, New Mexico, thirty (30) calendar days from the date of this publication.

SUPPLEMENTARY INFORMATION:

New Mexico Principal Meridian, New Mexico (NM)

The plat representing the dependent resurvey and survey in Township 12 South, Range 22 East, of the New Mexico Principal Meridian, accepted January 15, 2010, for Group 1096 NM.

The plat representing the dependent resurvey and survey, in Township 11

South, Range 22 East, of the New Mexico Principal Meridian, accepted January 15, 2010, for Group 1096 NM.

If a protest against a survey, as shown on any of the above plats is received prior to the date of official filing, the filing will be stayed pending consideration of the protest. A plat will not be officially filed until the day after all protests have been dismissed and become final or appeals from the dismissal affirmed.

A person or party who wishes to protest against any of these surveys must file a written protest with the New Mexico State Director, Bureau of Land Management, stating that they wish to protest.

A statement of reasons for a protest may be filed with the notice of protest to the State Director, or the statement of reasons must be filed with the State Director within thirty (30) days after the protest is filed.

FOR FURTHER INFORMATION CONTACT: These plats will be available for inspection in the New Mexico State Office, Bureau of Land Management, P.O. Box 27115, Santa Fe, New Mexico, 87502–0115. Copies may be obtained from this office upon payment. Contact Marcella Montoya at 505–954–2097, or *Marcella_Montoya@nm.blm.gov*, for assistance.

Stephen W. Beyerlein,

Acting, Chief, Branch of Cadastral Survey/ GeoSciences.

[FR Doc. 2010–5161 Filed 3–9–10; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R4–R–2009–N251; 40136–1265–0000–S3]

Central Arkansas National Wildlife Refuge Complex, Arkansas

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability: final comprehensive conservation plan and finding of no significant impact.

SUMMARY: We, the U.S. 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 the Central Arkansas National Wildlife Refuge (NWR) Complex, consisting of Bald Knob, Big Lake, Cache River, and Wapanocca National Wildlife Refuges. In the final CCP, we describe how we will manage the Central Arkansas NWR Complex over the next 15 years.

ADDRESSES: You may obtain a copy of the CCP by writing to: Mr. William R. Smith, Planning Team Leader, Central Arkansas National Wildlife Refuge Complex, 26320 Highway 33 South, Augusta, AR 72006. You may also access and download the document from the Service's Internet Web site: *http://southeast.fws.gov/planning/* under "Final Documents."

FOR FURTHER INFORMATION CONTACT: Mr. William R. Smith; telephone: 870/347–2074; fax: 870/347–2908; e-mail: *william_r_smith@fws.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we finalize the CCP process for the Central Arkansas NWR Complex. We started this process through a notice in the **Federal Register** on January 3, 2007 (72 FR 142). For more about the process, please see that notice.

The Central Arkansas NWR Complex is comprised of Bald Knob, Big Lake, Cache River, and Wapanocca National Wildlife Refuges. These four refuges are in eastern and central Arkansas and together encompass approximately 99,100 acres.

Significant issues identified in the CCP include management of the following: (1) Waterfowl, other migratory birds, and other native wildlife species; (2) bottomland hardwood reforestation; (3) moist-soil impoundments and croplands; (4) water quality; (5) invasive species; (6) land acquisition; and (7) visitor services (*e.g.,* hunting, fishing, wildlife observation, wildlife photography, environmental education and interpretation, access, and facilities).

Bald Knob National Wildlife Refuge

Bald Knob National Wildlife Refuge (NWR), near the town of Bald Knob in White County, Arkansas, was established in 1993 to protect and provide feeding and resting areas for migrating waterfowl, and now totals 16,100 acres of forested wetlands, moist-soil impoundments, and croplands. The refuge hosts one of the largest populations of wintering pintails in the State and is a crucial staging area for pintails migrating to the coastal areas of Louisiana and eastern Texas. The refuge has been named as an "Important Birding Area" by the Audubon Arkansas Board of Directors.

Big Lake National Wildlife Refuge

Big Lake National Wildlife Refuge (NWR), near the town of Manila in Mississippi County, Arkansas, was established in 1915 by executive order of President Woodrow Wilson, to serve as a reserve and breeding ground for native birds. The refuge encompasses 11,038 acres of lake and swamp habitats, including the 2,144-acre Big Lake Wilderness. Big Lake NWR provides important migratory bird habitat and is designated as a "National Natural Landmark Area." The American Bird Conservancy also has listed the refuge as a "Globally Important Bird Area."

Cache River National Wildlife Refuge

Cache River National Wildlife Refuge (NWR), near the towns of Augusta and Brinkley, Arkansas, was established in 1986 to provide critical wintering habitat for waterfowl and other migratory and resident wildlife species. Cache River NWR presently encompasses 66,350 acres of an approved land acquisition boundary of 185,574 acres within Jackson, Monroe, Prairie, and Woodruff Counties. Cache River NWR features some of the largest remaining tracts of bottomland hardwood forests within the Mississippi Alluvial Valley, and is designated as a "Wetland of International Importance." Cache River NWR is noted as part of the most important wintering habitats for mallards in North America.

Wapanocca National Wildlife Refuge

Wapanocca National Wildlife Refuge (NWR) is 20 miles northwest of Memphis, Tennessee, and near the town of Turrell, in Crittenden County, Arkansas. It was established in 1961 to provide a wintering area for migratory waterfowl, and presently encompasses 5,620 acres of agricultural land, grassland, bottomland hardwood forest, and flooded cypress/willow swamp. The refuge is important as a nesting area for resident wood ducks and provides significant habitat along the Mississippi River that is heavily used by migrating and wintering waterfowl. The American Bird Conservancy has listed the refuge as a "Continentally Important Bird Area."

Alternatives, Including the Preferred Alternative

A planning team comprised of Service personnel, State agency representatives, non-governmental organizations, and others developed three alternatives for managing the refuges over the next 15 years and chose Alternative C as the preferred alternative. A description of the three alternatives follows.

Alternative A—Maintain Current Management (No Action Alternative)

Under Alternative A, the "No Action" alternative, management would not

change from the current actions and direction. We would continue to restore, protect, and manage bottomland hardwood forests, wetlands, cropland units, moist-soil units, open water areas, grassland/scrub-shrub areas, and the Big Lake Wilderness. We would continue to focus management activities on afforestation and reforestation, restoration of wetlands, invasive plants and nuisance animals, cooperative farming, inventorying and monitoring, and priority public uses (*e.g.,* hunting, fishing, wildlife observation, wildlife photography, and environmental education and interpretation). We would acquire land from willing sellers, but only within the approved acquisition boundaries.

Alternative B—Minimal Management Alternative

Under Alternative B, the "Minimal Management" alternative, we would undertake minimal wildlife, habitat, and infrastructure management. In this "let nature take its course" alternative, there would be no more active reforestation efforts, no moist-soil impoundments and croplands, and no more road, beaver dam, or invasive species management and maintenance programs. Natural succession would be allowed to proceed unchecked, providing for development of early stage or successional forest habitat on abandoned lands, and no silvicultural treatments in existing forest stands would be conducted. All refuges would implement a custodial or passive stewardship approach to management and would monitor natural succession and wildlife populations over time. Quality and quantity of habitats for wildlife would be expected to decline, along with wildlife use of these habitats. There would likely be reduced associated public use, because roadways and facilities would not be maintained and the quality of visitor services would diminish. There would be no change in the acreage or amount of waterfowl sanctuaries. We would acquire land from willing sellers, but only within the approved acquisition boundaries.

Alternative C—Enhanced Habitat Management and Public Use Programs (Preferred Alternative)

By implementing Alternative C, the "Preferred" alternative, we will actively expand and improve habitat management and public use programs. We will intensify and enhance forest, moist-soil, scrub-shrub, grassland, and aquatic management programs in order to increase benefits for waterfowl, shorebirds, water birds, other migratory birds, and other species of native wildlife. Hydrologic, wetland, and forest restoration projects will also be expanded. Invasive plant and animal control projects will be increased. A full range of programs involving inventorying, monitoring, and researching will be developed and implemented to enable adaptive management. Habitat conservation and restoration will continue and expand through land acquired from willing sellers, but boundary expansions will also be pursued. Environmental education and interpretive programs will be improved as part of a comprehensive visitor services program. Opportunities for hunting, fishing, and wildlife observation will be expanded, and law enforcement coverage will be increased for more effective protection of resources and visitors. Additional staff will be recruited, additional equipment will be acquired, and improved facilities will be installed to enable implementation of these projects and programs.

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 solicited comments on the Draft Comprehensive Conservation Plan and Environmental Assessment (Draft CCP/EA) for the Central Arkansas NWR Complex for 30 days, as announced in the **Federal Register** on August 27, 2009 (74 FR 43716). A total of 24 individuals, representing landowners, citizens, conservation organizations, and State and Federal government agencies, attended 5 public meetings to discuss the Draft CCP/EA and 14 respondents provided comments. We reviewed all comments and have included them with our responses in the CCP.

Selected Alternative

We selected Alternative C, the planning team's preferred alternative, as the most reasonable alternative to implement the CCP. Under Alternative C, habitat and public use management will be enhanced and expanded overall, providing additional or increased benefits to refuge resources and visitor services and greater fulfillment of refuge purposes. With the implementation of Alternative C, the capacity and capability of the refuges to better manage the habitat and wildlife resources and to provide visitor services will greatly increase compared to Alternatives A or B. The additions to staffing and improvements to facilities under Alternative C will enhance effective refuge administration and visitor services.

Authority: This notice is published under the authority of the National Wildlife Refuge System Improvement Act of 1997, Public Law 105–57.

Dated: December 15, 2009.

Patrick Leonard,

Acting Regional Director.

[FR Doc. 2010–5071 Filed 3–9–10; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—ASTM International

Notice is hereby given that, on February 16, 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"), ASTM International ("ASTM") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing additions or changes to its standards development activities. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, ASTM has provided an updated list of current, ongoing ASTM standards activities originating between May, 2009, and September, 2009, designated as Work Items. A complete listing of ASTM Work Items, along with a brief description of each, is available at *http://www.astm.org.*

On September 15, 2004, ASTM filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on November 10, 2004 (69 FR 65226).

The last notification was filed with the Department on December 3, 2009. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on December 22, 2009 (74 FR 68078)

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 2010–5029 Filed 3–9–10; 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—Pistoia Alliance, Inc.

Notice is hereby given that, on January 27, 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") Pistoia Alliance, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages' under specified circumstances. Specifically, Infosys Technologies Ltd., Bridgewater, NJ; CambridgeSoft, San Diego, CA; Merck, Boston, MA; Collaborative Drug Discovery, Burlingame, CA; Royal Society of Chemistry, Cambridge, UNITED KINGDOM; Thomson Reuters HealthCare and Science, Philadelphia, PA; and EMBL/EBI, Hinxton, Cambridge, UNITED KINGDOM have been added 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 intends to file additional written notifications disclosing all changes in membership.

On May 28, 2009, Pistola Alliance, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on July 15, 2009 (74 FR 34364).

The last notification was filed with the Department on November 4, 2009. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on December 9, 2009 (74 FR 65157).

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 2010–5032 Filed 3–9–10; 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—Information Card Foundation

Notice is hereby given that, on January 29, 2010, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 ("the Act"), Information Card Foundation 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, Novell, Waltham, MA; and Intel, Hillsboro, OR 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 Information Card Foundation intends to file additional written notifications disclosing all changes in membership.

On June 2, 2008, Information Card Foundation filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 16, 2008 (73 FR 0883)

The last notification was filed with the Department on September 25, 2009. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 27, 2009 (74 FR 55257)

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 2010–5036 Filed 3–9–10; 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 Open Mobile Alliance

Notice is hereby given that, on January 13, 2008, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et sec.* ("the Act"), the Open Mobile Alliance ("OMA") 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, Arista Enterprises LLC, Fairbanks, AK; Beijing Leadtone Wireless Ltd., Chaoyang District, Beijing, PEOPLE'S REPUBLIC OF CHINA; Cinterion Wireless Modules, Munich, GERMANY; ConDel Technologies Inc., St. Jubel, TAIWAN; Dimark Software, Inc., Cupertino, CA; Enensys Technologies, Rennes, FRANCE; Garmin International Inc., Olathe, KS; GMIT GrnbH, Berlin, GERMANY; HTC Corporation, Taoyuan County, TAIWAN; Interop Technologies, Beirut, LEBANON; Kvaleberg AS, Oslo, NORWAY; MCTEL, Hector Otto, MONACO; Movenda SpA, Rome, ITALY; NDS Limited, Staines, Middlesex, UNITED KINGDOM; Neutral Tandem, Chicago, IL; Sagem Orga GmbH, Paderborn, GERMANY; Siodata Technologies, Hai Dian District, Beijing, PEOPLE'S REPUBLIC OF CHINA; Sofia Digital Ltd., Tampere, FINLAND; Solvix Technology Co., Ltd, Gangnam-gu, Seoul, REPUBLIC OF KOREA; Songdo Telecom, Inc., Yeonsu-gu, Incheon, REPUBLIC OF KOREA; S58 Networks, Milpitas, CA; Synclore Corporation, Tokyo, JAPAN; University of New Hampshire InterOperability Laboratory, Durham, NH; Verimatrix, Inc., San Diego, CA; Vobile, Inc., Santa Clara, CA; and Works Systems, mc, San Jose, CA, have been added as parties to this venture.

Also, Access Co., Ltd, Tokyo, JAPAN; Action Engine Corp. Redmond, WA; Adobe Systems Incorporated, San Francisco, CA; ALLTEL Communications, Inc., Little Rock, AR; AltGen Co., Ltd., Mapo-Gu, Seoul, REPUBLIC OF KOREA; Amiga Development India Pvt. Ltd., Pune, INDIA; Amrneon, Dublin, IRELAND; Anite Telecoms Ltd., Fleet, Hampshire, UNITED KINGDOM; Aricent, Gurgaon, INDIA; AtomiZ S.A., Paris, FRANCE;

BaA Systems, San Jose, CA; Beijing InfoThunder Technology Ltd., XiCheng District, Beijing, PEOPLE'S REPUBLIC OF CHINA; Beijing ZRRT Communications Technology, Co., Ltd., Haidian District, Beijing, PEOPLE'S REPUBLIC OF CHINA; Best of. the Web, Uniondale, NY; END Co., Ltd., Buk-gu, Daegu, REPUBLIC OF KOREA; Bridgewater Systems Corporation, Ottawa, Ontario, CANADA; Calton Hill Limited, Edinburgh, UNITED KINGDOM; Cambridge Silicon Radio plc, Cambridge, UNITED KINGDOM; Cell Guide, Rehorot, ISRAEL; Certicom Corp., Mississauga, Ontario, CANADA; Cisco Systems, Milpitas, CA; Clarity Communication Systems, Inc., Aurora, IL; ComEase Pte Ltd., SINGAPORE; CoinmWyse A/S, Lyngby, DENMARK; Comneon GrnbH, Nuernberg, GERMANY; Connectivity Communications Limited, London, UNITED KINGDOM; Credant Technologies, Addison, TX; Critical Software, SA, Coirnbra, PORTUGAL; Digital Connect PTE Ltd., SINGAPORE; Diversinet Corp., Toronto, Ontario, CANADA; eAccess Ltd., Minato—ku, Tokyo, JAPAN; Electric Pocket, Pontyneryneydd, Torfaen, UNITED KINGDOM; Elisa, Elisa, FINLAND; Eluon Corporation, Seocho-Gu, Seoul, REPUBLIC OF KOREA; End2End VAS APS, Aalborg SV, DENMARK; Entosys Co., Ltd., Mapo-gu, Seoul, REPUBLIC OF KOREA; Fenestrae By, The Hague, NETHERLANDS; Frost & Sullivan China, Beijing, PEOPLE'S REPUBLIC OF CHINA; fusionOne, San Jose, CA; GaeaSoft Corporation, Seoul, REPUBLIC OF KOREA; Hellosoft, Inc., Andhoa Pradesh, INDIA; HUNIT CO., LTD. Gangnam-gu, Seoul, REPUBLIC OF KOREA; Infocity, Inc., Tokyo, JAPAN; Infraware, Seoul, REPUBLIC OF KOREA; INKA Entworks, Inc., Kangnam-Gu, Seoul, KOREA; Intertrust Technologies Corporation, Sunnyvale, CA; Intrinsyc Sof tare International, Inc., Bellevue, WA; Jabber, Inc., Denver, CO; Kimia Solutions S.L., Madrid, SPAIN; KPN Mobile, Leeuwarden, NETHERLANDS; MarkAny Inc., Seoul, REPUBLIC OF KOREA; Mitsubishi Electric Corporation, Amagasaki-city, Hyogo, JAPAN; MobiCornp, Braga, PORTUGAL; Mobilaris AB, Lulea, SWEDEN; Mobilus, Inc., Buk-Gu, Daegu, REPUBLIC OF KOREA; Mobitel, d.d., Ljubljana, SLOVENIA; Monotype Imaging Inc., Woburn, MA; Motive, Inc., Austin, TX; M–Spatial Limited, Cambridge, UNITED KINGDOM; Nable Communications, Inc., Kangnam-gu, Seoul, REPUBLIC OF KOREA; NAGRAVISION, Cheseaux, SWITZERLAND; Navitime Japan Co., Ltd., Tokyo, JAPAN; Nemerix, Cambridge, UNITED KINGDOM; NewACT, Yokneam, ISRAEL; Nortel, Brampton, Ontario, CANADA; NXP Semiconductors, Eindhoven, NETHERLANDS; Optenet S.A, Madrid, SPAIN; OZ Communications, Inc., Montreal, Quebec, CANADA; Pacific DataVision, Inc., San Diego, CA; Panasonic, Yokohama, JAPAN; Pantech & Curitel Communications Inc., Seocho-gu, Seoul, REPUBLIC OF KOREA; Payzy Corp., Kiongtoey, Bangkok, THAILAND; Philips Electronics, Eindhoven, NETHERLANDS; Porss Technology Co., Ltd., Xicheng District, Beijing, PEOPLE'S REPUBLIC OF CHINA; Portugal Telecom Inovacao, S . A., Aveiro, PORTUGAL; Protect Software GmbH, Dortmund, GERMANY; RRD Reti Radiotelevisive Digitali Sri, Milan, ITALY; RSystems Inc., El Dorado Hills, CA; Rx Networks, Vancouver, BC, CANADA; SDC AG, Easel, SWITZERLAND; SEC Co. Ltd., Tokyo, JAPAN; Semiconductores Investigacion Y Diseno S.A., Madrid, SPAIN; SHARP Corporation, Hiroshima-City, Hiroshima, JAPAN; Siemens AG, Berlin, GERMANY; Silicon & Software Systems Limited, Leopardstown, Dublin, IRELAND; Softfront, Minato-ku, Tokyo, JAPAN; Sonim Technologies, Inc., San Mateo, CA; Sony Corporation, Tokyo, JAPAN; Soundbuzz Pte Ltd., SINGAPORE; Streamezzo, Paris, FRANCE; Sunpius mNobile, Hsinchu, TAIWAN; Swisscom Mobile Ltd., Ostermundigen, SWITZERLAND; Symbian, London, UNITED KINGDOM; Synapsy Mobile, Networks GmbH, Hirmnelstadt, GERMANY; Synkia Sp. z.o.o., Krolewska, POLAND; Telematica Instituut, An Enschede, NETHERLANDS; Telogic Sdn. Bhd., Petaling Jaya, Selangor, MALAYSIA; Thin Multimedia, Inc., Seocho-Ku, Seoul, REPUBLIC OF KOREA; THOMSON, Cesson-Sevigne, FRANCE; Time Warner, Dulles, VA; Toshiba Corporation, Tokyo, JAPAN; Trio Network Solutions Oy, Helsinki, FINLAND; TruePosition, Inc., Berwyn, PA; Ulticom Incorporated, Mt. Laurel, NJ; Unipier, Netanya, ISRAEL; Vantrix Corporation. Montreal, Quebec, CANADA; V–Enable Inc., San Diego, CA; Vidiator, Bellevue, WA; Virtual Logix, Montigny-le Bretonneux, France; Vishwak Solutions Pvt. Ltd., Chennai, INDIA; Webmessenger Inc., Tujunga, CA; weCornrn Limited, London, England, UNITED KINGDOM; Welgate Corp., Seocho Dong, Seoul, REPUBLIC OF KOREA; Widevine Technologies, Inc., Seattle, WA; Wipro Limited, Bangalore, Karnataka, INDIA; Wireless Services Corp., Bellevue, WA; WRG, Inc., Seongnam-Si, Gyeonggi-Do, REPUBLIC OF KOREA; XCome Technology Ltd., Sanchueng, Taipei, TAIWAN; Yahoo, Inc., Sunnyvale, CA, have withdrawn as parties to this venture.

The following members have changed their names: China United Telecommunications Corporation to China Unicorn; T–Mobile International AG to Deutsche Telekom AG, TMO; INTICUBE Corp. to Hansol Inticube; Purple Labs S.A. to Myriad Group AG; NeuStar Inc. to Neustar Inc.; O3SIS Information Technology to O3SIS AG; STMicroelectronics to ST–Ericsson; Tecnornen to Tecnomen Lifetree; Verizon Wireless to Verizon.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and the Forum intends to file additional written notifications disclosing all changes in membership.

On March 18, 1998, OMA filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on December 31, 1998 (63 FR 72333).

The last notification was filed with the Department on July 25, 2008. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on September 5, 2008 (73 FR 51850)

Patricia A. Brink,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 2010–5033 Filed 3–9–10; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF LABOR

Wage and Hour Division

Proposed Extension of the Approval of Information Collection Requirements

AGENCY: Wage and Hour Division, Labor.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance 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. Currently, the Wage and Hour Division is soliciting comments concerning its proposal to extend the Office of Management and Budget (OMB) approval of the Information Collection: Federal Service Contracts 29 CFR, Part 4. A copy of the proposed information collection request can be obtained by contacting the office listed below in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

DATES: Written comments must be submitted to the office listed in the addresses section below on or before May 10, 2010.

ADDRESSES: You may submit comments, identified by Control Number 1235–0150, through one of the following methods:

E-mail: WHDPRAComments@dol.gov; or

Mail, Hand Delivery, Courier: Regulatory Analysis Branch, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210.

Instructions: Please submit one copy of your comments by only one method. All submissions received must include the agency name and Control Number identified above for this information collection. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via email or to submit them by mail early. Comments, including any personal information provided, become a matter of public record. They will also be summarized and/or included in the request for Office of Management and Budget approval of the information collection request.

FOR FURTHER INFORMATION CONTACT: Michel Smyth, Chief, Regulatory Analysis Branch, Division of Interpretations and Regulatory Analysis, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–0406 (this is not a toll-free number). Copies of this notice may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0023 (not a toll-free number). TTY/TDD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

SUPPLEMENTARY INFORMATION

I. Background

Service Contract Act section 2(a) provides that every contract subject to the Act must contain a provision specifying the minimum monetary wages and fringe benefits to be paid to the various classes of service employees performing work on the contract. This information collection pertains to records needed to determine an employee's seniority for purposes of determining any vacation benefit, to conform wage rates where they do not appear on a wage determination (WD), and to update WDs because of changing terms in a collective bargaining agreement.

II. Review Focus

The DOL is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* Enhance the quality, utility and 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 submissions of responses.

III. Current Actions

The DOL seeks approval for the extension of this information collection in to order carry out the labor standards provisions applicable to Federal service contracts.

Type of Review: Extension.

Agency: Wage and Hour Division.

Title: Labor Standards for Federal Service Contracts—Regulations 29 CFR part 4.

OMB Numbers: 1235–0150.

Affected Public: Businesses or other for-profits, Federal Government.

Respondents: 49,484.

Total Annual responses: 50,812.

Estimated Total Burden Hours: 49,220.

Estimated Time Per Response: vacation benefit seniority list: 1 hour; conformance record 30 minutes; collective bargaining agreement, 5 minutes.

Frequency: On occasion.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $0.

Dated: March 5, 2010.

Michel Smyth,

Regulatory Analysis Branch Chief.

[FR Doc. 2010–5084 Filed 3–9–10; 8:45 am]

BILLING CODE 4510–27–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

150th Meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, the 150th open meeting of the full Advisory Council on Employee Welfare and Pension Benefit Plans will be held on March 22, 2010.

The session will take place in Room S–2508, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. The purpose of the open meeting, which will run from 1:30 p.m. to approximately 4:30 p.m., is to introduce the Council Chair and Vice Chair, receive an update from the Assistant Secretary of Labor for the Employee Benefits Security Administration, and determine the topics to be addressed by the Council in 2010.

Organizations or members of the public wishing to submit a written statement may do so by submitting 30 copies on or before March 15, 2010 to Larry Good, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Suite N–5623, 200 Constitution Avenue, NW., Washington, DC 20210. Statements received on or before March 15, 2010 will be included in the record of the meeting. Individuals or representatives of organizations wishing to address the Advisory Council should forward their requests to the Executive Secretary or telephone (202) 693–8668. Oral presentations will be limited to ten minutes, time permitting, but an extended statement may be submitted for the record. Individuals with disabilities who need special accommodations should contact Larry Good by March 15 at the address indicated.

Signed at Washington, DC, this 22nd day of February, 2010.

Phyllis C. Borzi,

Assistant Secretary, Employee Benefits Security Administration, United States Department of Labor.

[FR Doc. 2010–5137 Filed 3–5–10; 4:15 pm]

BILLING CODE 4510–29–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10–025)]

NASA Advisory Council; Commercial Space Committee; Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, the National Aeronautics and Space Administration announces a meeting of the Commercial Space Committee of the NASA Advisory Council.

DATES: Tuesday, March 30, 2010, 1 p.m.–5 p.m., EST.

ADDRESSES: NASA Headquarters, 300 E Street, SW., Glennan Conference Room, Room 1Q39, Washington DC 20546

FOR FURTHER INFORMATION CONTACT: Mr. John Emond, Office of Chief Technologist, National Aeronautics and Space Administration, Washington, DC, 20546. Phone 202–358–1686, fax: 202–358–3878, *john.l.emond@nasa.gov.*

SUPPLEMENTARY INFORMATION: The agenda for the meeting includes follow-on briefings and dialogue with the NASA Exploration Systems Mission Directorate and the Space Operations Mission Directorate regarding the presentations and initial discussion with the Committee that took place in the public meeting on February 16, 2010, at NASA Headquarters. These discussions will focus on budget and programmatic elements including but not limited to: Commercial spaceflight crew and cargo; space operations associated with the Space Shuttle and the International Space Station; and launch complex/launch services.

The meeting will be open to the public up to the seating capacity of the room. It is imperative that the meeting be held on this date to accommodate the scheduling priorities of the key participants. Visitors will need to show a valid picture identification such as a driver's license to enter the NASA Headquarters building (West Lobby—Visitor Control Center), and must state that they are attending the NASA Advisory Council Commercial Space Committee meeting in the Glennan Conference Room, before receiving an access badge. All non-U.S citizens must fax a copy of their passport, and print or type their name, current address, citizenship, company affiliation (if applicable) to include address, telephone number, and their title, place of birth, date of birth, U.S. visa information to include type, number, and expiration date, U.S. Social Security Number (if applicable), and place and date of entry into the U.S., fax to Mr. John Emond, Executive Secretary, Commercial Space Committee, NASA Advisory Council, Fax: 202–358–3878, by no later than March 23, 2010. To expedite admittance, attendees with U.S. citizenship can provide identifying information 3 working days in advance by contacting Mr. John Emond via e-mail at *john.l.emond@nasa.gov* or by phone at 202–358–1686 or fax: 202–358–3878.

Dated: March 4, 2010.

P. Diane Rausch,

Advisory Committee Management Office, National Aeronautics and Space Administration.

[FR Doc. 2010–5022 Filed 3–9–10; 8:45 am]

BILLING CODE P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before April 9, 2010. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting the Life Cycle Management Division (NWML) using one of the following means:

Mail: NARA (NWML), 8601 Adelphi Road, College Park, MD 20740–6001.

E-mail: request.schedule@nara.gov.

FAX: 301–837–3698

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Laurence Brewer, Director, Life Cycle Management Division (NWML), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1539. E-mail: *records.mgt@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained.

Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (*See* 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending

1. Department of Agriculture, Risk Management Agency (N1–258–09–8, 1 item, 1 temporary item). Master files of electronic information systems containing actuarial data and other information used to facilitate distribution of program data to insurance providers and producers and to enable insurance providers to sell risk management products to producers.

2. Department of Defense, Office of the Secretary (N1–330–10–2, 1 item, 1 temporary item). Master files of an electronic information system that contains data relating to civilian employees and personnel management, including job applications, resumes, position descriptions, performance plans, performance appraisals, and security clearance status information.

3. Department of Defense, Joint Staff (N1–218–09–6, 1 item, 1 temporary item). Master files of a no longer used electronic information system that contains copies of documents obtained from Defense Department components and other agencies that pertain to such matters as foreign media and events relevant to the war on terrorism.

4. Department of Education, Agency-wide (N1–441–09–10, 2 items, 2 temporary items). Records relating to information collection matters, including requests submitted to the Office of Management and Budget, reports, and master files of an electronic information system used to manage the information collection clearance process.

5. Department of Education, Agency-wide (N1–441–10–1, 13 items, 12 temporary items). Master files of electronic information systems used to manage programs and routine projects. Included are records relating to such matters as enterprise management, operations vulnerability, inspector general activities, special education programs, post-secondary education projects, and civil rights programs. Proposed for permanent retention are records that relate to significant mission-related programs.

6. Department of Education, Federal Student Aid (N1–441–09–26, 2 items, 2 temporary items). Master files of an electronic information system used for assigning personal identification (PIN) numbers to students, parents, and others who use Federal student aid systems.

7. Department of Education, Office for Civil Rights (N1–441–09–1, 2 items, 2 temporary items). Application files used to determine eligibility of school districts for financial assistance under the Magnet Schools Assistance Act.

8. Department of Education, Office of Management (N1–441–09–2, 1 item, 1 temporary item) Applications for transfer of excess real property owned by the agency that are not approved.

9. Department of Education, Office of Management (N1–441–09–3, 4 items, 4 temporary items). Records relating to student loan repayment benefits used to attract or retain personnel for the agency. Included are case files and reports to the Office of Personnel Management.

10. Department of Education, Office of Management (N1–441–09–5, 2 items, 2 temporary items). Applications submitted by agency employees for government-subsidized child care.

11. Department of Health and Human Services, Centers for Medicare & Medicaid Services (N1–440–09–8, 1 item, 1 temporary item). Master files of electronic information systems that contain cost data used to produce pricing modules that support Medicare claims processing.

12. Department of Health and Human Services, Centers for Medicare & Medicaid Services (N1–440–09–14, 1 item, 1 temporary item). Master files of an electronic information system used for finance and accounting.

13. Department of Health and Human Services, Centers for Medicare & Medicaid Services (N1–440–09–18, 1 item, 1 temporary item). Master files of an electronic information system which provides access to systems that contain data concerning medical goods and services providers who support agency health insurance programs.

14. Department of the Interior, Office of the Secretary (N1–48–09–8, 1 item, 1 temporary item). Electronic data relating to labor relations activities, including negotiations, arbitrations, disciplinary actions, grievances, and appeals.

15. Department of the Interior, Office of the Secretary (N1–48–09–11, 1 item, 1 temporary item). Records relating to agency training courses, including manuals, slides, handouts, and compact disks.

16. Department of the Interior, Human Resources Directorate (N1–48–09–12, 1 item, 1 temporary item). Records relating to corrective action reviews, including such records as reports, logs, and monthly review files.

17. Department of the Interior, Office of the Chief Information officer (N1–48–09–13, 1 item, 1 temporary). Records associated with an electronic information system that contains data concerning Freedom of Information Act and Privacy Act requests.

18. Department of Justice, Office of Inspector General (N1–60–09–45, 1 item, 1 temporary item). Master files of an electronic information system used to track due dates and completion dates for physical examinations required for criminal investigators.

19. Department of Justice, Bureau of Prisons (N1–129–09–24, 1 item, 1 temporary item). Master files of an electronic information system that contains data on international transfers of inmates.

20. Department of Justice, U.S. Trustee Program (N1–60–09–52, 1 item, 1 temporary item). Master files of an electronic information system used to track the collection of quarterly fees from Chapter 11 debtors.

21. Department of Transportation, Federal Aviation Administration (N1–237–09–23, 13 items, 10 temporary items). Records relating to budget and financial matters, including budget formulation and execution, accounting and cost management, internal controls, and the management of real and non-real property. Proposed for permanent retention are such records as congressional budget justifications, annual financial statements and other annual financial reports prepared for

Congress and oversight agencies, and annual cost accounting reports.

22. Department of Transportation, National Highway Traffic Safety Administration (N1–416–10–1, 1 item, 1 temporary item). Master files of an electronic information system used to allow public access to agency publications through its traffic safety materials catalog.

23. Department of the Treasury, Departmental Offices (N1–56–09–20, 5 items, 3 temporary items). Master files, inputs, and outputs associated with an electronic correspondence management system used to track incoming documentation related to case files, litigation, and other legal matters. Records relating to White House and congressional correspondence are proposed for permanent retention.

24. Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (N1–564–09–10, 2 items, 2 temporary items). Inputs and master files of an electronic information system that contains data on industry tax liabilities on regulated products.

25. Department of the Treasury, Internal Revenue Service (N1–58–09–59, 4 items, 4 temporary items). Master files, outputs, and system documentation associated with an electronic information system used to streamline customer service by providing a common user interface.

26. Department of the Treasury, Internal Revenue Service (N1–58–09–85, 2 items, 2 temporary items). Applications for grants used to fund programs which offer tax counseling and assistance to low income and elderly taxpayers.

27. Department of the Treasury, Internal Revenue Service (N1–58–09–87, 2 items, 2 temporary items). Master files and system documentation associated with an electronic information system used to verify the employment status of agency staff.

28. Department of the Treasury, Internal Revenue Service (N1–58–09–89, 3 items, 3 temporary items). Master files and system documentation associated with an electronic information system used to scan and route paper correspondence received from taxpayers.

Dated: March 4, 2010.

Michael J. Kurtz,

Assistant Archivist for Records Services—Washington, DC.

[FR Doc. 2010–5197 Filed 3–9–10; 8:45 am]

BILLING CODE 7515–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–364; NRC–2010–0092]

Southern Nuclear Operating Company; Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The U.S. Nuclear Regulatory Commission (NRC, the Commission) is considering issuance of an amendment to Facility Operating License No. NPF–8, issued to Southern Nuclear Operating Company, Inc. (SNC, the licensee), for operation of the Joseph M. Farley Nuclear Plant, Unit 2 (FNP, Unit 2), located in Houston County, Alabama. The proposed amendment would delay implementation of a modification to eliminate the reactor coolant pump breaker position reactor trip function for FNP Unit 2. Elimination of this trip function was approved by license amendment issued on September 18, 2009, which approved the licensee making the modification prior to the end of the 20th refueling outage (U2R20) for Unit 2. The licensee requested approval to delay implementation of the modification until prior to the end of Unit 2's refueling outage 21 (U2R21).

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in Title 10 of the Code of Federal Regulations (10 CFR), section 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed Unit 2 amendment implementation schedule extension is administrative in nature and does not require any physical plant modifications, physically affect any plant systems or components, or entail changes in plant operation. The amendment implementation schedule extension does not significantly increase the probability or consequences of an accident previously evaluated in the Final Safety Analysis Report (FSAR). All of the safety analyses have been evaluated for impact. The change in the implementation schedule of the reactor coolant pump breaker position reactor trip and technical specification change will not initiate any accident; therefore, the probability of an accident has not been increased. An evaluation of dose consequences, with respect to the proposed changes, indicates there is no impact due to the proposed changes and all acceptance criteria continue to be met. Operation for an additional cycle with the RCP breaker position trip enabled will have negligible safety consequences given that the configuration of plant equipment currently in place to minimize the likelihood of an unwarranted trip will remain. There is no change to the current licensing basis. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any previously evaluated?

Response: No.

The proposed Unit 2 amendment implementation schedule extension is administrative in nature and does not require any physical plant modifications, physically affect any plant systems or components, or entail changes in plant operation. The proposed amendment implementation schedule extension does not create the possibility of a new or different kind of accident than any accident already evaluated in the FSAR. No new accident scenarios, failure mechanisms or limiting single failures are introduced as result of the proposed change. The proposed amendment implementation schedule extension has no adverse effects on any safety-related system. Operation for an additional cycle with the RCP breaker position trip enabled will have negligible safety consequences given that the configuration of plant equipment currently in place to minimize the likelihood of an unwarranted trip will remain. There is no change to the current licensing basis. Therefore, all accident analyses criteria continue to be met and this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed Unit 2 amendment implementation schedule extension is administrative in nature and does not require any physical plant modifications, physically affect any plant systems or components, or entail changes in plant operation. The proposed amendment implementation schedule extension does not involve a significant reduction in a margin of safety. All analyses that credit the Reactor Coolant System Low Flow reactor trip function have

been reviewed and no changes to any inputs are required. The evaluation demonstrated that all applicable acceptance criteria are met. Operation for an additional cycle with the RCP breaker position trip enabled will have negligible safety consequences given that the configuration of plant equipment currently in place to minimize the likelihood of an unwarranted trip will remain. There is no change to the current licensing basis. Therefore, the proposed amendment implementation schedule extension does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves no significant hazards consideration. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period should circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility. Should the Commission take action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. Should the Commission make a final No Significant Hazards Consideration Determination, any hearing will take place after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rulemaking and Directives Branch (RDB), TWB–05–B01M, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be faxed to the RDB at 301–492–3446. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Room O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland.

Within 60 days after the date of publication of this notice, any person(s) whose interest may be affected by this action may file a request for a hearing and a petition to intervene with respect to issuance of the amendment to the subject facility operating license. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. Interested person(s) should consult a current copy of 10 CFR 2.309, which is available at the Commission's PDR, located at One White Flint North, Room O1F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or a presiding officer designated by the Commission or by the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the Chief Administrative Judge of the Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.309, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following general requirements: (1) The name, address and telephone number of the requestor or petitioner; (2) the nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (3) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (4) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also identify the specific contentions which the requestor/petitioner seeks to have litigated at the proceeding.

Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the requestor/petitioner shall provide a brief explanation of the bases for the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. The petition must include sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment. If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

All documents filed in NRC adjudicatory proceedings, including a request for hearing, a petition for leave to intervene, any motion or other document filed in the proceeding prior to the submission of a request for hearing or petition to intervene, and documents filed by interested governmental entities participating under 10 CFR 2.315(c), must be filed in accordance with the NRC E–Filing rule (72 FR 49139, August 28, 2007). The E–Filing process requires participants to submit and serve all adjudicatory documents over the Internet, or in some cases to mail copies on electronic storage media. Participants may not submit paper copies of their filings

unless they seek an exemption in accordance with the procedures described below.

To comply with the procedural requirements of E–Filing, at least ten (10) days prior to the filing deadline, the participant should contact the Office of the Secretary by e-mail at *hearing.docket@nrc.gov,* or by telephone at (301) 415–1677, to request (1) a digital ID certificate, which allows the participant (or its counsel or representative) to digitally sign documents and access the E–Submittal server for any proceeding in which it is participating; and (2) advise the Secretary that the participant will be submitting a request or petition for hearing (even in instances in which the participant, or its counsel or representative, already holds an NRC-issued digital ID certificate). Based upon this information, the Secretary will establish an electronic docket for the hearing in this proceeding if the Secretary has not already established an electronic docket.

Information about applying for a digital ID certificate is available on NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals/apply-certificates.html.* System requirements for accessing the E–Submittal server are detailed in NRC's "Guidance for Electronic Submission," which is available on the agency's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* Participants may attempt to use other software not listed on the Web site, but should note that the NRC's E–Filing system does not support unlisted software, and the NRC Meta System Help Desk will not be able to offer assistance in using unlisted software.

If a participant is electronically submitting a document to the NRC in accordance with the E–Filing rule, the participant must file the document using the NRC's online, Web-based submission form. In order to serve documents through EIE, users will be required to install a Web browser plug-in from the NRC Web site. Further information on the Web-based submission form, including the installation of the Web browser plug-in, is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.*

Once a participant has obtained a digital ID certificate and a docket has been created, the participant can then submit a request for hearing or petition for leave to intervene. Submissions should be in Portable Document Format (PDF) in accordance with NRC guidance available on the NRC public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* A filing is considered complete at the time the documents are submitted through the NRC's E–Filing system. To be timely, an electronic filing must be submitted to the E–Filing system no later than 11:59 p.m. Eastern Time on the due date. Upon receipt of a transmission, the E–Filing system time-stamps the document and sends the submitter an e-mail notice confirming receipt of the document. The E–Filing system also distributes an e-mail notice that provides access to the document to the NRC Office of the General Counsel and any others who have advised the Office of the Secretary that they wish to participate in the proceeding, so that the filer need not serve the documents on those participants separately. Therefore, applicants and other participants (or their counsel or representative) must apply for and receive a digital ID certificate before a hearing request/petition to intervene is filed so that they can obtain access to the document via the E–Filing system.

A person filing electronically using the agency's adjudicatory E–Filing system may seek assistance by contacting the NRC Meta System Help Desk through the "Contact Us" link located on the NRC Web site at *http://www.nrc.gov/site-help/e-submittals.html,* by e-mail at *MSHD.Resource@nrc.gov,* or by a toll-free call at (866) 672–7640. The NRC Meta System Help Desk is available between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday, excluding government holidays.

Participants who believe that they have a good cause for not submitting documents electronically must file an exemption request, in accordance with 10 CFR 2.302(g), with their initial paper filing requesting authorization to continue to submit documents in paper format. Such filings must be submitted by: (1) First class mail addressed to the Office of the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Staff; or (2) courier, express mail, or expedited delivery service to the Office of the Secretary, Sixteenth Floor, One White Flint North, 11555 Rockville Pike, Rockville, Maryland, 20852, Attention: Rulemaking and Adjudications Staff. Participants filing a document in this manner are responsible for serving the document on all other participants. Filing is considered complete by first-class mail as of the time of deposit in the mail, or by courier, express mail, or expedited delivery service upon depositing the document with the provider of the service. A presiding officer, having granted an exemption request from using E–Filing, may require a participant or party to use E–Filing if the presiding officer subsequently determines that the reason for granting the exemption from use of E–Filing no longer exists.

Documents submitted in adjudicatory proceedings will appear in NRC's electronic hearing docket which is available to the public at *http://ehd.nrc.gov/EHD_Proceeding/home.asp,* unless excluded pursuant to an order of the Commission, or the presiding officer. Participants are requested not to include personal privacy information, such as social security numbers, home addresses, or home phone numbers in their filings, unless an NRC regulation or other law requires submission of such information. With respect to copyrighted works, except for limited excerpts that serve the purpose of the adjudicatory filings and would constitute a Fair Use application, participants are requested not to include copyrighted materials in their submission.

Petitions for leave to intervene must be filed no later than 60 days from the date of publication of this notice. Non-timely filings will not be entertained absent a determination by the presiding officer that the petition or request should be granted or the contentions should be admitted, based on a balancing of the factors specified in 10 CFR 2.309(c)(1)(i)–(viii).

For further details with respect to this license amendment application, see the application for amendment dated February 26, 2010, which is available for public inspection at the Commission's PDR, located at One White Flint North, File Public 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's (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, 301–415–4737, or by e-mail to *pdr.resource@nrc.gov.*

Attorney for licensee: M. Stanford Blanton, Esq., Balch and Bingham, Post Office Box 306, 1710 Sixth Avenue North, Birmingham, Alabama 35201.

Dated at Rockville, Maryland, this 2nd day of March 2010.

For the Nuclear Regulatory Commission.

Robert E. Martin,

Senior Project Manager, Plant Licensing Branch 2–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–5092 Filed 3–9–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–293; NRC–2010–0094]

Entergy Nuclear Operations, Inc; Pilgrim Nuclear Power Station 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–35, issued to Entergy Nuclear Operations, Inc. (Entergy or the licensee), for operation of Pilgrim Nuclear Power Station (Pilgrim), located in Plymouth County, MA. In accordance with 10 CFR 51.21, the NRC prepared an environmental assessment documenting its finding. The NRC concluded that the proposed action will have no significant impact.

Environmental Assessment

Identification of the Proposed Action

The proposed action would exempt Pilgrim from the required implementation date of March 31, 2010, for several new requirements of 10 CFR part 73. Specifically, Pilgrim would be granted an exemption from being in full compliance with certain new requirements contained in 10 CFR 73.55 by the March 31, 2010, deadline. Entergy has proposed an alternate full compliance implementation date of September 15, 2010, approximately 6½ months beyond the date required by 10 CFR Part 73. The proposed action, an extension of the schedule for completion of certain actions required by the revised 10 CFR part 73, does not involve any physical changes to the reactor, fuel, plant structures, water, or land at the Pilgrim site.

The proposed action is in accordance with the licensee=s application dated January 22, 2010 (Agencywide Documents Access and Management System (ADAMS) Accession No. ML100260716), as supplemented on February 2, 2010 (ADAMS Accession No. ML100351182).

The Need for the Proposed Action

The proposed action is needed to provide the licensee with additional time to perform the required upgrades to the Pilgrim security system due to resource and logistical impacts. The request for an exemption from the March 31, 2010, implementation date to September 15, 2010, is based on the delivery dates for the new equipment and the time needed to install this new equipment to meet the revised requirements.

Environmental Impacts of the Proposed Action

The NRC has completed its environmental assessment of the proposed exemption. The staff 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 of an accident occurring.

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-Steven's 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 concludes that there are no significant environmental impacts associated with the proposed action. In addition, in promulgating its revisions to 10 CFR part 73, the Commission prepared an environmental assessment and published a finding of no significant impact [Part 73, Power Reactor Security Requirements, 74 FR 13926, 13967 (March 27, 2009)].

The NRC staff's safety evaluation will be provided in the exemption that will be issued as part of the 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 application would result in no change in current environmental impacts. If the proposed action was denied, the licensee would have to comply with the March 31, 2010, implementation deadline. The environmental impacts of the proposed action and the "no action" alternative action are similar.

Alternative Use of Resources

The action does not involve the use of any different resources than those previously considered in the Final Environmental Statement for Pilgrim, dated January 1972, and the "Generic Environmental Impact Statement for License Renewal of Nuclear Plants: Regarding Pilgrim Nuclear Power Station," NUREG–1437, Supplement 29, published in July 2007 (ADAMS Accession No. ML071990027).

Agencies and Persons Consulted

In accordance with its stated policy, on February 5, 2010, the NRC staff consulted with the Massachusetts State official of the Massachusetts Emergency Management Agency 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 January 22, 2010, as supplemented by letter dated February 2, 2010. Portions of the submittal dated January 22, 2010, as supplemented by letter dated February 2, 2010, contain security-related information and, accordingly, are not available to the public. Publicly-available versions of

this document are accessible electronically from the ADAMS with Accession Nos. ML100260716 and ML100351182, respectively.

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 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 3rd day of March 2010.

For the Nuclear Regulatory Commission.

James Kim,

Project Manager, Plant Licensing Branch I–1, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2010–5091 Filed 3–9–10; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Excepted Service

AGENCY: U.S. Office of Personnel Management (OPM).

ACTION: Notice.

SUMMARY: This gives notice of OPM decisions granting authority to make appointments under Schedules A, B, and C in the excepted service as required by 5 CFR 213.103.

FOR FURTHER INFORMATION CONTACT: Roland Edwards, Senior Executive Resource Services, Employee Services, 202–606–2246.

SUPPLEMENTARY INFORMATION: Appearing in the listing below are the individual authorities established under Schedules A, B, and C between January 1, 2010, and January 31, 2010. These notices are published monthly in the **Federal Register** at *http://www.gpoaccess.gov/fr/*. A consolidated listing of all authorities as of June 30 is also published each year. The following Schedules are *not* codified in the Code of Federal Regulations. These are agency-specific exceptions.

Schedule A

Section 213.3133 Federal Deposit Insurance Corporation

(c) Temporary or time-limited positions located at closed banks or savings and loan institutions that are concerned with liquidating the assets of the institutions, liquidating loans to the institutions, or paying the depositors of closed insured institutions. Time-limited appointments under this authority may not exceed 7 years.

Schedule B

Section 213.3206 Department of Defense

(b) Interdepartmental Activities.

(1) Seven (7) positions to provide general administration, general art and information, photography, and/or visual information support to the White House Photographic Service.

Schedule C

The following Schedule C appointments were approved during January 2010.

Office of Science and Technology Policy

TSGS10001 Confidential Assistant to the Associate Director for Environment. Effective January 8, 2010.

TSGS10002 Assistant Director for Legislative Affairs to the President for Science and Technology. Effective January 13, 2010.

Department of State

DSGS70076 Special Assistant for East Asian and Pacific Affairs. Effective January 4, 2010.

DSGS69985 Senior Advisor to the Secretary of State. Effective January 6, 2010.

DSGS70007 Deputy Chief of Protocol to the Chief of Protocol. Effective January 6, 2010.

DSGS70080 Staff Assistant to the Chief of Staff/Counselor. Effective January 29, 2010.

DSGS70101 Special Assistant to the Assistant Secretary Bureau of International Narcotics and Law Enforcement Affairs. Effective January 29, 2010.

Department of Defense

DDGS17268 Special Assistant to the Principal Deputy Assistant Secretary for Defense. Effective January 13, 2010.

DDGS17270 Special Assistant for Research to the Special Assistant for Speechwriting. Effective January 22, 2010.

Department of Air Force

DFGS60022 Special Assistant to the Secretary of the Air Force. Effective January 19, 2010.

DFGS60023 Special Assistant to the Assistant Secretary of the Air Force (Manpower and Reserve Affairs). Effective January 19, 2010.

Department of Justice

DJGS00551 Senior Counsel to the Assistant Attorney General. Effective January 4, 2010.

DJGS00082 Special Assistant to the Assistant Attorney General Environment and Natural Resources. Effective January 6, 2010.

DJGS00246 Counsel to the Assistant Attorney General Environment and Natural Resources. Effective January 19, 2010.

DJGS00553 Counsel and Chief of Staff to the Assistant Attorney General Environment and Natural Resources. Effective January 19, 2010.

Department of Homeland Security

DMGS00841 Public Affairs Specialist to the Deputy Under Secretary for National Protection and Programs Directorate. Effective January 14, 2010.

DMGS00842 Program Analyst to the Counselor to the Deputy Under Secretary for National Protection and Programs Directorate. Effective January 14, 2010.

Department of the Interior

DIGS01176 Senior Advisor for the Northwest Region to the Secretary. Effective January 28, 2010.

DIGS01177 Special Assistant to the Assistant Secretary Policy Management and Budget. Effective January 28, 2010.

DIGS01178 Senior Advisor for Southwest and Rocky Mountain Regions to the Secretary. Effective January 28, 2010.

DIGS01179 Deputy Director, to the Director, External Affairs. Effective January 28, 2010.

DIGS01180 Science Advisor to the Director, Minerals Management Service. Effective January 29, 2010.

DIGS01181 Special Assistant to the Assistant Secretary-Land and Minerals Management. Effective January 29, 2010.

Department of Agriculture

DAGS00103 Director of Advance to the Director of Communications. Effective January 28, 2010.

Department of Commerce

DCGS00582 Confidential Assistant to the Under Secretary of Commerce for

Industry and Security. Effective January 29, 2010.
DCGS00692 Director of Public Affairs to the Director of Outreach. Effective January 29, 2010.

Department of Labor

DLGS00084 Staff Assistant to the Director of Scheduling and Advance. Effective January 4, 2010.

Department of Education

DBGS00348 Confidential Assistant to the Under Secretary. Effective January 14, 2010.
DBGS00109 Confidential Assistant to the Assistant Secretary for Civil Rights. Effective January 21, 2010.
DBGS00611 Chief of Staff to the Assistant Secretary for Legislation and Congressional Affairs. Effective January 21, 2010.
DBGS00523 Director, White House Liaison to the Chief of Staff. Effective January 28, 2010.
DBGS00618 Chief of Staff to the Assistant Secretary for Planning, Evaluation, and Policy Development. Effective January 28, 2010.
DBGS00208 Special Assistant to the Deputy Secretary of Education. Effective January 29, 2010.
DBGS00568 Chief of Staff to the Assistant Secretary for Elementary and Secondary Education. Effective January 29, 2010.

Environmental Protection Agency

EPGS09008 White House Liaison to the Administrator. Effective January 21, 2010.
EPGS10003 Special Assistant to the Associate Administrator for Public Affairs. Effective January 28, 2010.

Department of Energy

DEGS00784 Senior Advisor to the Assistant Secretary (Energy Efficiency and Renewable Energy). Effective January 6, 2010.
DEGS00786 Special Assistant to the Director Advanced Research Projects Agency—Energy. Effective January 8, 2010.
DEGS00787 Special Assistant for Strategic Planning to the Director, Office of Scheduling and Advance. Effective January 21, 2010.
DEGS00790 Special Assistant to the Chief of Staff. Effective January 21, 2010.
DEGS00791 Scheduler to the Director, Office of Scheduling and Advance. Effective January 21, 2010.
DEGS00782 Deputy White House Liaison to the White House Liaison. Effective January 22, 2010.
DEGS00792 Trip Coordinator to the Director, Office of Scheduling and Advance. Effective January 29, 2010.
DEGS00793 Lead Advance Representative to the Director, Office of Scheduling and Advance. Effective January 29, 2010.

General Services Administration

GSGS01436 Special Assistant to the Regional Administrator. Effective January 4, 2010.
GSGS01437 Special Assistant to the Associate Administrator for Small Business Utilization. Effective January 4, 2010.

Commission on Civil Rights

CCGS60016 Special Assistant to a Commissioner. Effective January 14, 2010.

National Credit Union Administration

CUOT01379 Chief of Staff to the Chairman. Effective January 6, 2010.
CUOT01389 Senior Policy Advisor to the Vice Chair. Effective January 6, 2010.
CUOT01390 Senior Policy Advisor to a Board Member. Effective January 6, 2010.

Consumer Product Safety Commission

PSGS00075 Special Assistant (Legal) to a Commissioner. Effective January 6, 2010.
PSGS07343 Staff Assistant to a Commissioner. Effective January 6, 2010.
PSGS07344 Special Assistant to a Commissioner. Effective January 6, 2010.
PSGS60003 Special Assistant (Legal) to a Commissioner. Effective January 6, 2010.
PSGS60007 Director, Office of Congressional Relations to the Chairman, Consumer Product Safety Commission. Effective January 6, 2010.
PSGS60050 Executive Assistant to a Commissioner. Effective January 6, 2010.
PSGS60066 Supervisory Public Affairs Specialist to the Executive Director. Effective January 6, 2010.

Commodity Futures Trading Commission

CTOT00014 Administrative Assistant to a Commissioner. Effective January 2, 2010.

Department of Housing and Urban Development

DUGS60571 Deputy Assistant Secretary for International and Philanthropic Affairs, for Policy Development and Research. Effective January 21, 2010.

Authority: 5 U.S.C. 3301 and 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218.

U.S. Office of Personnel Management.

John Berry,

Director.

[FR Doc. 2010–5155 Filed 3–9–10; 8:45 am]

BILLING CODE 6325–39–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61651]

Policy Statement on Obtaining and Retaining Beneficial Ownership Information for Anti-Money Laundering Purposes

AGENCY: Securities and Exchange Commission.

ACTION: Policy statement.

SUMMARY: The Securities and Exchange Commission is issuing a policy statement to provide guidance on obtaining and retaining beneficial ownership information for anti-money laundering purposes.

DATES: *Effective Date:* March 5, 2010.

FOR FURTHER INFORMATION CONTACT: Lourdes Gonzalez (202–551–5550), John J. Fahey (202–551–5550), or Emily Westerberg Russell (202–551–5550), Office of the Chief Counsel, Division of Trading and Markets.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission is issuing a policy statement that provides guidance on obtaining and retaining beneficial ownership information for anti-money laundering purposes. This guidance is being issued jointly with the Financial Crimes Enforcement Network, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the National Credit Union Administration, and in consultation with the staff of the Commodity Futures Trading Commission. The guidance provided in this policy statement clarifies and consolidates existing regulatory expectations for obtaining beneficial ownership information for certain accounts and customer relationships.

Regulatory Requirements

The provisions of the Administrative Procedure Act ("APA") regarding notice of proposed rulemaking, opportunities for public comment, and prior publication are not applicable to general statements of policy, such as this.[1] Similarly, the provisions of the Regulatory Flexibility Act,[2] which apply

[1] 5 U.S.C. 553.

[2] 5 U.S.C. 601–602.

only when notice and comment are required by the APA or another statute, are not applicable.

By the Commission.

Dated: March 5, 2010

Florence E. Harmon,

Deputy Secretary.

Text of the Guidance

Guidance on Obtaining and Retaining Beneficial Ownership Information

The Financial Crimes Enforcement Network (FinCEN), along with the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Securities and Exchange Commission, are issuing this guidance, in consultation with staff of the Commodity Futures Trading Commission, to clarify and consolidate existing regulatory expectations for obtaining beneficial ownership information for certain accounts and customer relationships. Information on beneficial ownership in account relationships provides another tool for financial institutions to better understand and address money laundering and terrorist financing risks, protect themselves from criminal activity, and assist law enforcement with investigations and prosecutions.

Background

The cornerstone of a strong Bank Secrecy Act/Anti-Money Laundering (BSA/AML) compliance program is the adoption and implementation of internal controls, which include comprehensive customer due diligence (CDD) policies, procedures, and processes for all customers, particularly those that present a high risk for money laundering or terrorist financing.[1] The requirement that a financial institution know its customers, and the risks presented by its customers, is basic and fundamental to the development and implementation of an effective BSA/AML compliance program. Specifically, conducting appropriate CDD assists an institution in identifying, detecting, and evaluating unusual or suspicious activity.

In general, a financial institution's CDD processes should be commensurate with its BSA/AML risk, with particular focus on high risk customers. CDD processes should be developed to identify customers who pose heightened money laundering or terrorist financing risks, and should be enhanced in accordance with the institution's assessment of those risks.

Heightened risks can arise with respect to beneficial owners of accounts because nominal account holders can enable individuals and business entities to conceal the identity of the true owner of assets or property derived from or associated with criminal activity. Moreover, criminals, money launderers, tax evaders, and terrorists may exploit the privacy and confidentiality surrounding some business entities, including shell companies and other vehicles designed to conceal the nature and purpose of illicit transactions and the identities of the persons associated with them. Consequently, identifying the beneficial owner(s) of some legal entities may be challenging, as the characteristics of these entities often effectively shield the legal identity of the owner. However, such identification may be important in detecting suspicious activity and in providing useful information to law enforcement.

A financial institution may consider implementing these policies and procedures on an enterprise-wide basis. This may include sharing or obtaining beneficial ownership information across business lines, separate legal entities within an enterprise, and affiliated support units. To encourage cost effectiveness, enhance efficiency, and increase availability of potentially relevant information, AML staff may find it useful to cross-check for beneficial ownership information in data systems maintained within the financial institution for other purposes, such as credit underwriting, marketing, or fraud detection.

Customer Due Diligence

As part of an institution's BSA/AML compliance program, a financial institution should establish and maintain CDD procedures that are reasonably designed to identify and verify the identity of beneficial owners[2] of an account, as appropriate, based on the institution's evaluation of risk pertaining to an account.[3]

For example, CDD procedures may include the following:

- Determining whether the customer is acting as an agent for or on behalf of another, and if so, obtaining information regarding the capacity in which and on whose behalf the customer is acting.
- Where the customer is a legal entity that is not publicly traded in the United States, such as an unincorporated association, a private investment company (PIC), trust or foundation, obtaining information about the structure or ownership of the entity so as to allow the institution to determine whether the account poses heightened risk.
- Where the customer is a trustee, obtaining information about the trust structure to allow the institution to establish a reasonable understanding of the trust structure and to determine the provider of funds and any persons or entities that have control over the funds or have the power to remove the trustees.

With respect to accounts that have been identified by an institution's CDD procedures as posing a heightened risk, these accounts should be subjected to enhanced due diligence (EDD) that is reasonably designed to enable compliance with the requirements of the BSA. This may include steps, in accordance with the level of risk presented, to identify and verify beneficial owners, to reasonably understand the sources and uses of funds in the account, and to reasonably understand the relationship between the customer and the beneficial owner.

Certain trusts, corporate entities, shell entities,[4] and PICs are examples of customers that may pose heightened risk. In addition, FinCEN rules establish particular due diligence requirements concerning beneficial owners in the areas of private banking and foreign correspondent accounts.

In addition, CDD and EDD information should be used for monitoring purposes and to determine whether there are discrepancies

[1] This guidance does not alter or supersede previously issued regulations, rulings, or guidance related to Customer Identification Program (CIP) requirements.

[2] The definition of a "beneficial owner" under FinCEN's regulations specific to due diligence programs for private banking accounts and for correspondent accounts for foreign financial institutions is the individual(s) who have a level of control over, or entitlement to, the funds or assets in the account that, as a practical matter, enables the individual(s), directly or indirectly, to control, manage, or direct the account. The ability to fund the account or the entitlement to the funds of the account alone, however, without any corresponding authority to control, manage, or direct the account (such as in the case of a minor child beneficiary), does not cause the individual to be a beneficial owner. This definition may be useful for purposes of this guidance. *See, e.g.*, 31 CFR 103.175(b).

[3] The final rules implementing Section 326 of the USA PATRIOT Act similarly provide that, based on a financial institution's risk assessment of a new account opened by a customer that is not an individual, a financial institution may need to take additional steps to verify the identity of the customer by seeking information about individuals with ownership or control over the account, including signatories. *See, e.g.*, 31 CFR 103.121(b)(2)(ii)(C). In addition, a financial institution may need to look through the account in connection with customer due diligence procedures required under other provisions of its BSA compliance program.

[4] *http://www.fincen.gov/statutes_regs/guidance/pdf/AdvisoryOnShells_FINAL.pdf.*

between information obtained regarding the account's intended purpose and expected account activity and the actual sources of funds and uses of the account.

Private Banking [5]

Under FinCEN's regulations, a "covered financial institution" [6] must establish and maintain a due diligence program that includes policies, procedures, and controls reasonably designed to detect and report known or suspected money laundering or suspicious activity conducted through or involving private banking accounts. This requirement applies to private banking accounts established, maintained, administered, or managed in the United States.[7] The regulation currently covers private banking accounts at depository institutions, securities broker-dealers, futures commission merchants and introducing brokers in commodities, and mutual funds.

Among other actions, as part of their due diligence program, institutions that offer private banking services must take reasonable steps to ascertain the source(s) of the customer's wealth and the anticipated activity of the account, as well as potentially take into account the geographic location, the customer's corporate structure, and public information.[8] Moreover, reasonable steps must be taken to identify nominal and beneficial owners of private banking accounts.[9] Obtaining beneficial ownership information concerning the types of accounts listed above may require the application of EDD procedures.

Special rules apply for senior foreign political figures.[10] A review of private banking account relationships is required in part to determine whether the nominal or beneficial owners are senior foreign political figures. Covered financial institutions should establish policies, procedures, and controls that include reasonable steps to ascertain the status of a nominal or beneficial owner as a senior foreign political figure. This may include obtaining information on employment status and sources of income, as well as consulting news sources and checking references where appropriate.[11] Accounts for senior foreign political figures require, in all instances, EDD that is reasonably designed to detect and report transactions that may involve the proceeds of foreign corruption.[12]

With regard to private banking accounts, a covered financial institution's failure to take reasonable steps to identify the nominal and beneficial owners of an account generally would be viewed as a violation of the requirements of 31 CFR 103.178.

Foreign Correspondent Accounts

FinCEN's regulations also require covered financial institutions [13] to establish a due diligence program that includes appropriate, specific, risk-based, and, where necessary, enhanced policies, procedures and controls that are reasonably designed to detect and report, on an ongoing basis, any known or suspected money laundering activity conducted through or involving any correspondent account [14] established, maintained, administered, or managed in the United States for a *foreign financial institution.*[15] Under these regulations, enhanced due diligence is required for correspondent accounts [16] established, maintained, administered, or managed in the United States, for *foreign banks* that operate under: (1) An offshore banking license; (2) a banking license issued by a country that has been designated as non-cooperative with international anti-money laundering principles or procedures; or (3) a banking license issued by a country designated by the Secretary of the Treasury (under delegation to the Director of FinCEN, and in consultation with the Federal banking agencies, the Securities and Exchange Commission, and the Commodity Futures Trading Commission) as warranting special measures due to money laundering concerns.[17] Enhanced due diligence is designed to be risk-based, with flexibility in its implementation to allow covered financial institutions to obtain and retain this information based on risk.

With respect to correspondent accounts for such foreign banks, a covered financial institution's risk-based EDD should obtain information, as appropriate, from the foreign bank about the identity of any person with authority to direct transactions through any correspondent account that is a payable-through account, as well as the source and beneficial owner of funds or other assets in a payable-through account. A payable-through account is a correspondent account maintained by a covered financial institution for a foreign bank by means of which the foreign bank permits its customers to engage, either directly or through a subaccount, in banking activities usual in connection with the business of banking in the United States.[18] Covered financial institutions may elect to use a questionnaire or conduct a review of the transaction history for the respondent bank in collecting the information required.[19]

[5] A "private banking account" is defined in 31 CFR 103.175(o), as an account (or any combination of accounts) maintained at a covered financial institution that: (1) Requires a minimum aggregate deposit of funds or other assets of not less than $1,000,000; (2) is established on behalf of or for the benefit of one or more non-U.S. persons who are direct or beneficial owners of the account; and (3) is assigned to, or is administered or managed by, in whole or in part, an officer, employee, or agent of a covered financial institution acting as a liaison between the covered financial institution and the direct or beneficial owner of the account. Private banking accounts that do not fit within this definition should be subject to the general CDD procedures, including, as appropriate, EDD procedures discussed above.

[6] 31 CFR 103.175(f)(1).

[7] *See, generally,* 31 CFR 103.178.

[8] *See,* 31 CFR 103.178 (b)(3) and (b)(4). *See also,* Federal Financial Institutions Examination Council (FFIEC) Exam Manual, Private Banking—Overview. Although the FFIEC Exam Manual is issued by the federal banking regulators regarding AML requirements applicable to banks, it contains guidance that may be of interest to securities and futures firms.

[9] 31 CFR 103.178(b)(1).

[10] A senior foreign political figure is a current or former senior official in the executive, legislative, administrative, military, or judicial branches of a foreign government (whether elected or not), senior official of a major foreign political party or a senior executive of a foreign government-owned commercial enterprise, a corporation or other entity formed by or for the benefit of such individuals, or any immediate family member or widely and publically known close associate to such individuals. 31 CFR 103.175(r).

[11] *See, e.g.,* FFIEC Exam Manual, Private Banking Due Diligence Program (Non-U.S. Persons).

[12] 31 CFR 103.178 (b)(2) and (c).

[13] 31 CFR 103.175(f)(1). The definition of covered financial institution discussed above applies to both the private banking and correspondent account regulations.

[14] 31 CFR 103.175(d). Generally, a "correspondent account" is defined as an account established for a foreign financial institution to receive deposits from, or to make payments or other disbursements on behalf of, the foreign financial institution, or to handle other financial transactions related to such foreign financial institution. 31 CFR 103.175(d)(1).

[15] 31 CFR 103.176(a).

[16] For purposes of the enhanced due diligence requirements for certain foreign banks and the foreign shell bank prohibitions discussed herein, a "correspondent account" is defined as an account established for a foreign bank to receive deposits from, or to make payments or other disbursements on behalf of, the foreign bank, or to handle other financial transactions related to such foreign bank. 31 CFR 103.175(d)(1)(ii).

[17] *See* 31 CFR 103.176(b) and(c) for the full text of this provision. Special Due Diligence Programs for Certain Foreign Accounts, 72 FR 44768–44775 (August 9, 2007).

[18] *See,* 31 CFR 103.176(b)(1)(iii)(B).

[19] "An Assessment of the Final Rule Implementing Enhanced Due Diligence Provisions for Accounts for Certain Foreign Banks, p. 4. (March 2009). *http://www.fincen.gov/news_room/rp/files/Special_Due_Diligence_Program.pdf.*

Additionally, covered financial institutions [20] are prohibited from opening and maintaining correspondent accounts [21] for foreign shell banks.[22] Covered financial institutions that offer foreign correspondent accounts must take reasonable steps to ensure the account is not being used to indirectly provide banking services to foreign shell banks.[23] The covered financial institution must identify the owners [24] of foreign banks whose shares are not publicly traded and record the name and address of a person in the United States that is authorized to be an agent to accept service of legal process.[25]

With regard to foreign correspondent accounts, a covered financial institution's failure to maintain records identifying the owners of non-publicly traded foreign banks could be viewed as a violation of the requirements of 31 CFR 103.177.

For questions about this guidance, please contact FinCEN's Regulatory Helpline at (800) 949–2732 or your appropriate regulatory agency.

[FR Doc. 2010–5075 Filed 3–9–10; 8:45 am]

BILLING CODE 8011–01–P

[20] For purposes of the shell bank prohibitions, a covered institution generally includes: U.S. banks, savings associations, credit unions, private bankers, and trust companies; branches and agencies of foreign banks; Edge Act corporations; and securities broker-dealers. 31 CFR 103.175(f)(2).

[21] For purposes of the foreign shell bank prohibitions, a "correspondent account" is defined as an account established for a foreign bank to receive deposits from, or to make payments or other disbursements on behalf of, the foreign bank, or to handle other financial transactions related to such foreign bank. 31 CFR 103.175(d)(1)(ii).

[22] *See,* 31 CFR 103.177.

[23] 31 CFR 103.177(a)(1)(ii).

[24] For purposes of 31 CFR 103.177, "owner" is defined at 31 CFR 103.175(l). Similarly, under the enhanced due diligence provisions of the correspondent account rule, the covered financial institution may need to identify the owners of foreign banks whose shares are not publicly-traded. *See,* 31 CFR 103.176(b)(3). An "owner" is defined for this purpose to include any person who directly or indirectly owns, controls, or has the power to vote 10 percent or more of any class of securities. *See,* 31 CFR 103.176(b)(3)(ii).

[25] *See* 31 CFR 103.177(a)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61649; File No. PCAOB–2009–01]

Public Company Accounting Oversight Board; Order Approving Proposed Amendment to Board Rules Relating to Inspections

March 4, 2010.

I. Introduction

On July 2, 2009, the Public Company Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "Commission") a proposed rule amendment (PCAOB–2009–01) pursuant to Section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act") relating to the Board's rules governing inspections of registered public accounting firms. Notice of the proposed rule amendment was published in the **Federal Register** on November 25, 2009.[1] The Commission did not receive any comment letters relating to the proposed rule amendment. For the reasons discussed below, the Commission is granting approval of the proposed rule amendment.

II. Description

The PCAOB's proposed rule amendment would add paragraph (g) to existing PCAOB Rule 4003, *Frequency of Inspections,* to give the Board the ability to postpone, for up to three years, the current 2009 deadline for the first inspection of 49 non-U.S. firms that are located in 24 jurisdictions in which the Board has not conducted an inspection prior to 2009. As discussed further below, under the proposed rule amendment, the Board would conduct these inspections in each of the years from 2009 through 2012 according to a sequencing based on the U.S. market capitalization of the aforementioned 49 firms' issuer audit clients. The proposed rule amendment does not affect inspection frequency requirements concerning any other first inspections or concerning any second, or later, inspections of a firm. Further, the proposed amendment itself does not limit the PCAOB's authority to conduct inspections at any time and does not affect registered firms' obligations under the Act.

Pursuant to the requirements of Section 107(b) of the Act and Section 19(b) of the Securities Exchange Act of 1934 (the "Exchange Act"), the Commission published the proposed rule amendment for public comment on November 25, 2009.

III. Discussion of Comments

The Commission did not receive any comment letters relating to the proposed rule amendment.

IV. Discussion

Section 104 of the Act requires the PCAOB to conduct a continuing program of inspections to assess the degree of compliance of each registered public accounting firm and associated persons of that firm with the Act, the rules of the PCAOB, the rules of the Commission, and professional standards, in connection with its performance of audits, issuance of audit reports, and related maters involving issuers. Under current PCAOB rules, the PCAOB must conduct an inspection annually of each firm that issued audit reports for more than 100 issuers in the previous calendar year; and must conduct an inspection once every three years of each firm that, during any of the three prior calendar years, issued an audit report for at least one but not more than 100 issuers, or that played a substantial role in the preparation or furnishing of an audit report for at least one issuer.[2] The Act authorizes the PCAOB, by rule and with SEC approval, to adjust these frequency requirements if the Board finds that different inspection schedules are consistent with the purpose of the Act, the public interest, and the protection of investors.[3]

As described by the PCAOB, there were 49 non-U.S. registered firms that, by virtue of when they first issued audit reports after registering with the PCAOB, the Board was required to inspect for the first time by the end of 2009, and that were located in 24 jurisdictions where the Board had not conducted any inspections to date.[4] The Board indicated that these inspections were not conducted because of issues that relate primarily to the coordination of inspections with local authorities and the resolution of potential conflicts of law.[5]

In summarizing its rationale for the necessity of the proposed rule amendment, the Board noted its belief that most of the aforementioned 24 jurisdictions have or soon will have a local auditor oversight authority with which the Board would seek to work toward cooperative arrangements before conducting inspections, and noted its concerns about proceeding as if such cooperative arrangements and other necessary steps could be completed for all 24 jurisdictions in time to conduct the required inspections by the end of 2009.[6] To address these concerns, the Board adopted and submitted to the Commission for approval the proposed rule amendment, new paragraph (g) to Rule 4003, to allow it to defer these inspections for up to three years.

[1] *See* SEC Release No. 34–61032 (November 19, 2009); 74 FR 61722 (November 25, 2009).

[2] *See* PCAOB Rule 4003.

[3] *See* section 104(b)(2) of the Act [15 U.S.C. 7214(b)].

[4] *See* PCAOB Release No. 2009–003 (June 25, 2009).

[5] *Ibid.*

[6] *Ibid.*

In the Commission's publication of the proposed rules for comment, the notice indicated the following:

In determining the schedule for completion of the inspections subject to new paragraph (g), the Board will implement its proposal to sequence these 49 inspections such that certain minimum thresholds will be satisfied in each of the years from 2009 to 2012. The minimum thresholds relate to U.S. market capitalization of firms' issuer audit clients. The Board will begin by ranking the 49 firms according to the total U.S. market capitalization of a firm's foreign private issuer audit clients. Working from the top of the list (highest U.S. market capitalization total) down, the 49 firms will be distributed over 2009 to 2012 such that, at a minimum, the following criteria are satisfied:

- by the end of 2009, the Board will inspect firms whose combined issuer audit clients' U.S. market capitalization constitutes at least 35 percent of the aggregate U.S. market capitalization of the audit clients of all 49 firms;
- by the end of 2010, the Board will inspect firms whose combined issuer audit clients' U.S. market capitalization constitutes at least 90 percent of that aggregate;
- by the end of 2011, the Board will inspect firms whose combined issuer audit clients' U.S. market capitalization constitutes at least 99.9 percent of that aggregate; and
- the Board will inspect the remaining firms in 2012.

In addition to meeting those market capitalization thresholds, the Board also will satisfy certain criteria concerning the number of those 49 firms that will be inspected in each year. Specifically, the Board will conduct at least four of the 49 inspections in 2009, at least 11 more in 2010, and at least 14 more in 2011. (footnotes omitted)

On February 3, 2010, the PCAOB released new and updated information about the status of its inspections of registered non-U.S. accounting firms, including reporting on the PCAOB's progress in meeting the above target thresholds.[7] Specifically, the PCAOB reported that, as of December 31, 2009, the PCAOB had inspected five firms that would meet the proposed Rule 4003(g) criteria for deferral. However, the PCAOB inspected only two of the four firms that the PCAOB had scheduled for inspection in 2009 based on their clients' U.S. market capitalization. As a result, the PCAOB did not meet the target threshold for U.S. market capitalization for 2009. The PCAOB was unable to conduct the inspections of the remaining two firms it intended to inspect in 2009 because, on the basis of asserted restrictions under non-U.S. law, access to information necessary to conduct the inspections was denied.

The PCAOB also reported that discussions are continuing with the relevant authorities in the affected jurisdictions in an effort to resolve their objections to PCAOB inspections. We agree that the PCAOB should continue to work toward cooperative arrangements with the appropriate local auditor oversight authorities where it is reasonably likely that appropriate cooperative arrangements can be obtained.[8] We also recognize that formalization and finalization of such arrangements take time. However, as the Board has acknowledged, inspection is the cornerstone of the Board's regulatory oversight of audit firms.[9] Public companies and investors rely on the integrity of the auditing work performed by firms registered with the PCAOB, and the salutary effects of briefly delaying inspection of certain of these firms decrease as the period of delay increases or there no longer appears to be a reasonable possibility of reaching appropriate cooperative arrangements.

Accordingly, we encourage the PCAOB to continue to work with deliberate speed with its foreign counterparts to finalize these cooperative arrangements. We continue to expect the PCAOB to satisfy its announced inspection schedule for 2010–2012.[10] We also direct the PCAOB to work closely with Commission staff in the PCAOB's ongoing discussions with relevant authorities and efforts to meet its non-U.S. audit firm inspection schedule.[11]

V. Conclusion

On the basis of the foregoing, the Commission finds that the proposed amendment of the Board's rules governing inspections of registered public accounting firms are consistent with the requirements of the Act and the securities laws and are necessary or appropriate in the public interest or for the protection of investors.

It is therefore ordered, pursuant to section 107 of the Act and section 19(b)(2) of the Exchange Act, that the proposed rule amendment (File No. PCAOB 2009–01) be and hereby is approved.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–5046 Filed 3–9–10; 8:45 am]

BILLING CODE 8011–01–P

[7] *See http://pcaobus.org/News/Releases/Pages/02032010_Progress_IntlInspections.aspx.* The PCAOB also noted that that it intends to update its progress report semiannually to reflect information current as of June 30 and December 31.

[8] *Cf.,* PCAOB Release 2009–003 (June 25, 2009) (expressing the view that "There is long-term value in accepting a limited delay in inspections to continue working toward cooperative arrangements where it appears reasonably possible to reach them.").

[9] *See,* PCAOB Release 2009–003 (June 25, 2009) (stating that "[I]nspection is the Board's primary tool of oversight.").

[10] As part of its semiannual disclosures, the PCAOB also discloses a list of those registered firms where inspections have not been completed by the PCAOB, even though more than four years have passed since the end of the calendar year in which the firm first issued an auditor report while registered with the PCAOB.

[11] Separately, in the Commission's order approving the PCAOB's budget and annual accounting support fee for calendar year 2010, the Commission directed the PCAOB to include in its quarterly reports to the Commission information about the timing of the PCAOB's international inspection program and updates on the PCAOB's efforts to establish cooperative arrangements with respective non-U.S. authorities for inspections required in those countries. *See* SEC Release No. 34–61212 (December 22, 2009); 74 FR 68875 (December 29, 2009).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61630; File No. SR–Phlx–2010–26]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX, Inc. To Permit the Concurrent Listing of $3.50 and $4 Strikes for Classes Participating in the $0.50 Strike Program and the $1 Strike Program

March 2, 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 February 19, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The 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 is filing with the Commission a proposal to amend Commentary .05 to Rule 1012 (Series of Options Open for Trading) to permit the concurrent listing of $3.50 and $4 strikes for classes that participate in both the $0.50 Strike Price Program ("$0.50 Strike Program") [3] and the $1

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The $0.50 Strike Program was initially approved on September 18, 2009. *See* Securities Exchange Act Release No. 60694 (September 18, 2009), 74 FR 49048 (September 25, 2009) (SR–Phlx–2009–65) (order approving).

Strike Price Program ("$1 Strike Program").[4] The Exchange requests that the Commission waive the 30-day operative delay period contained in Exchange Act Rule 19b–4(f)(6)(iii).[5]

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/,* at the principal office of the Exchange, 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, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this proposal is to amend Commentary .05 to Rule 1012 to permit the concurrent listing of $3.50 and $4 strikes for classes that participate in both the $0.50 Strike Program and the $1 Strike Program.

The Exchange recently implemented a rule change that permits strike price intervals of $0.50 for options on stocks trading at or below $3.00 pursuant to the $0.50 Strike Program.[6] As part of the filing to establish the $0.50 Strike Program, the Exchange contemplated that a class may be selected to participate in both the $0.50 Strike Program and the $1 Strike Program. Under the $1 Strike Program, new series with $1 intervals are not permitted to be listed within $0.50 of an existing $2.50 strike price in the same series, except that strike prices of $2 and $3 are permitted to be listed within $0.50 of a $2.50 strike price for classes also selected to participate in the $0.50 Strike Program.[7] Under the Exchange's current Rule 1012, for classes selected to participate in both the $0.50 Strike Program and the $1 Strike Program, the Exchange may either: (a) List a $3.50 strike but not list a $4 strike; or (b) list a $4 strike but not list a $3.50 strike. For example, if a $3.50 strike for an option class in both the $0.50 and $1 Strike Programs was listed, the next highest permissible strike price would be $5.00. Alternatively, if a $4 strike was listed, the next lowest permissible strike price would be $3.00. The intent of the $0.50 Strike Program was to expand the ability of investors to hedge risks associated with stocks trading at or under $3 and to provide finer intervals of $0.50, beginning at $1 up to $3.50. As a result, the Exchange believes that the current filing is consistent with the purpose of the $0.50 Strike Program and will permit the Exchange to fill in any existing gaps resulting from having to choose whether to list a $3.50 or $4 strike for options classes in both the $0.50 and $1 Strike Programs.

Therefore, the Exchange is submitting the current filing to permit the listing of concurrent $3.50 and $4 strikes for classes that are selected to participate in both the $0.50 Strike Program and the $1 Strike Program. To effect this change, the Exchange is proposing to amend Commentary .05(a)(i)(B) to Rule 1012 by adding $4 to the strike prices of $2 and $3 currently permitted if a class participates in both the $0.50 Strike Program and the $1 Strike Program.

The Exchange is also proposing to amend the current rule text to delete references to "$2.50 strike prices" (and the example utilizing $2.50 strike prices) and to replace those references with broader language, e.g., "existing strike prices."

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[8] in general, and furthers the objectives of Section 6(b)(5) of the Act[9] 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, by permitting the Exchange to list more granular strikes on options overlying lower priced securities, which the Exchange believes will provide investors with greater flexibility by allowing them to establish positions that are better tailored to meet their investment objectives.

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 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 either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange believes that the foregoing proposed rule change may take effect upon filing with the Commission pursuant to Section 19(b)(3)(A)[10] of the Act and Rule 19b–4(f)(6)(iii) thereunder[11] because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

The Exchange has requested that the Commission waive the 30-day operative delay to permit the Exchange to compete with other exchanges whose rules permit concurrent listing of $3.50 and $4 strikes for classes similarly

[4] The $1 Strike Program was initially approved as a pilot on June 11, 2003. *See* Securities Exchange Act Release Nos. 48013 (June 11, 2003), 68 FR 35933 (June 17, 2003) (SR–Phlx–2002–55) (order approving). The program was subsequently made permanent and expanded. *See* Securities Exchange Act Release Nos. 57111 (January 8, 2008), 73 FR 2297 (January 14, 2008) (SR–Phlx–2008–01) (notice of filing and immediate effectiveness); 59590 (March 17, 2009), 74 FR 12412. (March 24, 2009) (SR–Phlx–2009–21) (notice of filing and immediate effectiveness); and 61277 (January 4, 2010), 75 FR 1442 (January 11, 2010)(SR–Phlx–2009–108) (notice of filing and immediate effectiveness).

[5] 17 CFR 240.19b–4(f)(6)(iii).

[6] *See* Securities Exchange Act Release No. 60694 (September 18, 2009), 74 FR 49048 (September 25, 2009) (SR–Phlx–2009–65) (order approving); and Commentary .05(a)(ii) to Rule 1012.

[7] *See* Commentary .05(a)(i)(C) of Rule 1012.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

participating in both a $0.50 strike program and a $1 strike program. The Commission finds that waiver of the operative delay is consistent with the protection of investors and the public interest because such waiver will encourage fair competition among the exchanges. Therefore, the Commission designates the proposal operative upon filing.[12]

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–Phlx–2010–26 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–Phlx–2010–26. 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. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2010–26 and should be submitted on or before March 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–5078 Filed 3–9–10; 8:45 am]

BILLING CODE 8011–01–P

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61645; File No. SR–NASDAQ–2010–029]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Fees for Members Using the NASDAQ Market Center

March 4, 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 February 26, 2010, The NASDAQ Stock Market LLC ("NASDAQ" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been 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

NASDAQ proposes to modify pricing for NASDAQ members using the NASDAQ Market Center. NASDAQ will implement the proposed change on March 1, 2010. The text of the proposed rule change is available at *http://nasdaqomx.cchwallstreet.com/,* at NASDAQ's principal office, 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, NASDAQ 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. NASDAQ 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

NASDAQ is making minor modifications to its pricing schedule for execution and routing of orders through the NASDAQ Market Center. First, NASDAQ is increasing the fee for members using the STGY, SCAN, SKNY, SKIP, or DOTI routing strategies.[3] For orders using these strategies that execute in destinations other than the New York Stock Exchange ("NYSE") (or NASDAQ OMX BX, in the case of DOTI orders), NASDAQ will increase the fee from $0.0029 to $0.0030 per share executed.[4]

Second, NASDAQ is eliminating a temporary pricing incentive designed to encourage use of Mid-Point Pegged Orders in the NASDAQ Market Center. Currently, members providing an average daily volume of more than 95 million shares of liquidity during a month pay no fee for the use of Mid-Point Pegged Orders. As a result of the change, all members will pay the same rates for executions of Mid-Point Pegged Orders as they pay for executions of other orders in the NASDAQ Market Center: either $0.0028 or $0.0030 per share executed, depending on the type of security traded and the member's trading volumes.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and with Section 6(b)(4) of the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Orders designated to use these routing strategies check the NASDAQ book for the full size of the order prior to routing. The terms and conditions of NASDAQ's routing strategies are described in NASDAQ Rule 4758.

[4] For DOTI orders that execute in NASDAQ OMX BX, NASDAQ will continue to pass through fees and rebates associated with order execution on that venue. SCAN, SKNY, STGY, and SKIP orders executed at NASDAQ OMX BX are currently charged $0.0029, however, and will now be charged $0.0030. DOTI, STGY, SCAN, SKNY, and SKIP orders that execute at NYSE are charged $0.0018 per share executed if they access liquidity at NYSE, or receive a $0.0010 per share executed credit if they add liquidity at NYSE. These fees and credits are unchanged.

[5] 15 U.S.C. 78f.

Act,[6] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls. The impact of the modest price increases upon the net fees paid by a particular market participant will depend upon a number of variables, including the routing strategies that it uses, the relative availability of liquidity on NASDAQ and other venues, the prices of the market participant's quotes and orders relative to the national best bid and offer (*i.e.,* its propensity to add or remove liquidity), the types of securities that it trades, and its usage of Mid-Point Pegged Orders. NASDAQ notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. Accordingly, if particular market participants object to the proposed fee increases, they can avoid paying the fees by directing orders to other venues or using routing strategies and order types that are not subject to the increases. NASDAQ believes that its fees continue to be reasonable and equitably allocated to members on the basis of whether they opt to direct orders to NASDAQ.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ 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, as amended. Because the market for order execution and routing is extremely competitive, members may readily direct orders to NASDAQ's competitors if they object to the proposed rule change.

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.

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)(ii) of the Act[7] and subparagraph (f)(2) of Rule 19b–4 thereunder.[8] At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2010–029 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–NASDAQ–2010–029. 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,[9] 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, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2010–029 and should be submitted on or before March 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–5070 Filed 3–9–10; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(a)(ii).

[8] 17 CFR 240.19b–4(f)(2).

[9] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61644; File No. SR–NYSEArca–2010–08]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. Deletion of Rules 6.96 and 14.5

March 3, 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 February 24, 2010, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III 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 delete Rules 6.96 and 14.5, which governed processing of orders received through the OCC Hub. The text of the proposed rule change is available on NYSE Arca's Web site at *http://www.nyse.com,* on the Commission's Web site at *http://www.sec.gov,* at NYSE Arca, 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, 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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 purpose of this filing is to delete outdated rules related to the receipt, execution, and reporting of Principal ("P") and Principal Acting as Agent ("P/A") entered to the Exchange through the order routing hub developed by the Options Clearing Corporation ("OCC Hub"). The affected Rules are NYSE Arca Rule 6.96 Temporary rule Governing P and P/A orders, and Rule 14.5 Liability for Options Intermarket Linkage.

At the time of approval of the Options Order Protection and Locked/Crossed Market Plan ("New Plan") and the simultaneous withdrawal of the Exchange from the Plan for the Purpose of Creating and Operating an Intermarket Options Linkage ("Old Plan"), the Exchange also filed and received approval for rules implementing the New Plan.[3] Certain Participants to the New Plan did not have technology in place to take full advantage of the New Plan, and remained dependent on the OCC Hub to route orders to markets at the NBBO. The Exchange was aware that such dependence might occur, and included a Temporary Rule Governing P and P/A Orders as part of the implementing rules for the New Plan.

Additionally, because the OCC Hub remained connected to the Exchange, Rule 14.5, Liability for Options Intermarket Linkage, was not eliminated with the other rules related to the Old Plan.

All of the Participant Exchanges have now migrated off the OCC Hub; consequently the rules related to the OCC Hub and the Old Plan are no longer necessary.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b)[4] of the Securities Exchange Act of 1934 (the "Act"), in general, and furthers the objectives of Section 6(b)(5)[5] in particular in that it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to perfect the mechanism for a free and open market and a national market system and, in general, to protect investors and the public interest, as the rules are now obsolete and should be removed from the rule set.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[6] and Rule 19b–4(f)(6) thereunder.[7]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2010–08 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–08. 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 Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2010–08 and should be submitted on or before March 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–5069 Filed 3–9–10; 8:45 am]

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[3] Exchange Act Release No. 60527 (August 18, 2009) (NYSEArca–2009–45) 74 FR 43178 (August 26, 2009).

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61642; File No. SR–NYSEArca–2010–07]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating to Listing of AdvisorShares WCM/BNY Mellon Focused Growth ADR ETF

March 3, 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 February 23, 2010, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III 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 list and trade the following under NYSE Arca Equities Rule 8.600 ("Managed Fund Shares"): AdvisorShares WCM/BNY Mellon Focused Growth ADR ETF. The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyx.com,* at the Exchange's principal office 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, 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade the following Managed Fund Shares[4] ("Shares") under NYSE Arca Equities Rule 8.600: AdvisorShares WCM/BNY Mellon Focused Growth ADR ETF ("ADR Fund" or "Fund").[5] The Shares will be offered by AdvisorShares Trust (the "Trust"), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an open-end management investment company.[6]

The investment advisor to the ADR Fund is AdvisorShares Investments, LLC (the "Advisor"). WCM Investment Management ("WCM") is the sub-advisor ("Sub-Advisor") to the ADR Fund and the portfolio manager. The Sub-Advisor selects securities for the Fund in which to invest pursuant to an "active" management strategy for security selection and portfolio construction. The ADR Fund will periodically change the composition of its portfolio to best meet its investment objective. Neither the Advisor nor the Sub-Advisor is affiliated with a broker-dealer.[7]

According to the Registration Statement, the ADR Fund's investment objective is long-term capital appreciation above international benchmarks, such as the BNY Mellon Classic ADR Index and the MSCI EAFE Index. WCM seeks to achieve the Fund's investment objective by primarily investing in other exchange-traded funds ("ETFs"), as well as a portfolio of American Depositary Receipts ("ADRs") included in the BNY Mellon Classic ADR Index,[8] and swap contracts. The ADR Fund's portfolio will typically have exposure to fewer than 30 companies concentrating on the best ideas developed in WCM's investment process.

The Fund currently intends to invest primarily in the securities of other ETFs

[4] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a) ("1940 Act") organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment advisor consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[5] The Commission previously approved listing and trading on the Exchange of the following actively managed funds under Rule 8.600. *See* Securities Exchange Act Release Nos. 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (SR–NYSEArca–2008–25) (order approving Rule 8.600 and Exchange listing and trading of PowerShares Active AlphaQ Fund, PowerShares Active Alpha Multi-Cap Fund, PowerShares Active Mega-Cap Portfolio and PowerShares Active Low Duration Portfolio); 57801 (May 8, 2008), 73 FR 27878 (May 14, 2008) (SR–NYSEArca–2008–31) (order approving Exchange listing and trading of twelve actively-managed funds of the WisdomTree Trust); 59826 (April 28, 2009), 74 FR 20512 (May 4, 2009) (SR–NYSEArca–2009–22) (order approving Exchange listing and trading of Grail American Beacon Large Cap Value ETF); 60460 (August 7, 2009), 74 FR 41468 (August 17, 2009) (SR–NYSEArca–2009–55) (order approving Exchange listing and trading of Dent Tactical ETF); 60975 (November 10, 2009) (SR–NYSEArca–2009–83) (order approving listing of Grail American Beacon International Equity ETF); 60981 (November 10, 200 [sic]) (SR–NYSEArca–2009–79) (order approving listing of five fixed income funds of the PIMCO ETF Trust).

[6] The Trust is registered under the 1940 Act. On September 8, 2009, the Trust filed with the Commission Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a), and under the 1940 Act relating to the Fund (File Nos. 333–157876 and 811–22110) (the "Registration Statement"). The description of the operation of the Trust and the Fund herein is based on the Registration Statement.

[7] With respect to the Fund, the Exchange represents that the Advisor, as the investment advisor of the Fund, as well as the Sub-Advisor to the Fund and their related personnel, are subject to Investment Advisers Act Rule 204A–1. This Rule specifically requires the adoption of a code of ethics by an investment advisor to include, at a minimum: (i) Standards of business conduct that reflect the firm's/personnel fiduciary obligations; (ii) provisions requiring supervised persons to comply with applicable federal securities laws; (iii) provisions that require all access persons to report, and the firm to review, their personal securities transactions and holdings periodically as specifically set forth in Rule 204A–1; (iv) provisions requiring supervised persons to report any violations of the code of ethics promptly to the chief compliance officer ("CCO") or, provided the CCO also receives reports of all violations, to other persons designated in the code of ethics; and (v) provisions requiring the investment advisor to provide each of the supervised persons with a copy of the code of ethics with an acknowledgement by said supervised persons. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment advisor to provide investment advice to clients unless such investment advisor has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment advisor and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[8] According to the Registration Statement, Depositary Receipts, which include ADRs, Global Depositary Receipts, Euro Depositary Receipts and New York Shares, are negotiable U.S. securities that generally represent a non-U.S. company's publicly traded equity or debt. Depositary Receipts may be purchased in the U.S. secondary trading market. They may trade either on an exchange or in the over-the-counter market. Although typically denominated in U.S. dollars, Depositary Receipts can also be denominated in Euros. Depositary Receipts can trade on all U.S. stock exchanges as well as on many European stock exchanges.

consistent with the requirements of Section 12(d)(1) of the 1940 Act, or any rule, regulation or order of the SEC or interpretation thereof. The Fund will only make such investments in conformity with the requirements of Section 817 of the Internal Revenue Code of 1986, as amended ("Internal Revenue Code"). The ETFs in which the Fund will invest will primarily be index-based ETFs that hold substantially all of their assets in securities representing a specific index. Typically the components of such indexes will be short-term U.S. government securities.

Although WCM currently seeks to achieve the Fund's investment objective by investing primarily in ETFs, WCM could at any point seek to achieve the Fund's investment objective by investing primarily in ADRs.

The Investment Process

According to the Registration Statement, WCM employs a team approach through Investment Strategy Group, consisting of four senior investment professionals (the "Portfolio Managers"). This team establishes portfolio guidelines for sector and industry analysis and develops the portfolio of the ADR Fund. The Portfolio Managers analyze the major trends in the global economy in order to identify those economic sectors and industries that are most likely to benefit. According to the Registration Statement, typical themes incorporated in the Portfolio Managers' investment process include demographics, global commerce, outsourcing, the growing global middle class and the proliferation of technology. A portfolio strategy is then implemented using a combination of low duration fixed income ETFs, direct investment in ADRs selected by WCM, and swap contracts based on the ADRs selected by WCM, that will best capitalize on these investment themes and subsequent expected growth of the underlying assets. All buy and sell decisions are made by the Portfolio Managers.

Portfolio Construction

According to the Registration Statement, WCM seeks, either directly or through swap exposure, non-US domiciled quality growth businesses. WCM focuses its attention on conventional growth sectors such as technology, consumer discretionary and staples, and healthcare.

The ADR Fund utilizes quantitative analysis that entails backward-looking screens to help narrow the non-U.S. universe of companies in which the ADR Fund invests. The ADR Fund looks for companies with market capitalization of $3.5 billion or greater within traditional growth sectors, and that have high returns on invested capital; low or no debt; high gross, operating margins; and a history of sustainable growth. Typical portfolio construction would entail exposure to 15 or more industries with initial positions of approximately 2–5%; maximum position size of approximately 10%; maximum sector size of approximately 45%; maximum industry exposure of approximately 15%; and maximum emerging markets exposure of approximately 35%.

The Fund will under normal circumstances have at least 80% of its total assets invested in ADRs or their synthetic equivalent. Prior to any change in this policy, the Fund will provide shareholders with 60 days written notice. This is a non-fundamental policy of the Fund and may be changed with respect to the Fund by the Fund's board of director.

The ADR Fund may invest in equity securities, including common and preferred stock, warrants, convertible securities and Master Limited Partnerships. The ADR Fund's portfolio will consist primarily of ADRs or their synthetic equivalent and the ADR Fund will not invest in non-U.S. equity securities outside of U.S. markets.

The Advisor represents that, with respect to Fund assets invested in ADRs, the composition of the Fund's portfolio, on a continual basis, will consist of:

(1) ADRs that in the aggregate account for at least 90% of the weight of the ADRs in the Fund's portfolio each shall have a minimum global market value of at least $100 million;

(2) ADRs that in the aggregate account for at least 70% of the weight of the ADRs in the Fund's portfolio each shall have a minimum global monthly trading volume of 250,000 shares, or minimum global notional volume traded per month of $25,000,000, averaged over the last six months; and

(3) Any portion of the Fund's portfolio consisting of ADRs will include a minimum of 20 ADRs of which the most heavily weighted ADR shall not exceed 25% of the weight of the ADRs in the Fund's portfolio, and the five most heavily weighted ADRs shall not exceed 60% of the weight of the ADRs in the Fund's portfolio.

The ADR Fund may use futures contracts and related options for bona fide hedging; attempting to offset changes in the value of securities held or expected to be acquired or be disposed of; attempting to gain exposure to a particular market, index or instrument; or other risk management purposes. As stated in the Registration Statement, the Trust is not subject is not subject [sic] to registration or regulation as a commodity pool operator under the Commodity Exchange Act.[9] The ADR Fund will reduce the risk that it will be unable to close out a futures contract by only entering into futures contracts that are traded on a national futures exchange regulated by the Commodity Futures Trading Commission ("CFTC").

The ADR Fund may purchase and write put and call options on indices and enter into related closing transactions; trade put and call options on securities, securities indices and currencies, as the Sub-Advisor determines is appropriate in seeking the ADR Fund's investment objective, except as restricted by the ADR Fund's investment limitations (as described in the Registration Statement); enter into repurchase agreements with financial institutions; use reverse repurchase agreements as part of the ADR Fund's investment strategy; and make short-term investments in U.S. Government securities.

The Fund expects to enter into swap agreements, including, but not limited to, equity index swaps and interest rate swap agreements. The Fund will utilize swap agreements in an attempt to gain exposure to specific securities in a market without actually purchasing those securities, or to hedge a position.

In addition, the ADR Fund may invest up to 15% of its net assets in illiquid securities. For this purpose, "illiquid securities" are securities that the ADR Fund may not sell or dispose of within seven days in the ordinary course of business at approximately the amount at which the ADR Fund has valued the securities.

The ADR Fund, from time to time, in the ordinary course of business, may purchase securities on a when-issued or delayed-delivery basis (*i.e.,* delivery and payment can take place between a month and 120 days after the date of the transaction). The ADR Fund may invest in U.S. Treasury zero-coupon bonds.

As stated in the Registration Statement, it is a fundamental policy of the ADR Fund that it may not, with respect to 75% of its total assets, (i) purchase securities of any issuer (except securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities) if, as a result, more than 5% of its total assets would be invested in the securities of such issuer; or (ii) acquire more than 10% of the outstanding voting securities of any one

[9] 7 U.S.C. 1 *et seq.*

issuer.[10] In addition, the ADR Fund may not purchase any securities which would cause 25% or more of its total assets to be invested in the securities of one or more issuers conducting their principal business activities in the same industry or group of industries, provided that this limitation does not apply to investments in securities issued or guaranteed by the U.S. Government, its agencies or instrumentalities, or shares of investment companies.[11]

According to the Registration Statement, the ADR Fund will seek to qualify for treatment as a Regulated Investment Company ("RIC") under the Internal Revenue Code.[12]

To respond to adverse market, economic, political or other conditions, the ADR Fund may invest 100% of its total assets, without limitation, in high-quality short-term debt securities and money market instruments. The ADR Fund may be invested in these instruments for extended periods, depending on the Sub-Advisor's assessment of market conditions. These debt securities and money market instruments include shares of other mutual funds, commercial paper, certificates of deposit, bankers' acceptances, U.S. Government securities and repurchase agreements.

Creations and redemptions of Shares occur in large specified blocks of Shares, referred to as "Creation Units". According to the Registration Statement, the shares of the Fund are "created" at their net asset value ("NAV") by market makers, large investors and institutions only in block-size Creation Units of 25,000 shares or more. A "creator" enters into an authorized participant agreement (a "Participant Agreement") with the ADR Fund's distributor (the "Distributor") or a DTC participant that has executed a Participant Agreement with the Distributor (an "Authorized Participant"), and deposits into the ADR Fund a portfolio of securities closely approximating the holdings of the ADR Fund and a specified amount of cash, together totaling the NAV of the Creation Unit(s), in exchange for 25,000 shares of the ADR Fund (or multiples thereof). Similarly, Shares can only be redeemed in Creation Units, generally 25,000 shares or more, principally in-kind for a portfolio of securities held by the ADR Fund and a specified amount of cash together totaling the NAV of the Creation Unit(s). Shares are not redeemable from the ADR Fund except when aggregated in Creation Units. The prices at which creations and redemptions occur are based on the next calculation of NAV after an order is received in a form prescribed in the Participant Agreement.

According to the Registration Statement, the Trust reserves the right to offer an "all cash" option for creations and redemptions of Creation Units for the ADR Fund. In addition, Creation Units may be issued in advance of receipt of Deposit Securities subject to various conditions, including a requirement to maintain a cash deposit with the Trust at least equal to a specified percentage of the market value of the missing Deposit Securities. In each instance, transaction fees may be imposed that will be higher than the transaction fees associated with traditional in-kind creations or redemptions. In all cases, such fees will be limited in accordance with SEC requirements applicable to management investment companies offering redeemable securities.

The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rule 8.600. The Exchange represents that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 [13] under the Exchange Act, as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the net asset value and the Disclosed Portfolio will be made available to all market participants at the same time.

Availability of Information

The Fund's Web site (*http://www.advisorshares.com*), which will be publicly available prior to the public offering of Shares, will include a form of the Prospectus for the Fund that may be downloaded. The Fund's Web site will include additional quantitative information updated on a daily basis, including, for the Fund, (1) daily trading volume, the prior business day's reported closing price, NAV and mid-point of the bid/ask spread at the time of calculation of such NAV (the "Bid/Ask Price"),[14] and a calculation of the premium and discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio as defined in NYSE Arca Equities Rule 8.600(c)(2) that will form the basis for the Fund's calculation of NAV at the end of the business day.[15]

On a daily basis, for each portfolio security of the Fund, the Fund will disclose on its Web site the following information: Ticker symbol, name of security, number of shares held in the portfolio, and percentage weighting of the security in the portfolio. On a daily basis, the Advisor will disclose for each portfolio security or other financial instrument of the Fund the following information: Ticker symbol (if applicable), name of security or financial instrument, number of shares or dollar value of financial instruments held in the portfolio, and percentage weighting of the security or financial instrument in the portfolio. The Web site information will be publicly available at no charge.

In addition, a basket composition file, which includes the security names and share quantities required to be delivered in exchange for Fund shares, together with estimates and actual cash

[10] This diversification standard is contained in section 5(b)(1) of the 1940 Act.

[11] Such fundamental policies may not be changed without the vote of a majority of the outstanding voting securities of the ADR Fund.

[12] According to the Registration Statement, one of several requirements for RIC qualification is that a Fund must receive at least 90% of the Fund's gross income each year from dividends, interest, payments with respect to securities loans, gains from the sale or other disposition of stock, securities or foreign currencies, or other income derived with respect to the Fund's investments in stock, securities, foreign currencies and net income from an interest in a qualified publicly traded partnership (the "90% Test"). A second requirement for qualification as a RIC is that a Fund must diversify its holdings so that, at the end of each fiscal quarter of the Fund's taxable year: (a) At least 50% of the market value of the Fund's total assets is represented by cash and cash items, U.S. Government securities, securities of other RICs, and other securities, with these other securities limited, in respect to any one issuer, to an amount not greater than 5% of the value of the Fund's total assets or 10% of the outstanding voting securities of such issuer; and (b) not more than 25% of the value of its total assets are invested in the securities (other than U.S. Government securities or securities of other RICs) of any one issuer or two or more issuers which the Fund controls and which are engaged in the same, similar, or related trades or businesses, or the securities of one or more qualified publicly traded partnership (the "Asset Test").

[13] 17 CFR 240.10A–3.

[14] The Bid/Ask Price of the Fund is determined using the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

[15] Under accounting procedures followed by the Fund, trades made on the prior business day ("T") will be booked and reflected in NAV on the current business day ("T + 1"). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

components, will be publicly disseminated daily prior to the opening of the New York Stock Exchange ("NYSE") via the National Securities Clearing Corporation. The basket represents one Creation Unit of the Fund. The NAV of the Fund will normally be determined as of the close of the regular trading session on the NYSE (ordinarily 4 p.m. Eastern Time) on each business day.

Investors can also obtain the Trust's Statement of Additional Information ("SAI"), the Fund's Shareholder Reports, and its Form N–CSR and Form N–SAR, filed twice a year. The Trust's SAI and Shareholder Reports are available free upon request from the Trust, and those documents and the Form N–CSR and Form N–SAR may be viewed on-screen or downloaded from the Commission's Web site at *http://www.sec.gov.* Information regarding market price and trading volume of the Shares is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association ("CTA") high-speed line. In addition, the Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600 (c)(3), will be disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session. The dissemination of the Portfolio Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and to provide a close estimate of that value throughout the trading day.

Additional information regarding the Trust and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions and taxes is included in the Registration Statement. All terms relating to the Fund that are referred to, but not defined in, this proposed rule change are defined in the Registration Statement.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.[16] Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities comprising the Disclosed Portfolio and/or the financial instruments of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares will be subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4 a.m. to 8 p.m. Eastern Time in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. The minimum trading increment for Shares on the Exchange will be $0.01.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which include Managed Fund Shares) to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange may obtain information via the Intermarket Surveillance Group ("ISG") from other exchanges that are members of ISG.[17]

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its Equity Trading Permit ("ETP") Holders in an Information Bulletin ("Bulletin") of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Unit aggregations (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Portfolio Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Portfolio Indicative Value is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Exchange Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m. Eastern Time each trading day.

2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5)[18] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change will facilitate the listing and trading of additional types of actively-managed exchange-traded products that will enhance competition among market

[16] *See* NYSE Arca Equities Rule 7.12, Commentary .04.

[17] For a list of the current members of ISG, see *http://www.isgportal.org.* The Exchange may obtain information from futures exchanges with which the Exchange has entered into a surveillance sharing agreement or that are ISG members. The Exchange notes that not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[18] 15 U.S.C. 78f(b)(5).

participants, to the benefit of investors and the marketplace.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

The Exchange has requested accelerated approval of this proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register**. The Commission is considering granting accelerated approval of the proposed rule change at the end of a 15-day comment period.

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–NYSEArca–2010–07 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–07. 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. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2010–07 and should be submitted on or before March 25, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–5068 Filed 3–9–10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61641; File No. SR–CBOE–2010–020]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Options Regulatory Fee

March 3, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on February 23, 2010, Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by CBOE. 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

Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") proposes to amend the Options Regulatory Fee to eliminate the minimum one-cent charge per trade. 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 these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange charges an Options Regulatory Fee ("ORF") of $.004 per contract to each member for all options transactions executed or cleared by the member that are cleared by The Options Clearing Corporation ("OCC") in the customer range, excluding Linkage orders, regardless of the exchange on which the transaction occurs. The ORF is collected indirectly from members through their clearing firms by OCC on behalf of the Exchange. There is a minimum one-cent charge per trade.[2]

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] The ORF was established in October 2008 as a replacement of Registered Representative fees. *See* Securities Exchange Act Release No. 58817 (October 20, 2008), 73 FR 63744 (October 27, 2008). The ORF was to be effective January 1, 2009. In December 2008 and January 2009, the Exchange filed proposed rule changes waiving the ORF for January and February, to allow additional time for the Exchange, OCC and firms to put in place appropriate procedures to implement the fee. *See*

The Exchange proposes to eliminate the minimum one-cent charge per trade. The Exchange does not calculate the ORF on a trade-by-trade basis.[3] The Exchange calculates the ORF by multiplying the aggregate number of contracts executed by each clearing firm every month by the ORF rate and then rounding to the nearest $.01 using pure rounding (i.e., any digit 5 and above is rounded up). Because the Exchange does not calculate the ORF on a trade-by-trade basis, the Exchange proposes to remove the minimum one-cent charge per trade from its fees schedule.

2. Statutory Basis

By clarifying how the Exchange calculates the ORF, the Exchange believes the proposed rule change is consistent with section 6(b) of the Securities Exchange Act of 1934 ("Act")[4], in general, and furthers the objectives of section 6(b)(4)[5] of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

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 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

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act[6] and subparagraph (f)(2) of Rule 19b–4[7] thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2010–020 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–2010–020. 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 Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–CBOE–2010–020 and should be submitted on or before March 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–5067 Filed 3–9–10; 8:45 am]

BILLING CODE 8011–01–P

Securities Exchange Act Release No. 59182 (December 30, 2008), 74 FR 730 (January 7, 2009), and Securities Exchange Act Release No. 59355 (February 3, 2009), 74 FR 6677 (February 10, 2009). The ORF was amended three additional times in 2009. *See* Securities Exchange Act Release No. 59427 (February 20, 2009), 74 FR 9013 (February 27, 2009); Securities Exchange Act Release No. 60093 (June 10, 2009), 74 FR 28749 (June 17, 2009); and Securities Exchange Act Release No. 60513 (August 17, 2009), 74 FR 42719 (August 24, 2009).

[3] *See* CBOE Regulatory Circular RG09–30.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78s(b)(3)(A).

[7] 17 CFR 240.19b–4(f)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61639; File No. SR–NYSEArca–2010–09]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Listing of Wilshire 5000 Total Market ETF and the Wilshire 4500 Completion ETF

March 3, 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 February 25, 2010, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") 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 list and trade the shares of the Wilshire 5000 Total Market ETF and the Wilshire 4500 Completion ETF under NYSE Arca Equities Rule 5.2(j)(3). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

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

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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 Exchange proposes to list and trade the shares ("Shares") of the Wilshire 5000 Total Market ETF and the Wilshire 4500 Completion ETF (each, a "Fund", and, collectively, "Funds") under NYSE Arca Equities Rule 5.2(j)(3), the Exchange's listing standards for Investment Company Units ("ICUs") [4]. Each of the Funds is a series of the Claymore Exchange-Traded Fund Trust.

The Wilshire 5000 Total Market ETF seeks investment results that correspond generally to the performance, before the Fund's fees and expenses of the Wilshire 5000 Total Market Index ("Wilshire 5000").[5] The Wilshire 4500 Completion ETF seeks investment results that correspond generally to the performance, before the Fund's fees and expenses of the Wilshire 4500 Completion Index ("Wilshire 4500", and, together with the Wilshire 5000, the "Underlying Indexes").[6]

The Exchange is submitting this proposed rule change because the Underlying Indexes for the Funds do not meet all of the "generic" listing requirements of Commentary .01(a)(A) to NYSE Arca Equities Rule 5.2(j)(3) applicable to listing of ICUs based on US indexes. The Underlying Indexes meets all such requirements except for that set forth in Commentary .01(a)(A)(5).[7] Specifically, as of January 21, 2010, stocks comprising 99.952% of the weight of the Wilshire 5000 were NMS stocks and stocks comprising 99.734% of the weight of the Wilshire 4500 were NMS stocks.[8]

The Exchange represents that: (1) Except for Commentary .01(a)(A)(5) to NYSE Arca Equities Rule 5.2(j)(3), the Shares of the Fund currently satisfy all of the generic listing standards under NYSE Arca Equities Rule 5.2(j)(3); (2) the continued listing standards under NYSE Arca Equities Rules 5.2(j)(3) and 5.5(g)(2) applicable to ICUs shall apply to the Shares; and (3) the Trust is required to comply with Rule 10A–3 [9] under the Act for the initial and continued listing of the Shares. In addition, the Exchange represents that the Shares will comply with all other requirements applicable to ICUs including, but not limited to, requirements relating to the dissemination of key information such as the value of the Underlying Indexes and Intraday Indicative Value, rules governing the trading of equity securities, trading hours, trading halts, surveillance, and Information Bulletin to ETP Holders, as set forth in Exchange rules applicable to ICUs and prior Commission orders approving the generic listing rules applicable to the listing and trading of ICUs.[10]

Detailed descriptions of the Funds, the Underlying Indexes, procedures for creating and redeeming Shares, transaction fees and expenses, dividends, distributions, taxes, risks, and reports to be distributed to beneficial owners of the Shares can be found in the Registration Statement [11] or on the Web site for the Funds (*http://www.claymore.com*), as applicable.

2. Statutory Basis

The proposed rule change is consistent with section 6(b) [12] of the Act, in general, and furthers the objectives of section 6(b)(5),[13] 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. The Exchange believes that the proposed rule change will facilitate the listing and trading of an additional type of exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [14] and Rule 19b–4(f)(6) thereunder.[15] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [16] and Rule 19b–4(f)(6)(iii) thereunder.[17]

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[4] An Investment Company Unit is a security that represents an interest in a registered investment company that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities (or holds securities in another registered investment company that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities). *See* NYSE Arca Equities Rule 5.2(j)(3)(A).

[5] The Wilshire 5000 Index is designed to represent the total U.S. equity market. The Wilshire 5000 Index includes all U.S. equity securities that have readily available prices.

[6] The Wilshire 4500 Index is a subset of the Wilshire 5000 Total Market Index. Designed to represent the extended market, the Wilshire 4500 Index is the Wilshire 5000 Index with the components of the S&P 500 Index excluded.

[7] Commentary .01(a)(A)(5) to NYSE Arca Equities Rule 5.2(j)(3) provides that all securities in the index or portfolio shall be U.S. Component Stocks listed on a national securities exchange and shall be NMS Stocks as defined in Rule 600 of Regulation NMS under the Securities Exchange Act of 1934 (17 U.S.C. 78a) ("Act"). NYSE Arca Equities Rule 5.2(j)(3) defines the term "U.S. Component Stock" as an equity security that is registered under Sections 12(b) or 12(g) of the Act or an American Depositary Receipt, the underlying equity security of which is registered under Sections 12(b) or 12(g) of the Act.

[8] As of January 21, 2010, the Wilshire 5000 and Wilshire 4500 each included 197 non-NMS stocks. Such stocks are traded either on the OTC Bulletin Board or the Pink OTC Markets.

[9] 17 CFR 240.10A–3.

[10] *See, e.g.,* Securities Exchange Act Release No. 44551 (July 12, 2001), 66 FR 37716 (July 19, 2001) (SR–PCX–2001–14) (order approving generic listing standards for ICUs and Portfolio Depositary Receipts); Securities Exchange Act Release No. 41983 (October 6, 1999), 64 FR 56008 (October 15, 1999) (SR–PCX–98–29) (order approving rules for listing and trading of ICUs).

[11] *See* the Claymore Exchange-Traded Fund Trust Registration Statement on Form N–1A, dated December 18, 2009 (File Nos. 333–134551; 811–21906) ("Registration Statement").

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

[14] 15 U.S.C. 78s(b)(3)(A)(iii).

[15] 17 CFR 240.19b–4(f)(6).

[16] 15 U.S.C. 78s(b)(3)(A).

[17] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied the pre-filing requirement.

A proposed rule change filed under Rule 19b–4(f)(6) [18] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[19] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange states that the proposed rule change does not significantly affect the protection of investors or the public interest and does not impose any significant burden on competition. In addition, the Exchange believes that it has developed adequate trading rules, procedures, surveillance programs, and listing standards for the continued listing and trading of the Shares.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Commission notes that the Underlying Indexes for the Funds fail to meet the requirements set forth in Commentary .01(a)(A)(5) to NYSE Arca Equities Rule 5.2(j)(3) by only a small amount and that Exchange has represented that the Shares of the Funds currently satisfy all of the other generic listing standards under NYSE Arca Equities Rule 5.2(j)(3) and all other requirements applicable to ICUs, as set forth in Exchange rules and prior Commission orders approving the generic listing rules applicable to the listing and trading of ICUs. Therefore, the Commission believes that the listing and trading of the Shares do not present any novel or significant issues or impose any significant burden on competition, and that waiving the 30-day operative delay will benefit the market and investors by providing market participants with additional investing choices. For these reasons, the Commission designates the proposed rule change as operative under upon filing.[20]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

[18] 17 CFR 240.19b–4(f)(6).

[19] 17 CFR 240.19b–4(f)(6)(iii).

[20] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–NYSEArca–2010–09 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2010–09. 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 Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2010–09 and should be submitted on or before March 31, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–5066 Filed 3–9–10; 8:45 am]

BILLING CODE 8011–01–P

[21] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 6915]

Lifting of Nonproliferation Measures Against One Russian Entity

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: A determination has been made, pursuant to Section 6 of Executive Order 12938 of November 14, 1994, as amended, to remove nonproliferation measures on one Russian entity.

DATES: *Effective Date:* March 10, 2010.

FOR FURTHER INFORMATION CONTACT: Pamela K. Durham, Office of Missile Threat Reduction, Bureau of International Security and Nonproliferation, Department of State (202–647–4930).

SUPPLEMENTARY INFORMATION: Pursuant to the authorities vested in the President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) ("IEEPA"), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), the Arms Export Control Act (22 U.S.C. 2751 *et seq.*), and section 301 of title 3, United States Code, and Section 6 of Executive Order 12938 of November 14, 1994, as amended, a determination was made on March 1, 2010, that it is in the foreign policy or national security interests of the United States to remove the restrictions imposed pursuant to sections 4(b), 4(c), and 4(d) of the Executive Order on the following Russian entity, its sub-units and successors:

1. Glavkosmos.

These restrictions were imposed on July 30, 1998 (*see* 63 FR 42089).

Dated: March 4, 2010.

Vann H. Van Diepen,

Acting Assistant Secretary of State for International Security and Nonproliferation.

[FR Doc. 2010–5135 Filed 3–9–10; 8:45 am]

BILLING CODE 4710–27–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35355]

Albany & Eastern Railroad Company—Acquisition and Operation Exemption—Union Pacific Railroad Company and Willamette & Pacific Railroad, Inc.

Albany & Eastern Railroad Company (AERC), a Class III rail carrier, has filed a verified notice of exemption under 49 CFR 1150.41 to acquire and operate the exclusive rail freight easement between milepost 682.25, near Greenberry, OR, and milepost 687.6, near Corvallis, OR (the Line), a distance of approximately 5.35 miles. AERC will: (1) Acquire the rail freight easement from Union Pacific Railroad Company (UP), the current owner of the Line; and (2) take assignment of UP's lease with Willamette & Pacific Railroad, Inc. (WPRR), the current operator on the Line, and any and all of WPRR's remaining operating rights and obligations with respect to the Line. UP and WPRR will retain limited overhead trackage rights on the Line.

This transaction is related to a concurrently filed notice of exemption in STB Finance Docket No. 35353, *VFRC, LLC—Acquisition Exemption—Union Pacific Railroad Company*. In that proceeding, VFRC, LLC (VFRC) seeks an exemption under 49 CFR 1150.31 to acquire from UP the physical assets and the underlying right-of-way of the Line.

AERC states that it will execute an operating agreement with VFRC, pursuant to which it will provide all rail freight service between industries on the Line and connecting carrier WPRR near Corvallis. To physically interchange cars with WPRR, AERC and WPRR will enter into an interchange agreement that will provide AERC incidental operating rights over certain additional trackage owned by UP and leased by WPRR.

AERC also states that the proposed transaction does not contain any provision or involve any agreement that would limit its future ability to interchange traffic with a third party connecting carrier.

AERC certifies that its projected annual revenues as a result of the transaction will not result in AERC becoming a Class II or Class I rail carrier and further certifies that its projected annual revenues will not exceed $5 million.

AERC states that it expects the transaction to be consummated on or shortly after the effective date of this exemption. The earliest this transaction may be consummated is March 24, 2010, the effective date of the exemption (30 days after the exemption was filed).

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than March 17, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35355, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Myles L. Tobin, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: March 5, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2010–5081 Filed 3–9–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35353]

VFRC, LLC—Acquisition Exemption—Union Pacific Railroad Company

VFRC, LLC (VFRC), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire certain physical assets of a rail line and the underlying right-of-way from the Union Pacific Railroad Company (UP), between milepost 682.25, near Greenberry, OR, and milepost 687.6, near Corvallis, OR (the Line), a distance of approximately 5.35 miles.

VFRC states that it will not provide rail freight service over the Line, but that UP will retain a permanent, exclusive rail freight easement to provide service over the Line. In a currently filed notice of exemption to become the operator of the Line, the Albany & Eastern Railroad Company seeks to acquire the freight easement from UP and to acquire by assignment from the Willamette & Pacific Railroad, Inc. (WPRR), the current operator of the Line, WPRR's operating rights and obligations with respect to the Line. *See Albany & Eastern Railroad Company—Acquisition and Operation Exemption—Union Pacific Railroad Company and Willamette & Pacific Railroad, Inc.,* STB Finance Docket No. 35355.

VFRC states that it is in the process of finalizing a Line Sale Contract with UP, pursuant to which UP will: (1) Convey to VFRC certain track and track structures on, and the right-of-way underlying, the Line; and (2) retain the freight easement for operating the Line. VFRC also states that the Line Sale Contract does not contain a provision prohibiting the interchange of traffic with a third party.[1]

VFRC certifies that its projected annual revenues as a result of the transaction will not exceed those that would qualify it as Class III rail carrier and further certifies that its projected annual revenues will not exceed $5 million.

VFRC states that it expects the transaction to be consummated on or shortly after the effective date of this exemption. The earliest this transaction may be consummated is March 24, 2010, the effective date of the exemption (30 days after the exemption was filed).

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than March 17, 2010 (at least 7 days before the exemption becomes effective).

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 35353, must be filed with the Surface Transportation Board, 395 E Street, SW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Karl Morell, Ball Janik LLP, 1445 F Street, NW., Suite 225, Washington, DC 20005.

Board decisions and notices are available on our Web site at *http://www.stb.dot.gov.*

Decided: March 5, 2010.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2010–5077 Filed 3–9–10; 8:45 am]

BILLING CODE 4915–01–P

[1] VFRC indicates that it will shortly be filing a motion to dismiss this notice of exemption on the grounds that the Board does not have jurisdiction over the involved purchase. If such a motion is filed, it will be addressed in a subsequent Board decision.

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement; Lee and Collier Counties, Florida

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of cancellation of notice of intent.

SUMMARY: The FHWA is issuing this notice of cancellation to advise the public that we are no longer lead Federal Agency for preparation of an Environmental Impact Statement (EIS) for the proposed County Road 951 highway project in Lee and Collier Counties, Florida. This is formal cancellation of the notice of intent that was published in the **Federal Register** on June 27, 2005.

FOR FURTHER INFORMATION CONTACT: Mr. George Hadley, Environmental Programs Coordinator, Federal Highway Administration, 545 John Knox Road, Suite 200, Tallahassee, Florida 32303, Telephone (850) 942–9650 extension 3011.

SUPPLEMENTARY INFORMATION: The notice of intent to prepare an EIS was for proposed roadway improvements by upgrading the existing facility or building on new alignment for a distance of approximately 15 miles. The notice of intent to prepare an EIS is rescinded.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning and Construction. The regulations implementing Executive Order 12372 regarding inter-governmental consultation on Federal programs and activities apply to this program.)

Issued on: March 4, 2010.

George B. Hadley,

Environmental Programs Coordinator, Tallahassee, Florida.

[FR Doc. 2010–5160 Filed 3–9–10; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Government/Industry Aeronautical Charting Forum Meeting

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of public meeting.

SUMMARY: This notice announces the bi-annual meeting of the Federal Aviation Administration (FAA) Government/Industry Aeronautical Charting Forum (ACF 10–01) to discuss informational content and design of aeronautical charts and related products, as well as instrument flight procedures development policy and design criteria.

DATES: The ACF is separated into two distinct groups. The Instrument Procedures Group (IPG) will meet April 27, 2010 from 8:30 a.m. to 5 p.m. The Charting Group will meet April 28 and 29, 2010 from 8:30 a.m. to 5 p.m.

ADDRESSES: The meeting will be hosted by the Air Line Pilots Association (ALPA), 535 Herndon Parkway, Herndon, VA 20192.

FOR FURTHER INFORMATION CONTACT: For information relating to the Instrument Procedures Group, contact Thomas E. Schneider, FAA, Flight Procedures Standards Branch, AFS–420, 6500 South MacArthur Blvd, P.O. Box 25082, Oklahoma City, OK. 73 125; telephone (405) 954–5852; fax: (405) 954–2528.

For information relating to the Charting Group, Contact John A. Moore, FAA, National Aeronautical Navigation Services (AeroNav Services) Group, Regulatory Support and Coordination Team, AJW–372, 1305 East-West Highway, SSMC4-Station 5544. Silver Spring, MD. 20910; telephone: (301) 713–2631 x172, fax: (301) 713–1960.

SUPPLEMENTARY INFORMATION: Pursuant to I0(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463: 5 V+S.C. App. II), notice is hereby given of a meeting of the FAA Aeronautical Charting Forum to be held from April 27 through April 29, 2010 from 8:30 a.m. to 5 p.m. at the Air Line Pilots Association (ALPA). 535 Herndon Parkway, Hemdon. VA 20192.

The Instrument Procedures Group agenda will include briefings and discussions on recommendations regarding pilot procedures for instrument flight, as well as criteria, design, and developmental policy for instrument approach and departure procedures.

The Charting Group agenda will include briefings and discussions on recommendations regarding aeronautical charting specifications, flight information products, as well as new aeronautical charting and air traffic control initiatives. Attendance is open to the interested public but will be limited to the space available.

The public must make arrangements by April 9, 2010 to present oral statements or papers at the meeting. The public may present written statements and/or new agenda items to the committee by providing a copy to the person listed in the **FOR FURTHER INFORMATION CONTACT** section not later than April 9. 2010. Public statements will only be considered if time permits.

Issued in Washington, DC, on March 2, 2010.

John A. Moore

Co-Chair, Aeronautical Charting Forum.

[FR Doc. 2010–4946 Filed 3–9–10; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Tip Reporting Alternative Commitment Agreement (TRAC) for Use in Industries Other Than the Food and Beverage Industry and the Cosmetology and Barber Industry

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, 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 proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Tip Reporting Alternative Commitment Agreement (TRAC) for Use in Industries Other Than the Food and Beverage Industry and the Cosmetology and Barber Industry.

DATES: Written comments should be received on or before May 10, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Joel P. Goldberger at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 927–9368, or through the Internet at *Joel.P.Goldberger@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Tip Reporting Alternative Commitment Agreement (TRAC) for Use in Industries Other Than the Food and Beverage Industry and the Cosmetology and Barber Industry.

OMB Number: 1545–1714.

Abstract: Announcement 2000–19, 2000–19 I.R.B. 973, and Announcement 2001–1, #2001–2 I.R.B. p. 277 contain information required by the Internal

Revenue Service, in its tax compliance efforts to assist employers and their employees in understanding and complying with Internal Revenue Code section 6053(a), which requires employees to report all their tips monthly to their employers.

Current Actions: There is no change to this existing information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents and/or Recordkeeping: 300.

Estimated Average Time per Respondent/Recordkeeper: 16 hr., 16 min.

Estimated Total Annual Reporting and/or Recordkeeping Burden Hours: 4,877.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. 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.

Approved: January 29, 2010.

R. Joseph Durbala,

IRS Supervisory Tax Analyst.

[FR Doc. 2010–5035 Filed 3–9–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Tip Reporting Alternative Tip Agreement Used in the Cosmetology and Barber Industry

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, 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 proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Tip Reporting Alternative Commitment used in the Cosmetology and Barber Industry.

DATES: Written comments should be received on or before May 10, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be directed to Joel P. Goldberger at Internal Revenue Service, Room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 927–9368, or through the Internet at *joel.p.goldberger@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Tip Reporting Alternative Commitment Agreement used in the Cosmetology and Barber Industry.

OMB Number: 1545–1529.

Abstract: Announcement 2000–21, 2000–19 I.R.B. 983, and Announcement 2001–1, #2001–2 I.R.B. p. 277, contain information required by the Internal Revenue Service in its tax compliance efforts to assist employers and their employees in understanding and complying with Internal Revenue Code section 6053(a), which requires employees to report all their tips monthly to their employers.

Current Actions: There is no change to this existing information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents and/or Recordkeeping: 4,600.

Estimated Average Time per Respondent/Recordkeeper: 9 hr., 22 min.

Estimated Total Annual Reporting and/or Recordkeeping Burden Hours: 43,073.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. 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.

Approved: January 25, 2010.

R. Joseph Durbala,

IRS Supervisory Tax Analyst.

[FR Doc. 2010–5050 Filed 3–9–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Tip Reporting Alternative Commitment Agreement (TRAC) for Use in the Food and Beverage Industry

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, 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 proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning the Tip Reporting Alternative Commitment Agreement (TRAC) for Use in the Food and Beverage Industry.

DATES: Written comments should be received on or before May 10, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the regulations should be directed to Joel Goldberger at Internal Revenue Service, room 6129, 1111 Constitution Avenue, NW., Washington, DC 20224, or at (202) 927–9368 or through the Internet at *joel.p.goldberger@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Tip Reporting Alternative Commitment Agreement(TRAC) for Use in the Food and Beverage Industry.

OMB Number: 1545–1549.

Abstract: Announcement 2000–22, 2000–19 I.R.B. 987, and Announcement 2001–1, #2001–2 I.R.B. p.277, contain Information required by the Internal Revenue Service in its compliance efforts to assist employers and their employees in understanding and complying with Internal Revenue Code section 6053(a), which requires employees to report all their tips monthly to their employers.

Current Actions: There is no change to this existing information collection.

Type of Review: Extension of currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents and/or Recordkeepers: 41,800.

Estimated Average Time per Respondent/Recordkeeper: 7 hours, 6 minutes.

Estimate Total Annual Reporting and/or Recordkeeping Burden Hours: 296,916.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the Collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. 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.

Approved: January 29, 2010.

R. Joseph Durbala,

IRS Supervisory Tax Analyst.

[FR Doc. 2010–5051 Filed 3–9–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Tip Rate Determination Agreement (TRDA) for Use in Industries Other Than the Food and Beverage Industry and the Gaming Industry

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, 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 proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Tip Rate Determination Agreement (TRDA) for industries other than the food and beverage industry and the gaming industry.

DATES: Written comments should be received on or before May 10, 2010 to be assured of consideration.

ADDRESSES: Direct all written comments to R. Joseph Durbala, Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of information collection should be directed to Joel P. Goldberger at Internal Revenue Service, room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 927–9368, or through the Internet at *joel.p.goldberger@irs.gov.*

SUPPLEMENTARY INFORMATION: *Title:* Tip Rate Determination Agreement (TRDA) for industries other than the food and beverage industry and the gaming industry.

OMB Number: 1545–1717.

Abstract: Announcement 2000–20, 2000–19 I.R.B. 977, and Announcement 2001–1, #2001–2 I.R.B. p.277 contain information required by the Internal Revenue Service in its tax compliance efforts to assist employers and their employees in understanding and complying with Internal Revenue Code section 6053(a), which requires employees to report all their tips monthly to their employers.

Current Actions: There is no change to this existing information collection.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents and/or Recordkeeping: 100.

Estimated Average Time per Respondent/Recordkeeper: 18 hr., 58 min.

Estimated Total Annual Reporting and/or Recordkeeping Burden Hours: 1,897.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. 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.

Approved: January 29, 2010.

R. Joseph Durbala,

IRS Supervisory Tax Analyst.

[FR Doc. 2010–5047 Filed 3–9–10; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

United States Mint

Citizens Coinage Advisory Committee March 2010 Public Meeting

AGENCY: United States Mint, Department of the Treasury.

ACTION: Notification.

SUMMARY: Pursuant to United States Code, Title 31, section 5135(b)(8)(C), the United States Mint announces the Citizens Coinage Advisory Committee (CCAC) public meeting scheduled for March 23, 2010.

Date: March 23, 2010.

Time: 3 p.m. to 5 p.m.

Location: 8th Floor Boardroom, United States Mint, 801 9th Street, NW., Washington, DC 20220.

Subject: Review candidate designs for the 2010 American Eagle Platinum Coin Program and discuss the 2009 and 2010 Annual Reports.

Interested persons should call 202–354–7502 for the latest update on meeting time and room location.

In accordance with 31 U.S.C. 5135, the CCAC:

- Advises the Secretary of the Treasury on any theme or design proposals relating to circulating coinage, bullion coinage, Congressional Gold Medals, and national and other medals.
- Advises the Secretary of the Treasury with regard to the events, persons, or places to be commemorated by the issuance of commemorative coins in each of the five calendar years succeeding the year in which a commemorative coin designation is made.
- Makes recommendations with respect to the mintage level for any commemorative coin recommended.

FOR FURTHER INFORMATION CONTACT: Cliff Northup, United States Mint Liaison to the CCAC; 801 9th Street, NW.; Washington, DC 20220; or call 202–354–7200.

Any member of the public interested in submitting matters for the CCAC's consideration is invited to submit them by fax to the following number: 202–756–6830.

Authority: 31 U.S.C. 5135(b)(8)(C).

Dated: March 5, 2010.

Edmund C. Moy,

Director, United States Mint.

[FR Doc. 2010–5096 Filed 3–9–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds: Pennsylvania Manufacturers Indemnity Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 7 to the Treasury Department Circular 570, 2009 Revision, published July 1, 2009, at 74 FR 31536.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–6850.

SUPPLEMENTARY INFORMATION: A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued under 31 U.S.C. 9305 to the following company:

Pennsylvania Manufacturers Indemnity Company (NAIC #41424). Business.

Address: P.O. Box 3031, Blue Bell, PA 19422–0754.

Phone: (610) 397–5000. Underwriting Limitation b/: $7,021,000.

Surety Licenses c/: AL, AK, AZ, AR, CO, CT, DE, DC, ID, IN, KS, KY, LA, ME, MD, MT, MS, MO, MT, NE, NV, NJ, NM, NY, NC, OH, PA, RI, SC, SD, TN, UT, VT, VA, WA. *Incorporated In:* Pennsylvania.

Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570 ("Circular"), 2009 Revision, to reflect this addition.

Certificates of Authority expire on June 30th each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (*see* 31 CFR part 223). A list of qualified companies is published annually as of July 1st in the Circular, which outlines details as to the underwriting limitations, areas in which companies are licensed to transact surety business, and other information.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570.*

Questions concerning this Notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Dated: February 25, 2010.

Vivian L. Cooper,

Director, Financial Accounting and Services Division.

[FR Doc. 2010–4938 Filed 3–9–10; 8:45 am]

BILLING CODE M

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable On Federal Bonds: Manufacturers Alliance Insurance Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 9 to the Treasury Department Circular 570, 2009 Revision, published July 1, 2009, at 74 FR 31536.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–6850.

SUPPLEMENTARY INFORMATION: A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued under 31 U.S.C. 9305 to the following company:

Manufacturers Alliance Insurance Company (NAIC # 36897). Business.

Address: P.O. Box 3031, Blue Bell, PA 19422–0754.

Phone: (610) 397–5000. *Underwriting Limitation B/:* $ 6,077,000.

Surety Licenses C/: AL, AK, AZ, AR, CO, CT, DE, DC, ID, IN, KS, KY, LA, ME, MD, MI, MS, MO, MT, NE, NV, NJ, NM, NY, NC, OH, PA, RI, SC, SD, TN, UT, VT, VA, WA. *Incorporated In:* Pennsylvania.

Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570 ("Circular"), 2009 Revision, to reflect this addition.

Certificates of Authority expire on June 30th each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as tong as the companies remain qualified

(*see* 31 CFR part 223). A list of qualified companies is published annually as of July 1st in the Circular, which outlines details as to the underwriting limitations, areas in which companies are licensed to transact surety business, and other information.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570.*

Questions concerning this Notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Dated: February 25, 2010.

Vivian L. Cooper,

Director, Financial Accounting and Services Division.

[FR Doc. 2010–4939 Filed 3–9–10; 8:45 am]

BILLING CODE 4810–35–M

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds: Pennsylvania Manufacturers' Association Insurance Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 8 to the Treasury Department Circular 570, 2009 Revision, published July 1, 2009, at 74 FR 31536.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–6850.

SUPPLEMENTARY INFORMATION: A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued under 31 U.S.C. 9305 to the following company:

Pennsylvania Manufacturers' Association Insurance Company (NAIC # 12262). *Business Address:* P.O. Box 3031, Blue Bell, PA. 19422–0754. *Phone:*(610) 397–5000. *Underwriting Limitation* b/: $20,193,000. *SURETY LICENSES C/:* AL, AK, AR, CA, CO, CT, DE, DC, FL, GA, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MI, MS, MO, MT, NE, NV, NJ, NM, NY, NC, OH, OK, PA, RI, SC, SD, TN, TX, UT, VT, WA, WV. *Incorporated In:* Pennsylvania.

Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570 ("Circular"), 2009 Revision, to reflect this addition.

Certificates of Authority expire on June 30th each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (*see* 31 CFR part 223). A list of qualified companies is published annually as of July l in the Circular, which outlines details as to the underwriting limitations, areas in which companies are licensed to transact surety business, and other information.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570.*

Questions concerning this Notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F01, Hyattsville, MD 20782.

Dated: February 25, 2010.

Vivian L. Cooper,

Director, Financial Accounting and Services Division.

[FR Doc. 2010–4941 Filed 3–9–10; 8:45 am]

BILLING CODE 4810–35–M

UNITED STATES INSTITUTE OF PEACE

Notice of Meeting

Date/Time: Tuesday, March 16, 2010. 11 a.m.–12 p.m.

Location: 1200 17th Street, NW., Suite 200, Washington, DC 20036–3011.

Status: Board Executive Session—Portions may be closed pursuant to Subsection (c) of section 552(b) of Title 5, United States Code, as provided in subsection I 706(h)(3) of the United States Institute of Peace Act, Public Law 98–525.

Agenda: March 16, 2010 Board Executive Session. Approval of Board Resolutions; Transition discussions.

Contact: Tessie F. Higgs, Executive Assistant, Telephone: (202) 429–3836.

Dated: March 3, 2010.

Tara Sonenshine,

Executive Vice President, United States Institute of Peace.

[FR Doc. 2010–4958 Filed 3–9–10; 8:45 am]

BILLING CODE 6820–AR–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Cemeteries and Memorials; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Advisory Committee on Cemeteries and Memorials will be held April 28–29, 2010, at the Houston Airport Marriott, 18700 John F. Kennedy Boulevard, Houston, Texas, from 8:30 a.m. to 4 p.m. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on the administration of national cemeteries, soldiers' lots and plots, the selection of new national cemetery sites, the erection of appropriate memorials, and the adequacy of Federal burial benefits.

On April 28, the Committee will receive updates on National Cemetery Administration issues. On April 29, the Committee will tour Houston National Cemetery, located at 10410 Veterans Memorial Drive, Houston, Texas, and then reconvene at the hotel for a business session in the afternoon. On April 29, the Committee will discuss Committee recommendations, future meeting sites, and potential agenda topics at future meetings. Time will be allocated for receiving public comments at 1 p.m. Public comments will be limited to three minutes each. Individuals wishing to make oral statements before the Committee will be accommodated on a first-come, first-served basis. Individuals who speak are invited to submit 1–2 page summaries of their comments at the time of the meeting for inclusion in the official meeting record.

Members of the public may direct questions or submit written statements for review by the Committee in advance of the meeting to Mr. Michael Nacincik, Designated Federal Officer, Department of Veterans Affairs, National Cemetery Administration (41C2), 810 Vermont Avenue, NW., Washington, DC 20420, or by e-mail at *Michael.n@va.gov.* In the public's communications with the Committee, the writers must identify themselves and state the organizations, associations, or persons they represent. Any member of the public wishing to attend the meeting should contact Mr. Nacincik at (202) 461–6240.

Dated: March 5, 2010.

By Direction of the Secretary.

Vivian Drake,

Acting Committee Management Officer.

[FR Doc. 2010–5118 Filed 3–9–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF VETERANS AFFAIRS

Summary of Precedent Opinions of the General Counsel

AGENCY: Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Department of Veterans Affairs (VA) is publishing a summary of legal interpretations issued by the Office of General Counsel involving Veterans' benefits under laws administered by VA. These interpretations are considered precedential by VA and will be followed by VA officials and employees in future claim matters involving the same legal issues. The summary is published to provide the public, and, in particular, Veterans' benefits claimants and their representatives, with notice of VA's interpretations regarding the legal matters at issue.

FOR FURTHER INFORMATION CONTACT: Susan P. Sokoll, Law Librarian, Department of Veterans Affairs, 810 Vermont Avenue, N.W. (026H), Washington, DC 20420, (202) 461–7623.

SUPPLEMENTARY INFORMATION: A VA regulation at 38 CFR 2.6(e)(8) delegates to the General Counsel the power to designate an opinion as precedential and 38 CFR 14.507(b) specifies that precedential opinions involving Veterans' benefits are binding on VA officials and employees in subsequent matters involving the legal issue decided in the precedent opinion. The interpretation of the General Counsel on legal matters, contained in such opinions, is conclusive as to all VA officials and employees, not only in the matter at issue, but also in future adjudications and appeals involving the same legal issues, in the absence of a change in controlling statute or regulation or a superseding written legal opinion of the General Counsel.

VA publishes summaries of such opinions in order to provide the public with notice of those interpretations of the General Counsel that must be followed in future benefit matters and to assist Veterans' benefits claimants and their representatives in the prosecution of benefit claims. The full text of such opinions, with personal identifiers deleted, may be obtained by contacting the VA official named above or by accessing the opinions on the internet at *http://www.va.gov/ogc/precedentopinions.asp.*

VAOPGCPREC 1–2010

Questions Presented

May the amount of a tort claim settlement required to be offset from 38 U.S.C. 1151 disability compensation be reduced by the amount of an overpayment of such compensation, due to untimely discontinuance of compensation, that does not result in the creation of a debt or is waived?'

Held

If a veteran who has established entitlement to compensation for a disability under 38 U.S.C. 1151(a) is awarded a judgment or enters into a settlement or compromise under the Federal Tort Claims Act based on the same disability, section 1151(b)(1) prohibits the Department of Veterans Affairs (VA) from paying compensation for that disability for any month beginning after the judgment, settlement, or compromise becomes final until the aggregate amount of compensation that would otherwise have been paid equals the amount of the judgment, settlement, or compromise. If VA erroneously continues to pay compensation to the veteran and the resulting overpayment does not result in establishment of a debt or VA waives recovery of the overpayment, VA may not apply the amount of the overpayment or the waived amount to reduce the amount required to be offset from future compensation payments.

Effective Date: January 4, 2010.

VAOPGCPREC 2–2007 Withdrawn

VAOPGCPREC 2–2007 is not applicable to claims in which the claimant dies on or after October 10, 2008. Subsequent to the issuance of that opinion, Congress enacted Public Law 110–389, section 212 of which added a new section 5121A to title 38, U.S. Code, providing that, if a claimant dies while a claim or an appeal of a decision on a claim is pending, a person who would be eligible for accrued benefits under 38 U.S.C. 5121(a) may, within one year of the claimant's death, request to be substituted as the claimant for purposes of processing the claim to completion.

Furthermore, section 212(c) of Public Law 110–389 specifies that section 5121A shall apply with respect to the claim of any claimant who dies on or after the date of enactment, October 10, 2008. *Id.* Therefore, VAOPGCPREC 2–2007 is obsolete as to pending claims in which the claimant dies on or after that date.

Effective Date: September 14, 2009

VAOPGCPREC 6–1999 Withdrawn

VAOPGCPREC 6–99 is withdrawn in light of the subsequent decision of the Court of Appeals for Veterans Claims in *Bradley* v. *Peake,* 22 Vet. App. 280 (2010). In VAOPGCPREC 6–99, we explained that section 1114(s) excludes total disability based upon individual unemployability (TDIU) as a basis for establishing a total rating under that section because a TDIU rating takes into account all of a Veteran's service-connected disabilities and that, therefore, considering a TDIU rating and a schedular rating in determining eligibility for SMC would conflict with the statutory requirement for "additional" disability of 60 percent or more by counting the same disability twice. The exclusion of TDIU as a basis for satisfying the total-rating requirement under section 1114(s) holds true in the specific circumstance where a disability relied upon in establishing the TDIU rating would also be relied upon, at least in part, in meeting the statutory requirement for "additional" disability of 60 percent or more. In such a case, consideration of a TDIU rating for purposes of awarding SMC would result in duplicate counting of a disability in awarding additional; compensation.

However, the Veterans Court found there are other circumstances in which a TDIU rating may satisfy the total-rating requirement without resulting in duplicate counting of a disability. The court concluded that it is possible for a Veteran to be awarded TDIU based on a single disability and receive schedular disability ratings for other conditions. Under that circumstance, the court concluded there would be no duplicate counting of disabilities in awarding SMC based on the TDIU rating and schedular rating(s) and read the General Counsel opinion as not barring the TDIU rating where the same disability need not be counted twice, i.e., as a basis for TDIU and as a separate disability rated 60-percent or more disabling. Furthermore, the logic of *Bradley* suggests that if a Veteran has a schedular total rating for a particular service-connected disability and subsequently claims TDIU for a separate disability, VA must consider the TDIU claim despite the existence of the schedular total rating and award SMC under section 114(s) if VA finds the separate disability supports a TDIU rating independent of the other 100-percent disability rating. This would directly conflict with the holdings of VAOPGCPREC 6–99.

Effective Date: November 4, 2009

Dated: March 4, 2010.

By Direction of the Secretary.

Will A. Gunn,

General Counsel.

[FR Doc. 2010–5008 Filed 3–9–10; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Wednesday,
March 10, 2010

Part II

Securities and Exchange Commission

17 CFR Part 242

Amendments to Regulation SHO; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 242

[Release No. 34–61595; File No. S7–08–09]

RIN 3235–AK35

Amendments to Regulation SHO

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting amendments to Regulation SHO under the Securities Exchange Act of 1934 ("Exchange Act"). We are adopting a short sale-related circuit breaker that, if triggered, will impose a restriction on the prices at which securities may be sold short ("short sale price test" or "short sale price test restriction"). Specifically, the Rule requires that a trading center establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day. In addition, the Rule requires that the trading center establish, maintain, and enforce written policies and procedures reasonably designed to impose this short sale price test restriction for the remainder of the day and the following day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan. We believe it is appropriate at this time to adopt a short sale-related circuit breaker because, when triggered, it will prevent short selling, including potentially manipulative or abusive short selling, from driving down further the price of a security that has already experienced a significant intra-day price decline, and will facilitate the ability of long sellers to sell first upon such a decline. This approach establishes a narrowly-tailored Rule that will target only those securities that are experiencing significant intra-day price declines. We believe that addressing short selling in connection with such declines in individual securities will help address erosion of investor confidence in our markets generally.

In addition, we are amending Regulation SHO to provide that a broker-dealer may mark certain qualifying sell orders "short exempt." In particular, if the broker-dealer chooses to rely on its own determination that it is submitting the short sale order to the trading center at a price that is above the current national best bid at the time of submission or to rely on an exception specified in the Rule, it must mark the order as "short exempt." This "short exempt" marking requirement will aid surveillance by self-regulatory organizations ("SROs") and the Commission for compliance with the provisions of Rule 201 of Regulation SHO.

DATES: *Effective Date:* May 10, 2010.

Compliance Date: November 10, 2010.

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SUPPLEMENTARY INFORMATION: The Commission is amending Rules 200(g) and 201 of Regulation SHO [17 CFR 242.200(g) and 17 CFR 242.201] under the Exchange Act.

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I. Executive Summary

In July 2007, the Commission eliminated all short sale price test restrictions. Prior to that time, short sale price test restrictions included Rule 10a–1 under the Exchange Act, also known as the "uptick rule" or "tick test" ("former Rule 10a–1"), that applied to exchange-listed securities,[1] and the National Association of Securities Dealers, Inc.'s ("NASD")[2] bid test, Rule 3350 ("NASD's former bid test"), that applied to certain Nasdaq securities.[3] The Commission's removal of short sale price test restrictions followed a careful, deliberative rulemaking process, carried out in multiple stages from 1999 through 2006, and was open to the public at every stage.

The Commission took a number of steps as part of that process, including seeking extensive public comment and conducting a comprehensive staff study to assess whether then-current short sale price test restrictions were appropriate. For example, beginning in 1999, the Commission published a concept release in which it sought comment regarding short sale price test regulation, including comment on whether to eliminate such regulation.[4] In 2004, the Commission initiated a year-long pilot ("Pilot") to study the removal of short sale price tests for approximately one-third of the largest stocks.[5] Short sale data was made publicly available during this Pilot to allow the public and Commission staff (the "Staff") to study the effects of eliminating short sale price test restrictions. The findings of third party researchers were presented and discussed in a public Roundtable in September 2006.[6] In addition, the results of the Staff study of the Pilot data were made publicly available in draft form in September 2006 and in final form in February 2007.[7]

Since then, there has been significant market turmoil. Concurrent with the development of the subprime mortgage crisis and credit crisis in 2007, market volatility, including steep price declines, particularly in the stocks of certain financial services companies, increased markedly in the U.S. and in every major stock market around the world (including markets that continued to operate under short sale price test restrictions).[8] As market conditions continued to worsen, investor confidence eroded, and the Commission received many requests from the public to consider imposing restrictions with respect to short selling, based in part on the belief that such action would help restore investor confidence.[9]

We determined that it was appropriate to re-examine the appropriateness of short sale price test restrictions and seek comment on whether to restore any such restrictions. Thus, in April 2009 we proposed two approaches to restrictions on short selling, one that would apply on a permanent, market-wide basis and another that would apply to a particular security upon a significant decline in the price of that security (the "proposed circuit breaker approach" or "proposed circuit breaker rules").[10]

With respect to the permanent, market-wide approach, we proposed two alternative price tests. The first alternative price test, in many ways similar to NASD's former bid test, would be based on the national best bid (the "proposed modified uptick rule"). The second alternative price test, similar to former Rule 10a–1, would be based on the last sale price (the "proposed uptick rule").

With respect to the proposed circuit breaker approach, we proposed two basic alternatives. First, we proposed a circuit breaker rule that, when triggered by a significant price decline in a particular security, would temporarily prohibit any person from selling short that security, subject to certain exceptions ("proposed circuit breaker halt rule"). Second, we proposed a circuit breaker rule that, when triggered by a significant price decline in a particular security, would trigger a temporary short sale price test for that security. In connection with this alternative, we proposed two short sale price tests. One was the modified uptick rule—that is, we proposed a circuit breaker rule that, when triggered by a significant price decline in a particular security, would temporarily impose the proposed modified uptick rule for that security ("proposed circuit breaker modified uptick rule"). The other was the uptick rule—that is, we proposed a circuit breaker rule that, when triggered by a significant market decline in a particular security, would temporarily impose the proposed uptick rule for that security ("proposed circuit breaker uptick rule").

In addition, in the Proposal we inquired whether a short sale price test restriction that would permit short selling at a price above the current national best bid (the "alternative uptick rule"), would be preferable to the proposed modified uptick rule and the proposed uptick rule.[11] We sought comment regarding the application of the alternative uptick rule as a market-wide permanent short sale price test restriction or in conjunction with a circuit breaker.[12] As a supplement to our request for comment in the Proposal and to help ensure the public had a full opportunity to comment on, among other things, the alternative uptick rule, on August 20, 2009 we re-opened the comment period to the Proposal.[13] In addition, on May 5, 2009, we held a Roundtable to Examine Short Sale Price Test and Circuit Breaker Restrictions (the "May 2009 Roundtable").[14] Panelists included representatives of public issuers, investors, financial services firms, SROs and the academic community.[15]

Although in recent months there has been an increase in stability in the securities markets, we remain concerned that excessive downward price pressure on individual securities accompanied by the fear of unconstrained short selling can undermine investor confidence in our

[1] *See infra* note 41 and accompanying text.

[2] NASD is now known as the Financial Industry Regulatory Authority, Inc. ("FINRA").

[3] *See infra* note 43 and accompanying text.

[4] *See* Exchange Act Release No. 42037 (Oct. 20, 1999), 64 FR 57996 (Oct. 28, 1999) ("1999 Concept Release").

[5] *See* Exchange Act Release No. 50104 (July 28, 2004), 69 FR 48032 (Aug. 6, 2004) ("Pilot Release").

[6] *See http://www.sec.gov/about/economic/shopilottrans091506.pdf* (the "Regulation SHO 2006 Roundtable").

[7] *See http://www.sec.gov/about/economic/shopilot091506/draft_reg_sho_pilot_report.pdf* and *http://www.sec.gov/news/studies/2007/regshopilot020607.pdf. See also infra* notes 48 to 62 and accompanying text (discussing findings of the Staff study).

[8] *See* Exchange Act Release No. 59748 (Apr. 10, 2009), 74 FR 18042, 18043 (Apr. 20, 2009) (the "Proposal").

[9] *See id.*

[10] *See* Proposal, 74 FR 18042.

[11] *See* Proposal, 74 FR at 18072, 18081, 18082.

[12] *See id.*

[13] *See* Exchange Act Release No. 60509 (Aug. 17, 2009), 74 FR 42033 (Aug. 20, 2009) (the "Re-Opening Release").

[14] *See* Exchange Act Release No. 59855 (May 1, 2009); Press Release No. 2009–101 (agenda and panelists included); Press Release No. 2009–88 (preliminary agenda included).

[15] *See http://www.sec.gov/spotlight/shortsales/roundtable050509/shortsalesroundtable050509-transcript.txt* (unofficial transcript of May 2009 Roundtable).

markets generally.[16] In addition, we are concerned about potential future market turmoil, including significant increases in market volatility and steep price declines. Thus, as discussed in more detail below, after considering the comments, we have determined that it is appropriate at this time to adopt in Rule 201 a targeted short sale price test restriction that will apply the alternative uptick rule for the remainder of the day and the following day if the price of an individual security declines intra-day by 10% or more from the prior day's closing price for that security as determined by the covered security's listing market.

By not allowing short sellers to sell at or below the current national best bid while the circuit breaker is in effect, the short sale price test restriction in Rule 201 will allow long sellers, who will be able to sell at the bid, to sell first in a declining market for a particular security. As the Commission has noted previously in connection with short sale price test restrictions, a goal of such restrictions is to allow long sellers to sell first in a declining market.[17] A short seller that is seeking to profit quickly from accelerated, downward market moves may find it advantageous to be able to short sell at the current national best bid. In addition, by making such bids accessible only by long sellers when a security's price is undergoing significant downward price pressure, Rule 201 will help to facilitate and maintain stability in the markets and help ensure that they function efficiently. It will also help restore investor confidence during times of substantial uncertainty because, once the circuit breaker has been triggered for a particular security, long sellers will have preferred access to bids for the security, and the security's continued price decline will more likely be due to long selling and the underlying fundamentals of the issuer, rather than to other factors.

In addition, combining the alternative uptick rule with a circuit breaker will strike the appropriate balance between our goal of preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security and the need to allow for the continued smooth functioning of the markets, including the provision of liquidity and price efficiency in the markets.[18] The circuit breaker approach of Rule 201 will help benefit the market for a particular security by allowing participants, when a security is undergoing a significant intra-day price decline, an opportunity to re-evaluate circumstances and respond to volatility in that security. We also believe that a circuit breaker will better target short selling that may be related to potential bear raids [19] and other forms of manipulation that may be used to exacerbate a price decline in a covered security.

At the same time, however, we recognize the benefits to the market of legitimate short selling, such as the provision of liquidity and price efficiency. Thus, by imposing a short sale price test restriction only when an individual security is undergoing significant downward price pressure, the short sale price test restrictions of Rule 201 will apply to a limited number of securities, rather than to all securities all the time. As discussed in more detail below,[20] in response to our request for comment on an appropriate threshold at which to trigger the proposed circuit breaker short sale price test restrictions, commenters submitted estimates of the number of securities that would trigger a circuit breaker rule at a 10% threshold.[21] While commenters' analyses (including the facts and assumptions used) and their resulting estimates varied,[22] commenters' estimates reflect that a 10% circuit breaker threshold, on average, should affect a limited percentage of covered securities.[23] Given the variations in the facts and assumptions underlying the estimates submitted by commenters, the Staff also looked at trading data to confirm the reasonableness of those estimates. The Staff found that, during the period covering April 9, 2001 to September 30, 2009,[24] the price test restrictions of Rule 201 would have been triggered, on an average day, for approximately 4% of covered securities.[25] The Staff also found that for a low volatility period, covering January 1, 2004 to December 31, 2006, the 10% trigger level of Rule 201 would have, on an average day, been triggered for approximately 1.3% of covered securities.[26]

Thus, Rule 201 is structured so that the circuit breaker generally will not be triggered for the majority of covered securities at any given time and, thereby, will not interfere with the smooth functioning of the markets for those securities, including when prices in such securities are undergoing minimal downward price pressure or are stable or rising. If the short sale price test restrictions of Rule 201 apply to a covered security it will be because and when that security is undergoing significant downward price pressure.

In addition, to help ensure the Rule's workability, we are amending Rule 200(g) of Regulation SHO, substantially as proposed, to provide that, once the circuit breaker has been triggered for a covered security, if a broker-dealer chooses to rely on its own determination that it is submitting a short sale order to a trading center at a price that is above the current national best bid at the time of submission or to rely on an exception specified in the Rule, it must mark the order "short

[16] We note that investor confidence may include a number of different elements, such as investor perceptions about fundamental market risk, investor optimism about the economy, or investor trust in the fairness of financial markets as influenced by applicable regulatory protections. Although the latter can be directly influenced by Commission actions, the Commission does not have control over fundamental market risk and economic optimism. Thus, as used here, the term "investor confidence" refers to investor trust in the fairness of financial markets.

[17] *See* Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972, 62989 (Nov. 6, 2003) ("2003 Regulation SHO Proposing Release"); *see also* Exchange Act Release No. 30772 (June 3, 1992), 57 FR 24415, 24416 (June 9, 1992) (stating that former Rule 10a–1 was "designed to limit short selling of a security in a declining market, by requiring, in effect, that each successive lower price be established by a long seller").

[18] Where we use the terms "market efficiency" and "price efficiency" in this adopting release we are using terms of art as used in the economic literature proceeding under the "efficient markets hypothesis," under which financial prices are assumed to reflect all available information and accordingly adjust quickly to reflect new information. *See, e.g.,* Eugene F. Fama, 1991, *Efficient capital markets: II,* Journal of Finance; 46: 1575–1617; Eugene F. Fama and Kenneth R. French, 1992, *The Cross-Section of Expected Stock Returns,* Journal of Finance, 47: 427–465. It should be noted that economic efficiency and price efficiency are not identical with the ordinary sense of the word "efficiency."

[19] *See infra* note 36 and accompanying text.

[20] *See infra* Section III.A.5. (discussing the circuit breaker trigger level).

[21] *See, e.g.,* letter from Mary Lou Von Kaenel, Managing Director, Management Consulting, Jordan & Jordan, dated June 19, 2009 ("Jordan & Jordan"); letter from John C. Nagel, Managing Director and Deputy General Counsel, Citadel Investment Group, John Liftin, Managing Director and General Counsel, The D.E. Shaw Group, and Mark Silber, Executive Vice President, Renaissance Technologies, dated June 19, 2009 ("Citadel *et al.* (June 2009)"); letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, dated June 22, 2009 ("MFA (June 2009)"); letter from Ira D. Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association, dated June 19, 2009 ("SIFMA (June 2009)"); letter from Daniel Mathisson, Managing Director, Credit Suisse Securities (USA), LLC, dated Sept. 21, 2009 ("Credit Suisse (Sept. 2009)").

[22] *See infra* note 306.

[23] *See infra* note 307.

[24] *See infra* note 309.

[25] *See infra* note 310.

[26] *See infra* note 311.

exempt."[27] The short sale price test restrictions of Rule 201 generally will apply to a small number of securities for a limited duration, and will continue to permit short selling rather than, for example, halting short selling when the restrictions are in place. As such, we believe that the circumstances under which a broker-dealer may need to mark a short sale order "short exempt" under Rule 201 are limited.

II. Background on Short Sale Restrictions

Short selling involves a sale of a security that the seller does not own or a sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller.[28] In order to deliver the security to the purchaser, the short seller will borrow the security, usually from a broker-dealer or an institutional investor. Typically, the short seller later closes out the position by purchasing equivalent securities on the open market and returning the security to the lender. In general, short selling is used to profit from an expected downward price movement, to provide liquidity in response to unanticipated demand, or to hedge the risk of an economic long position in the same security or in a related security.[29]

A. Short Selling and Its Market Impact

Short selling provides the market with important benefits, including market liquidity and pricing efficiency.[30] Market liquidity is often provided through short selling by market professionals, such as market makers (including specialists) and block positioners, who offset temporary imbalances in the buying and selling interest for securities. Short sales effected in the market add to the selling interest of stock available to purchasers and reduce the risk that the price paid by investors is artificially high because of a temporary imbalance between buying and selling interest. Short sellers covering their sales also may add to the buying interest of stock available to sellers.[31]

Short selling also can contribute to the pricing efficiency of the equities markets.[32] When a short seller speculates or hedges against a downward movement in a security, his transaction is a mirror image of the person who purchases the security in anticipation that the security's price will rise or to hedge against such an increase. Both the purchaser and the short seller hope to profit, or hedge against loss, by buying the security at one price and selling at a higher price. The strategies primarily differ in the sequence of transactions. Market participants who believe a stock is overvalued may engage in short sales in an attempt to profit from a perceived divergence of prices from true economic values. Such short sellers add to stock pricing efficiency because their transactions inform the market of their evaluation of future stock price performance. This evaluation is reflected in the resulting market price of the security.[33]

Although short selling serves useful market purposes, it also may be used to drive down the price of a security or as a tool to accelerate a declining market in a security.[34] In addition, short selling may be used to illegally manipulate stock prices.[35] One example is the "bear raid" where an equity security is sold short in an effort to drive down the price of the security by creating an imbalance of sell-side interest.[36] This unrestricted short selling could exacerbate a declining market in a security by increasing pressure from the sell-side, eliminating bids, and causing a further reduction in the price of a security by creating an appearance that the security's price is falling for fundamental reasons, when the decline, or the speed of the decline, is being driven by other factors.[37]

B. History of Short Sale Price Test Restrictions in the U.S.

Section 10(a) of the Exchange Act[38] gives the Commission plenary authority to regulate short sales of securities registered on a national securities exchange, as necessary or appropriate in the public interest or for the protection of investors.[39] After conducting an inquiry into the effects of concentrated short selling during the market break of 1937,[40] the Commission adopted former Rule 10a–1 in 1938 to restrict short selling in a declining market.[41]

The core provisions of former Rule 10a–1 remained virtually unchanged for almost seventy years. Over the years, however, in response to changes in the securities markets, including changes in trading strategies and systems used in

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[27] We note that, as discussed in more detail below, unless a sale order is marked "short exempt," a trading center's policies and procedures must be reasonably designed to prevent the execution or display of the order at a price that is less than or equal to the current national best bid.

[28] *See* 17 CFR 242.200(a).

[29] *See, e.g.,* Exchange Act Release No. 54891 (Dec. 7, 2006), 71 FR 75068, 75069 (Dec. 13, 2006) ("2006 Price Test Elimination Proposing Release"); 2003 Regulation SHO Proposing Release, 68 FR at 62974. In this adopting release, we use the terms "liquidity provider" and "liquidity taker," and correlative terms, in their technical sense in the literature of market microstructure. *See, e.g.,* Larry Harris, *Trading and Exchanges: Market Microstructure for Practitioners,* at 70 (2003) (an introductory textbook to the economics of market microstructure). As used therein, a liquidity taker is a buyer or seller (including a short seller) who submits an order designed for immediate execution, such as a market order or a marketable limit order, while a liquidity provider is a more patient buyer or seller (including a short seller) who submits orders that may or may not be executed, and thus provides depth to the market. This usage differs from the usage of the term "liquidity provider" to refer to a bank, central bank, or other financial institution or investor who provides cash financing or otherwise increases the money supply.

[30] *See id.; see also* Exchange Act Release No. 29278 (June 7, 1991), 56 FR 27280 (June 13, 1991); Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008, 48009 n.6 (Aug. 6, 2004) ("2004 Regulation SHO Adopting Release"); Ekkehart Boehmer and J. Julie Wu, *Short Selling and the Informational Efficiency of Prices,* Working Paper, Jan. 8, 2009.

[31] *See, e.g.,* 2006 Price Test Elimination Proposing Release, 71 FR at 75069; 2003 Regulation SHO Proposing Release, 68 FR at 62974.

[32] *See id.*

[33] *See* 2006 Price Test Elimination Proposing Release, 71 FR at 75069–75070; 2003 Regulation SHO Proposing Release, 68 FR at 62974. Arbitrageurs also contribute to pricing efficiency by utilizing short sales to profit from price disparities between a stock and a derivative security, such as a convertible security or an option on that stock. For example, an arbitrageur may purchase a convertible security and sell the underlying stock short to profit from a current price differential between two economically similar positions. *See id.*

[34] *See, e.g.,* Proposal, 74 FR at 18065 (noting that a short selling circuit breaker rule would be designed to target only those securities that experience rapid severe intra-day price declines and, therefore, might help to prevent short selling from being used to drive the price of a security down or to accelerate the decline in the price of those securities).

[35] *See, e.g., U.S.* v. *Russo,* 74 F.3d 1383, 1392 (2d Cir. 1996) (short sales were sufficiently connected to the manipulation scheme as to constitute a violation of Exchange Act Section 10(b) and Rule 10b–5); *S.E.C.* v. *Gardiner,* 48 S.E.C. Docket 811, No. 91 Civ. 2091 (S.D.N.Y. Mar. 27, 1991) (alleged manipulation by sales representative by directing or inducing customers to sell stock short in order to depress its price).

[36] Many people blamed "bear raids" for the 1929 stock market crash and the market's prolonged inability to recover from the crash. *See, e.g.,* Steve Thel, *$850,000 in Six Minutes—The Mechanics of Securities Manipulation,* 79 Cornell L. Rev. 219, 295–296 (1994); Jonathan R. Macey, Mark Mitchell & Jeffry Netter, *Restrictions on Short Sales: An Analysis of the Uptick Rule and its Role in View of the October 1987 Stock Market Crash,* 74 Cornell L. Rev. 799, 801–802 (1989).

[37] *See* 2006 Price Test Elimination Proposing Release, 71 FR at 75070; 2003 Regulation SHO Proposing Release, 68 FR at 62974.

[38] 15 U.S.C. 78j(a).

[39] *See id.; see also* 2006 Price Test Elimination Proposing Release, 71 FR at 75068; 2003 Regulation SHO Proposing Release, 68 FR at 62973.

[40] The study covered two weekly periods, that of September 7–13, 1937, and that of October 18–23, 1937. *See* Exchange Act Release No. 1548 (Jan. 24, 1938), 3 FR 213 (Jan. 26, 1938) ("Former Rule 10a–1 Adopting Release").

[41] *See id.* Former Rule 10a–1 provided that, subject to certain exceptions, a listed security could be sold short (i) at a price above the price at which the immediately preceding sale was effected (plus tick), or (ii) at the last sale price if it was higher than the last different price (zero plus tick).

the marketplace, the Commission added exceptions to former Rule 10a–1 and granted numerous written requests for relief from the Rule's restrictions. These market changes included decimalization, the increased use of matching systems that execute trades at independently-derived prices during random times within specific time intervals,[42] and the spread of fully automated markets. In addition, market developments over the years led to the application of different price tests to securities trading in different markets.[43]

In July 2004, the Commission adopted Rule 202T of Regulation SHO,[44] which established procedures for the Commission to temporarily suspend short sale price tests for a prescribed set of securities so that the Commission could study the effectiveness of these tests.[45] Pursuant to the process established in Rule 202T, the Commission issued an order creating the Pilot, which temporarily suspended the tick test of former Rule 10a–1 and any price test of any national securities exchange or national securities association for short sales of certain securities.[46] The Pilot was designed to assist the Commission in assessing whether changes to short sale price test regulation were appropriate at that time in light of then-current market practices and the purposes underlying short sale price test regulation.[47]

The Staff gathered the data made public during the Pilot, analyzed the data and provided the Commission with a summary report on the Pilot ("Staff's Summary Pilot Report").[48] The Staff's Summary Pilot Report, which was made public, examined several aspects of market quality including the overall effect of then-current price tests on short selling, liquidity, volatility and price efficiency.[49] The Pilot was also designed to allow the Commission and members of the public to examine whether the effects of the then-current short sale price tests were similar across stocks.[50]

As set forth in the Staff's Summary Pilot Report, the Staff found little empirical justification at that time for maintaining then-current short sale price test restrictions, especially for actively traded securities. Amongst its results, the Staff found that such short sale price tests did not have a significant impact on daily volatility. However, the Staff also found some evidence that the short sale price tests dampened intra-day volatility for smaller stocks.[51]

In addition, the Staff found that the Pilot data provided limited evidence that then-current price test restrictions distorted a security's price.[52] The Staff also found that the price test restrictions resulted in an increase in quote depths.[53] Realized liquidity levels, however, were unaffected by the removal of such short sale price test restrictions.[54] The Pilot data also provided evidence that the short sale price test restrictions reduced the volume of executed short sales to total volume and, therefore, acted as a constraint on short selling.[55] The Staff did not find, however, a significant difference in short interest positions between those securities subject to a short sale price test versus those securities that were not subject to such a test during the Pilot.[56]

In addition, the Commission encouraged outside researchers to examine the Pilot data. In response to this request, the Commission received four completed studies (the "Academic Studies") from outside researchers that specifically examined the Pilot data.[57] The Commission also held the Regulation SHO 2006 Roundtable[58] that focused on the empirical evidence learned from the Pilot data (the Staff's Summary Pilot Report, Academic Studies, and Regulation SHO 2006 Roundtable are referred to collectively herein as the "Pilot Results").[59] The Pilot Results contained a variety of observations, which the Commission considered in determining whether or not to propose removal of then-current short sale price test restrictions and subsequently whether or not to eliminate such restrictions. For example, one study concluded that former Rule 10a–1 had little or no effect on price efficiency.[60] Another study found no evidence that former Rule

[42] *See, e.g.,* letter from Larry E. Bergmann, Senior Associate Director, Division of Market Regulation, SEC, to Andre E. Owens, Schiff Hardin & Waite, dated Apr. 23, 2003 (granting exemptive relief from former Rule 10a–1 for trades executed through an alternative trading system ("ATS") that matches buying and selling interest among institutional investors and broker-dealers at various set times during the day).

[43] *See, e.g.,* Exchange Act Release No. 55245 (Feb. 5, 2007), 72 FR 6635 (Feb. 12, 2007). Former Rule 10a–1 applied only to short sale transactions in exchange-listed securities. In 1994, the Commission granted temporary approval to NASD to apply its own short sale rule, known as the "bid test," on a pilot basis that was renewed annually until the Commission repealed short sale price tests. NASD's former bid test prohibited short sales in Nasdaq Global Market securities (then known as Nasdaq National Market securities) at or below the current (inside) bid when the current best (inside) bid was below the previous best (inside) bid in a security. As a result, until the Commission eliminated former Rule 10a–1, and prohibited any SRO from having a short sale price test in July 2007, Nasdaq Global Market securities traded on Nasdaq or the over-the-counter ("OTC") market and reported to a NASD facility were subject to a bid test. Nasdaq securities traded on exchanges other than Nasdaq were not subject to any price test. In addition, many thinly-traded securities, such as Nasdaq Capital Market securities and securities quoted on the OTC Bulletin Board and Pink Sheets, were not subject to any price test wherever traded. According to the Staff, in 2005, prior to the start of the Pilot, NASD's former bid test applied to approximately 2,800 securities, while former Rule 10a–1 applied to approximately 4,000 securities.

[44] 17 CFR 242.202T.

[45] *See* 17 CFR 242.202T; *see also* 2004 Regulation SHO Adopting Release, 69 FR at 48012–48013.

[46] *See* Pilot Release, 69 FR 48032.

[47] *See id.* In the 2004 Regulation SHO Adopting Release, we noted that "the purpose of the [P]ilot is to assist the Commission in considering alternatives, such as: (1) Eliminating a Commission-mandated price test for an appropriate group of securities, which may be all securities; (2) adopting a uniform bid test, and any exceptions, with the possibility of extending a uniform bid test to securities for which there is currently no price test; or (3) leaving in place the current price tests." 2004 Regulation SHO Adopting Release, 69 FR at 48010.

[48] *See http://www.sec.gov/about/economic/shopilot091506/draft_reg_sho_pilot_report.pdf* and *http://www.sec.gov/news/studies/2007/regshopilot020607.pdf.*

[49] *See* Staff's Summary Pilot Report at 40–47; *see also id.* at 22–24 (discussing the selection of securities included in the Pilot and the control group).

[50] In the 2004 Regulation SHO Adopting Release, the Commission stated its expectation that data on trading during the Pilot would be made available to the public to encourage independent researchers to study the Pilot. *See* 2004 Regulation SHO Adopting Release, 69 FR at 48009, n.9. Accordingly, nine SROs began publicly releasing transactional short selling data on Jan. 3, 2005. The nine SROs at that time were the Amex, ARCA, BSE, CHX, NASD, Nasdaq, National Stock Exchange, NYSE and Phlx. The SROs agreed to collect and make publicly available trading data on each executed short sale involving equity securities reported by the SRO to a securities information processor ("SIP"). The SROs published the information on a monthly basis on their Internet Web sites.

[51] *See* Staff's Summary Pilot Report at 55–56.

[52] On the day the Pilot went into effect, listed Pilot securities underperformed listed control group securities by approximately 24 basis points. The Pilot and control group securities, however, had similar returns over the first six months of the Pilot. *See* Staff's Summary Pilot Report at 8.

[53] *See* Staff's Summary Pilot Report at 55.

[54] This conclusion is based on the result that changes in effective spreads were not economically significant (less than a basis point) and that the changes in the bid and ask depth appear not to affect the transaction costs paid by investors. Arguably, the changes in bid and ask depth appeared to affect the intra-day volatility. However, the Staff concluded that overall, the Pilot data did not suggest a deleterious impact on market quality or liquidity. *See* Staff's Summary Pilot Report at 40–42, 55.

[55] *See* Staff's Summary Pilot Report at 35.

[56] *See id.*

[57] *See* Karl B. Diether, Kuan Hui Lee and Ingrid M. Werner, 2009, *It's SHO Time! Short-Sale Price-Tests and Market Quality,* Journal of Finance 64:37–73; Gordon J. Alexander and Mark A. Peterson, 2008, *The Effect of Price Tests on Trader Behavior and Market Quality: An Analysis of Reg. SHO,* Journal of Financial Markets 11:84–111; J. Julie Wu, *Uptick Rule, short selling and price efficiency,* Aug. 14, 2006; Lynn Bai, 2008, *The Uptick Rule of Short Sale Regulation—Can it Alleviate Downward Price Pressure from Negative Earnings Shocks?* Rutgers Business Law Journal 5:1–63.

[58] *See supra* note 6.

[59] *See id.*

[60] *See* J. Julie Wu, *Uptick Rule, short selling and price efficiency,* Aug. 14, 2006.

10a–1 negatively impacted price discovery.[61]

Generally, the Pilot Results supported removal of the short sale price test restrictions that were in effect at that time.[62] In addition to the Pilot Results, thirteen other analyses by SEC staff and various third party researchers were conducted between 1963 and 2004 addressing price test restrictions.[63] Among these were several studies that evaluated short sale price tests during times of significant market decline, including the market break of May 28, 1962, the market decline of September and October 1976, the market break of October 19, 1987, and the Nasdaq market decline of 2000–2001. The results of these studies were mixed, but generally the studies found that former Rule 10a–1 did not prevent short sales in extreme down markets and did limit short selling in up markets, and the studies provided additional support for the removal of the permanent, market-wide short sale price test restrictions in existence at that time.

In December 2006, the Commission proposed to eliminate former Rule 10a–1 by removing restrictions on the execution prices of short sales, as well as prohibiting any SRO from having a short sale price test.[64] The Commission received twenty-seven comment letters in response to its proposal to eliminate former Rule 10a–1 and prohibit any SRO from having a short sale price test. The comments in response to the proposed amendments varied. Most commenters (including individual traders, an academic, broker-dealers, SROs and trade associations) advocated removing all short sale price test restrictions.[65] Generally, these commenters believed that short sale price test restrictions were no longer necessary due to increased market transparency and the existence of real-time regulatory surveillance that could monitor for and detect any potential short sale manipulation.[66]

Two commenters (both individual investors) opposed the proposed amendments, noting the need for short sale price tests to prevent "bear raids."[67] One commenter, although generally in support of removing all short sale price test restrictions, stated the belief that at some level unrestricted short selling should be collared.[68] This commenter supported having a 10% circuit breaker to prevent panic in the event there is a major market collapse.[69] The New York Stock Exchange ("NYSE") also noted its concern about unrestricted short selling during periods of unusually rapid and large market declines. The NYSE stated that the effects of an unusually rapid and large market decline could not be measured or analyzed during the Pilot because such decline did not occur during the period studied.[70]

Effective July 3, 2007, the Commission eliminated former Rule 10a–1 and added Rule 201 of Regulation SHO, prohibiting any SRO from having a short sale price test.[71] The Commission stated that it determined to eliminate all short sale price test restrictions after reviewing the comments received in response to its proposal to eliminate all short sale price test restrictions, reviewing the Pilot Results, and taking into account the market developments that had occurred in the securities industry since the Commission adopted former Rule 10a–1 in 1938.[72] In addition, the Commission stated its belief that the amendments would bring increased uniformity to short sale regulation, level the playing field for market participants, and remove an opportunity for regulatory arbitrage.[73]

C. Proposal To Adopt a Short Sale Price Test Restriction or Circuit Breaker

On April 8, 2009, following changes in market conditions since the elimination of former Rule 10a–1, we proposed to re-examine and seek comment on whether to impose price test restrictions or circuit breaker restrictions on short selling.[74] In the Proposal, we noted that market volatility had recently increased markedly in the U.S., as well as in every major stock market around the world.[75] We also noted that although we were not aware of specific empirical evidence that the elimination of short sale price tests contributed to the increased volatility in U.S. markets, many members of the public associate the removal of former Rule 10a–1 with such volatility, including steep declines in some securities' prices, and loss of investor confidence in our markets.[76] Due to the market conditions with which we were faced and the resulting deterioration in investor confidence, we stated in the Proposal that we believed it was appropriate to propose amending Regulation SHO to add a short sale price test or a circuit breaker rule.[77]

In response to the Proposal and the Re-Opening Release, we received over 4,300 unique comment letters.[78] A number of commenters stated that they do not believe that we should reinstate any form of short sale price test restriction, whether in the form of a short sale price test restriction or a circuit breaker rule. For example, a number of commenters noted a lack of empirical evidence suggesting that such restrictions would advance the Commission's goals of restoring investor confidence and preventing short selling, including potentially abusive or manipulative short selling, from driving down the market or being used as a tool to exacerbate a declining market in a security.[79] In response to our specific

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[61] *See* Lynn Bai, 2008, *The Uptick Rule of Short Sale Regulation—Can it Alleviate Downward Price Pressure from Negative Earnings Shocks?* Rutgers Business Law Journal 5:1–63.

[62] *See* 2006 Price Test Elimination Proposing Release, 71 FR at 75072–75075 (discussing the Pilot Results).

[63] *See* Staff's Summary Pilot Report at 14, 17–22 (discussing the thirteen studies).

[64] *See* 2006 Price Test Elimination Proposing Release, 71 FR 75068.

[65] *See, e.g.,* letter from Howard Teitelman, CSO, Trillium Trading, dated Feb. 6, 2007; letter from S. Kevin An, Deputy General Counsel, E*TRADE, dated Feb. 9, 2007 ("E*TRADE (Feb. 2007)"); letter from Carl Giannone, dated Feb. 11, 2007 ("Giannone (Feb. 2007)"); letter from David Schwarz, dated Feb. 12, 2007; letter from John G. Gaine, President, Managed Funds Association, dated Feb. 12, 2007; letter from Lisa M. Utasi, Chairman of the Board, John C. Giesea, President and CEO, Security Traders Association, dated Feb. 12, 2007 ("STA (Feb. 2007)"); letter from Gerard S. Citera, Executive Director, U.S. Equities, UBS, dated Feb. 14, 2007 ("UBS (Feb. 2007)"); letter from Mary Yeager, Assistant Secretary, NYSE Euronext, dated Feb. 14, 2007 ("NYSE Euronext (Feb. 2007)"); letter from James J. Angel, PhD, CFA, Associate Professor of Finance, McDonough School of Business, Georgetown University, dated Feb. 14, 2007; letter from Ira D. Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association, dated Feb. 16, 2007; *see also* Exchange Act Release No. 55970 (June 28, 2007), 72 FR 36348, 36350–36351 (July 3, 2007) ("2007 Price Test Adopting Release") (discussing the comment letters).

[66] *See, e.g.,* letter from Giannone (Feb. 2007); letter from E*TRADE (Feb. 2007); letter from STA (Feb. 2007); letter from UBS (Feb. 2007); *see also* 2007 Price Test Adopting Release, 72 FR at 36350–36351 (discussing the comment letters).

[67] *See, e.g.,* letter from Jim Ferguson, dated Dec. 19, 2006; letter from David Patch, dated Jan. 1, 2007; letter from David Patch, dated Jan. 12, 2007.

[68] *See* letter from Giannone (Feb. 2007).

[69] *See id.*

[70] *See* letter from NYSE Euronext (Feb. 2007).

[71] *See* 2007 Price Test Adopting Release, 72 FR 36348.

[72] *See id.* at 36352.

[73] *See id.*

[74] *See* Proposal, 74 FR 18042.

[75] *See id.* at 18049.

[76] *See id.*

[77] *See* Proposal, 74 FR at 18047.

[78] *See http://www.sec.gov/comments/s7-08-09/s70809.shtml.*

[79] *See, e.g.,* letter from Daniel Mathisson, Managing Director, Credit Suisse Securities (USA), LLC, dated June 16, 2009 ("Credit Suisse (June 2009)"); letter from Citadel *et al.* (June 2009); letter from Peter Kovac, Chief Operating Officer and Financial and Operations Principal, EWT, LLC, dated June 19, 2009 ("EWT (June 2009)"); letter from Stephen Schuler, Managing Member, Daniel Tierney, Managing Member, Global Electronic Trading Company, dated June 19, 2009 ("GETCO (June 2009)"); letter from SIFMA (June 2009); letter

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request for empirical data in the Proposal, a number of commenters submitted data or referenced studies in support of their position that a short sale price test restriction would not have a positive impact on the market.[80] In addition, several commenters stated they do not believe that short selling exacerbated market declines during the Fall 2008 financial crisis, and suggested that long sale activity was a more substantial factor in those declines.[81] Other commenters stated that short selling is a small segment of the overall equity marketplace and active short sellers are an even smaller group of participants and, therefore, represented a de minimus amount of the selling pressure that the markets experienced recently.[82] As support for their arguments, commenters referenced, among other things, two recent studies by the Staff that were also discussed in the Proposal.[83] In these studies, the Staff analyzed the impact that a short sale price test might have had during a thirteen day period in September 2008,[84] as well as whether and the extent to which short selling and long selling exerted downward price pressure during a volatile period in early September 2008.[85] The first of these studies noted that, although its data was limited to historical trade and quote data from a period when no short sale price test was in place and the shape of order book and trading sequences might have differed had a short sale price test been in place, a short sale price test would likely have been most restrictive during periods of low volatility, with greatest impact on short selling in lower priced and more active stocks.[86] The second study found that during periods of price declines, the selling pressure was more intense from long sellers than from short sellers. It also found that, on average, short sale volume as a fraction of total volume was highest during periods of positive returns, noting, however, that it was also possible that there were instances in which short selling activity peaked during periods of extreme negative returns.[87]

Some commenters stated that the recent market stability suggests that investor confidence has been restored and, therefore, short sale price test restrictions are not necessary.[88] Several commenters submitted data or referenced studies showing that investor confidence has recently improved.[89] A number of commenters expressed concern that any short sale price test restriction would carry with it the unintended consequences of reduced liquidity and widened bid-ask spreads, resulting in less efficient pricing in the securities markets.[90] One commenter stated its belief that because short sale price test restrictions would weaken and erode benefits of short selling such as

from Kimberly Unger, Executive Director, Security Traders Association of New York, Inc., dated June 18, 2009 ("STANY (June 2009)"); letter from Karrie McMillan, General Counsel, Investment Company Institute, dated June 19, 2009 ("ICI (June 2009)"); letter from Megan A. Flaherty, Chief Legal Counsel, Wolverine Trading, LLC, dated June 19, 2009 ("Wolverine"); letter from Eric Swanson, SVP and General Counsel, BATS Exchange, Inc., dated Sept. 21, 2009 ("BATS (Sept. 2009)"); letter from Michael R. Trocchio, Esq. on behalf of Bingham McCutchen, LLP, dated Sept. 30, 2009 ("Bingham McCutchen"); letter from James S. Chanos, Chairman, Coalition of Private Investment Companies, dated Sept. 21, 2009 ("CPIC (Sept. 2009)") (citing letter from Credit Suisse letter (June 2009)); letter from Luke Fichthorn, Managing Member, John Fichthorn, Managing Member, Dialectic Capital Management, LLC, dated Sept. 21, 2009 ("Dialectic Capital (Sept. 2009)"); letter from Eric W. Hess, General Counsel, Direct Edge Holdings LLC, dated Sept. 21, 2009 ("Direct Edge (Sept. 2009)"); letter from Paul M. Russo, Managing Director and Head of U.S. Equity Trading, Goldman, Sachs & Co., dated Sept. 21, 2009 ("Goldman Sachs (Sept. 2009)"); letter from Suhas Daftuar, Managing Director, Hudson River Trading LLC, dated Sept. 21, 2009 ("Hudson River Trading"); letter from Leonard J. Amoruso, General Counsel, Knight Capital Group, Inc., dated Sept. 22, 2009 ("Knight Capital (Sept. 2009)"); letter from Richard Chase, Managing Director and General Counsel, RBC Capital Markets Corporation, dated Sept. 21, 2009 ("RBC (Sept. 2009)"); letter from Peter J. Driscoll, Chairman, John C. Giesea, President and CEO, Security Traders Association, dated Sept. 21, 2009 ("STA (Sept. 2009)"); letter from Barbara Palk, President, TD Asset Management, Inc., dated Sept. 14, 2009 ("TD Asset Management"); letter from George U. Sauter, Managing Director and Chief Investment Officer, The Vanguard Group, Inc., dated Sept. 21, 2009 ("Vanguard (Sept. 2009)"); letter from Chris Concannon, Virtu Financial, LLC, dated Sept. 21, 2009 ("Virtu Financial"); letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, dated Oct. 1, 2009 ("MFA (Oct. 2009)"); letter from Jeffrey S. Davis, Vice President and Deputy General Counsel, The Nasdaq OMX Group, Inc., dated Oct. 7, 2009 ("Nasdaq OMX Group (Oct. 2009)").

[80] *See, e.g.,* letter from Michael D. Lipkin, Adjunct Assistant Professor, Columbia University, dated Apr. 9, 2009 ("Prof. Lipkin"); letter from Eric Swanson, SVP and General Counsel, BATS Exchange, Inc., dated May 14, 2009 ("BATS (May 2009)"); Autore, Billingsley, and Kovacs, *Short Sale Constraints, Dispersion of Opinion, and Market Quality: Evidence from the Short Sale Ban on U.S. Financial Stocks* (June 19, 2009); letter from William J. Brodsky, Chairman and CEO, Edward J. Joyce, President and COO, The Chicago Board Options Exchange, Inc., dated June 19, 2009 ("CBOE (June 2009)"); letter from James S. Chanos, Chairman, Coalition of Private Investment Companies, dated June 19, 2009 ("CPIC (June 2009)"); letter from STANY (June 2009); letter from SIFMA (June 2009); letter from MFA (June 2009); letter from ICI (June 2009); letter from Joan Hinchman, Executive Director, President and CEO, National Society of Compliance Professionals Inc., dated June 19, 2009 ("NSCP"); letter from Mary Richardson, Director of Regulatory and Tax Department, Alternative Investment Management Association, dated June 19, 2009 ("AIMA"); letter from Credit Suisse (June 2009); letter from Rory O'Kane, President, TD Professional Execution, Inc, dated June 19, 2009 ("T.D. Pro Ex"); letter from Citadel *et al.* (June 2009); letter from William Connell, President and CEO, Allston Trading, LLC, dated June 18, 2009 ("Allston Trading (June 2009)"); letter from Wolverine; letter from Roy J. Katzovicz, Chief Legal Officer, Pershing Square Capital Management L.P., dated June 19, 2009 ("Pershing Square"); letter from GETCO (June 2009); letter from Luke Fichthorn, Managing Member, John Fichthorn, Managing Member, Dialectic Capital Management, LLC, dated June 18, 2009 ("Dialectic Capital (June 2009)"); memorandum of a meeting between representatives of Credit Suisse and the Office of Commissioner Aguilar, dated July 2, 2009, and written materials submitted at the meeting ("Credit Suisse (July 2009)"); letter from CPIC (Sept. 2009); letter from STA (Sept. 2009); letter from Ira D. Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association, dated Sept. 21, 2009 ("SIFMA (Sept. 2009)"); letter from TD Asset Management; letter from Goldman Sachs (Sept. 2009); letter from Peter Kovac, Chief Operating Officer and Financial and Operations Principal, EWT, LLC, dated Sept. 21, 2009 ("EWT (Sept. 2009)"); letter from Charles M. Jones, PhD, Robert W. Lear Professor of Finance and Economics, Columbia Business School, dated Sept. 21, 2009 ("Prof. Jones"). *See also infra* Section II.D. (discussing the data and studies submitted and/or referenced by commenters).

[81] *See, e.g.,* letter from MFA (June 2009); letter from STANY (June 2009); letter from Credit Suisse (June 2009); letter from STA (Sept. 2009) (noting that "[t]he STA believes that long sellers deleveraging and anticipating withdrawals and redemptions were largely responsible for the declines").

[82] *See, e.g.,* letter from STA (Sept. 2009).

[83] *See* Proposal, 74 FR at 18049.

[84] *See* Staff, *Analysis of a short sale price test using intraday quote and trade data,* Dec. 17, 2008 ("Staff Analysis (Dec. 17, 2008)") at *http://www.sec.gov/comments/s7-08-09/s70809-368.pdf.*

[85] *See* Staff, *Analysis of Short Selling Activity during the First Weeks of September, 2008,* Dec. 16, 2008 ("Staff Analysis (Dec. 16, 2008)") at *http://www.sec.gov/comments/s7-08-09/s70809-369.pdf.*

[86] *See* Staff Analysis (Dec. 17, 2008).

[87] *See* Staff Analysis (Dec. 16, 2008).

[88] *See, e.g.,* letter from Renee M. Toth, President, National Association of Active Investment Managers, dated June 12, 2009 ("NAAIM"); letter from NSCP; letter from RBC (Sept. 2009).

[89] *See, e.g.,* memorandum of meeting between representative of TD Ameritrade and the Office of Commissioner Aguilar, dated June 1, 2009, and written materials submitted at the meeting ("TD Ameritrade"); letter from RBC (Sept. 2009); letter from EWT (Sept. 2009). In addition, one commenter submitted preliminary data on the relationship between short selling and investor confidence and stated that "[w]hile it is too early to draw conclusions from this data, the evidence presented below does not suggest that there is a negative relationship between short selling activity and investor confidence." *See* letter from Ingrid M. Werner, PhD, Martin and Andrew Murrer Professor of Finance, Fisher College of Business, The Ohio State University, dated June 19, 2009 ("Prof. Werner"). *See also infra* Section II.D. (discussing data submitted and/or referenced by commenters regarding investor confidence).

[90] *See e.g.,* letter from Jeffrey S. Wecker, CEO, Lime Brokerage LLC, dated June 19, 2009 ("Lime Brokerage (June 2009)") (noting that "[w]e believe there would be significant unintended consequences of the proposed restrictions, including reduction in overall market liquidity and widening of spreads * * *"); letter from Leonard J. Amoruso, General Counsel, Knight Capital Group, Inc., dated June 18, 2009 ("Knight Capital (June 2009)"); letter from MFA (June 2009); *see also infra* Section II.D. (discussing empirical data regarding the potential impact of short sale price test restrictions).

liquidity, price discovery and the ability to manage risk, they would also weaken and erode investor confidence.[91] Many commenters stated that the reinstatement of any short sale price test restriction would impose significant costs on market participants and lead to increased transaction costs for investors.[92] In addition, several commenters noted that while the Commission is rightly trying to increase investor confidence, current short sale regulations, including Rule 204 of Regulation SHO and Exchange Act Rule 10b–21, are sufficient to address the public's concerns about potentially abusive short selling.[93]

A significant number of commenters, however, continue to urge the Commission to reinstate some form of short sale price test restriction because these commenters believe that such a measure will help to restore investor confidence.[94] One commenter stated that "we believe that a price test could have a real impact on investors' and issuers' confidence in the equities market."[95] Some commenters have stated that a lack of price test restrictions makes them question whether they should invest in the stock market.[96] Other commenters have stated that they believe a short sale price test will aid small investors.[97] In addition, some commenters have suggested that restricting the prices at which securities may be sold short will help address steep declines in securities' prices.[98]

[91] *See* letter from AIMA; *see also* letter from CPIC (June 2009) (stating "investor confidence will not be served in the long term by the adoption of rules that the Commission itself has acknowledged have no sound empirical basis and may decrease market efficiency, limit price discovery, provide less protection against upward stock price manipulations, increase trading costs, reduce liquidity and impose other potential costs on investors").

[92] *See e.g.,* letter from Scott C. Goebel, Senior Vice President and General Counsel, Fidelity Investments, dated June 22, 2009 ("Fidelity"); letter from MFA (June 2009); letter from Credit Suisse (June 2009); letter from EWT (June 2009); letter from SIFMA (June 2009); letter from Wolverine; letter from T.D. Pro Ex; letter from ICI (June 2009); letter from Simon M. Lorne, Chief Legal Officer, Martin Z. Schwartz, Chief Compliance Officer, Millennium Management LLC, dated June 19, 2009 ("Millennium"); letter from Citadel *et al.* (June 2009).

[93] *See e.g.,* letter from Tim Belloto, dated May 5, 2009; letter from MFA (June 2009); letter from SIFMA (June 2009); letter from Pershing Square; letter from Paul M. Russo, Managing Director and Head of U.S. Equity Trading, Goldman, Sachs & Co., dated June 19, 2009 ("Goldman Sachs (June 2009)"); letter from CBOE (June 2009); letter from Allston Trading (June 2009); letter from STANY (June 2009); letter from Citadel *et al.* (June 2009); letter from STA (Sept. 2009); letter from BATS (Sept. 2009).

[94] *See, e.g.,* letter from Herbert C. Roubidoux, dated May 4, 2009; letter from William K. Barnard, CEO, Equity Insight, Inc., dated May 4, 2009 ("Equity Insight"); letter from Henry J. Judd, CEO, Alethium Corp., dated May 6, 2009; letter from John Sook, dated May 6, 2009; letter from Boris Finkelstein, dated May 7, 2009; letter from John E. Detraz, dated May 8, 2009; letter from Joseph Giancola, dated May 8, 2009; letter from John W. Kozak, Chief Financial Officer, Park National Corporation, dated May 19, 2009 ("Park National"); letter from Robert S. Miloszewski, dated June 1, 2009; letter from Dr. George R. Arends, dated June 1, 2009; letter from Kent Hendrickson, dated June 4, 2009; letter from Dennis Nixon, Chairman and Chief Executive Officer, International Bancshares Corporation, dated June 9, 2009 ("IBC"); letter from Brian P. Hendey, dated June 9, 2009; letter from Catherine Mapen, dated June 15, 2009; letter from Jeffrey T. Brown, Senior Vice President, Office of Legislative and Regulatory Affairs, Charles Schwab & Co., Inc., dated June 18, 2009 ("Schwab"); letter from Michael Gitlin, Head of Global Trading, David Oestreicher, Chief Legal Counsel, Christopher P. Hayes, Sr. Legal Counsel, T. Rowe Price Associates, Inc., dated June 18, 2009 ("T. Rowe Price (June 2009)"); letter from Michael R. McAlevey, Vice President and Chief Corporate, Securities and Finance Counsel, General Electric Company, dated June 18, 2009 ("GE"); letter from Janet M. Kissane, Senior Vice President, Legal and Corporate Secretary, NYSE Euronext, dated June 19, 2009 ("NYSE Euronext (June 2009)"); letter from Ronald C. Long, Director, Regulatory Affairs, Wells Fargo Advisors, dated June 15, 2009 ("Wells Fargo (June 2009)"). In addition, prior to the Proposal, a number of commenters stated that they believe that reinstatement of some form of price test restriction would help restore investor confidence. *See, e.g.,* letter from Richard F. Vulpi, dated Sept. 24, 2008; letter from Maureen Christensen, dated Oct. 9, 2008; letter from Peter B. Eckle, CEO Associate Arrangements, dated Oct. 11, 2008; letter from Joe Garrett, dated Oct. 15, 2008; letter from Jenna L. Spurrier, dated Oct. 24, 2008; letter from Scotland Settle, dated Oct. 27, 2008; letter from Patrick McQuaid, dated Oct. 29, 2008; letter from Lynn Miller, dated Nov. 13, 2008; letter from David Sheridan, dated Nov. 18, 2008; letter from W. Romain Spell, dated Nov. 19, 2008; letter from Phil Mason, dated Nov. 19, 2008; letter from Jeff Brower, dated Nov. 20, 2008; letter from Mike Abraham, dated Nov. 20, 2008; letter from Marvin Dingott, dated Nov. 20, 2008; letter from Josh Dodson, dated Nov. 21, 2008; letter from J. Geddes Parsons, dated Nov. 21, 2008; letter from Charles Rudisill, dated Nov. 21, 2008; letter from Mike Ryan, dated Nov. 21, 2008; letter from David B. Campbell and Natalie H. Win, dated Nov. 25, 2008; letter from Edward L. Yingling, American Bankers Association, dated Dec. 16, 2008; letter from Robert A. Lee, dated Feb. 10, 2009; letter from Robert Levine, dated Feb. 17, 2009; letter from Karl Findorff, dated Feb. 19, 2009; letter from Robert Lounsbury, dated Feb. 25, 2009; letter from Dr. Bill Daniel, dated Feb. 26, 2009; letter from Glenn A. Webster, dated Feb. 26, 2009; letter from Arleen Golden, dated Mar. 2, 2009; letter from Doug Cameron, dated Mar. 2, 2009; letter from Mike Rogers, dated Mar. 3, 2009; letter from George A. Flagg, dated Mar. 3, 2009; letter from Kevin Girard, dated Mar. 4, 2009; letter from Briggs Diuguid, dated Mar. 5, 2009 ("Briggs Diuguid"); letter from Bob Young, dated Mar. 5, 2009; letter from Troy Williams, dated Mar. 6, 2009; letter from Paul Kent, dated Mar. 7, 2009; letter from Chris Baratta, dated Mar. 9, 2009 ("Chris Baratta"); *see also* letter from Professor Constantine Katsoris, Fordham University School of Law, dated Mar. 4, 2009 (stating that elimination of former Rule 10a–1 "hardly generates confidence on the part of a true investor who is entrusting his or her life's savings * * * to the current market").

[95] Letter from NYSE Euronext (June 2009).

[96] *See, e.g.,* letter from Phil Koepke, dated May 5, 2009; letter from Joe Wells, dated May 29, 2009; letter from Michael Anderson, dated June 1, 2009 (noting "[i]f the SEC fails to act in the best interest of all investors, then peopel (sic) like myself, will look at other investment alternatives than the Stock Market."); letter from Anton Kleinschmidt, dated June 2, 2009 (noting that he "will not return to the equity markets" until he is "confident that the wide range of market predators such as unregulated short sellers are being effectively controlled"). In addition, prior to (and as cited in) the Proposal, commenters expressed similar concerns regarding a lack of price test restrictions. *See, e.g.,* letter from Jeff Boyd, dated Feb. 10, 2009; letter from Tim Zanni, dated Feb. 19, 2009.

[97] *See, e.g.,* letter from Michael Anderson, dated June 1, 2009; letter from Carl H. Van Hoozier, Jr., dated June 3, 2009; letter from Kevin Adcock, dated June 3, 2009 (noting that "[w]ithout this reinstatement the market will never be judged as fair, balanced or worth the unfair risks created by the SEC removing a tried and tested 70+ year old rule"); letter from Fran Mazenko, dated June 4, 2009; letter from Daniel H. Owings, dated June 4, 2009 (noting "the elimination of the uptick rule * * * prevented the small investor from equal treatment in the market"); letter from Kathleen Jardine, dated June 4, 2009. In addition, prior to (and as cited in) the Proposal, commenters expressed similar statements regarding short sale price tests aiding small investors. *See, e.g.,* letter from Chris Baratta (noting that while price test restrictions could not reasonably be expected to prevent market downturns, they would, in his opinion, "give the little investor a chance" in the current conditions); *see also* letter from Paul D. Mendelsohn, President, Windham Financial Services, Inc., dated Mar. 6, 2009 (stating that he believes former Rule 10a–1 "protected" the markets and that "suspension of the uptick rule has opened a security hole into our financial system"); letter from Bob Young, dated Mar. 5, 2009 (suggesting that reinstatement of the uptick rule "will not be a quick or total fix, but it will help").

[98] *See, e.g.,* letter from Grant D. Wieler, dated May 8, 2009; letter from John J. Piccitto, Managing Director, John Piccitto Consulting Ltd., dated May 7, 2009 (noting that "[b]ecause the decline of the value of a stock can be very steep and very fast indeed, the ensuing 'feeding frenzy' * * * should be addressed by regulators. Slowing the cascade of short selling would create both the fact and the appearance of regulatory control * * *"); letter from Mucho Balka, Esq., dated May 30, 2009; letter from George A. Mitchell, dated June 1, 2009; letter from Jason Sturm, dated June 1, 2009; letter from Erin Chieffi, dated June 2, 2009; letter from Paul Rivett, Vice President and Chief Legal Officer, Fairfax Financial Holdings Ltd., dated June 17, 2009 ("Fairfax Financial"); letter from GE; letter from Michael Lamanna, dated June 17, 2009; letter from Stanyarne Burrows, dated June 17, 2009; letter from William R. Harker, Senior Vice President, General Counsel and Corporate Secretary, Sears Holdings Corporation, dated June 19, 2009 ("Sears"); letter from Glen Shipway, dated Sept. 21, 2009 ("Glen Shipway (Sept. 2009)"). In addition, the American Bankers Association noted that its members, "both large and small, have told us that short sellers were taking advantage of the uptick rule's absence; that their stock prices were experiencing excessive downward pressure unrelated to actual conditions of the firm. * * *" and that its members expressed "that measures needed to be taken, including reinstating the uptick rule in some format, to reduce the avenues for abusive trading practices and to restore investor confidence." Letter from Sarah A. Miller, Senior Vice President, Center for Securities, Trust and Investments, American Bankers Association, dated July 1, 2009 ("Amer. Bankers Assoc."); *see also* letter from Paul Tudor Jones II, Tudor Investment Corporation, dated Oct. 10, 2008 (stating that he believes that one way to "immediately stem the decline" in the stock market would be to reinstate the uptick rule); letter from James F. Kane, Jr., dated Feb. 6, 2009 (stating that he believes that reinstating "the Up-tick Rule will

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Some Members of Congress and representatives of one SRO have also continued to express support for reinstatement of price test restrictions.[99] One such SRO representative noted that over 95% of its issuers who participated in a survey believed that the market would function better with one of the proposed short sale price test restrictions.[100]

As we noted in the Proposal, some researchers have also indicated that they believe that they have collected data that establishes a possible association between the recent market downturn and the elimination of former Rule 10a–1.[101] Commenters also submitted data or referenced studies they believe support the contention that a price test restriction would have a positive impact on the market.[102] In addition, there have been reports of significant short selling in connection with the use of credit default swaps ("CDS"), particularly in the securities of significant financial institutions,[103] and it has been suggested that the interaction between and amplifying effects of CDS and short selling may be a reason to reinstate a short sale price test.[104]

Further, as we stated in the Proposal, questions and comments have been raised about the role that short selling, and in particular potentially abusive short selling, may have had in connection with the recent price fluctuations and disruption in our markets.[105] As such, prior to issuing the Proposal, in the latter part of 2008, we took a number of other short sale-related actions aimed at addressing these concerns. For example, due to our concerns that false rumors spread by short sellers regarding financial institutions of significance in the U.S. may have fueled market volatility in the securities of some of these institutions, on July 15, 2008, we issued an emergency order ("July Emergency Order") [106] pursuant to section 12(k)(2) of the Exchange Act [107] which imposed borrowing and delivery requirements on short sales of the equity securities of certain financial institutions. We noted in the July Emergency Order that false rumors can lead to a loss of investor confidence. Such loss of investor confidence can lead to panic selling, which may be further exacerbated by "naked" short selling. As a result, the prices of securities may artificially and unnecessarily decline well below the price level that would have resulted from the normal price discovery process.[108] If significant financial institutions are involved, this chain of events can threaten disruption of our markets.[109]

Due to our concerns regarding the impact of short selling on the prices of financial institution securities, on September 18, 2008, we issued another emergency order prohibiting short selling in the publicly traded securities of certain financial institutions.[110] Our concerns, however, were not limited to financial institutions, given the importance of confidence in our markets and the rapid and steep declines in the prices of securities that generally we were seeing at that time.[111] Such rapid and steep price declines can give rise to questions about the underlying financial condition of an institution, which in turn can erode confidence, even without an underlying fundamental basis.[112] This erosion of confidence can impair the liquidity and ultimate viability of an institution, with potentially broad market consequences.[113]

These concerns resulted in our issuance on September 17, 2008 of an emergency order under Section 12(k)(2) of the Exchange Act, in part targeting short selling in all equity securities.[114] Pursuant to the September Emergency Order we imposed enhanced delivery requirements on sales of all equity securities under Rule 204T of Regulation SHO.[115]

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go a long way in preventing speculators from ganging up on a particular stock and forcing it down"); letter from Briggs Diuguid (stating that while short sellers "make efficient markets," he is nonetheless concerned that short selling may be a tool of manipulators when short sales are "piled on" a particular company).

[99] *See e.g.,* letter to Mary Schapiro, Chairman, from Kirsten Gillibrand, United States Senator, dated June 5, 2009; joint statement of Ted Kaufman, United States Senator, and Johnny Isakson, United States Senator, dated Sept. 29, 2009. In addition, prior to (and as cited in) the Proposal, several current and former Members of Congress have called for reinstatement of short sale price test restrictions. *See, e.g.,* letter to Christopher Cox, Chairman, from Hillary Rodham Clinton, former United States Senator, dated Sept. 17, 2008; letter to Christopher Cox, Chairman, from Bill Sali, Member of Congress, dated Oct. 1, 2008; letter to Christopher Cox, Chairman, from Peter T. King, Member of Congress, dated Oct. 7, 2008; letter to Mary Schapiro, Chairman, from Gary L. Ackerman, Member of Congress, dated Jan. 27, 2009; letter to Mary Schapiro, Chairman, from Rep. Barney Frank and other Members of the House Financial Services Committee, dated Mar. 11, 2009; Proposal, 74 FR at 18046–18047 (noting statements by a Member of Congress and a former U.S. Senator asking the Commission to reinstate former Rule 10a–1 or some other form of short sale price test restriction). *See also* letter to Mary Schapiro, Chairman, from Carolyn Maloney, Member of Congress and Chairman of the Joint Economic Committee, dated Mar. 23, 2009. We note, however, that other Members of Congress have expressed concerns regarding our adopting a short sale price test restriction. *See, e.g.,* letter to Mary Schapiro, Chairman, from Michael Crapo, United States Senator, Jim Bunning, United States Senator, David Vitter, United States Senator, Michael Enzi, United States Senator, and Mel Martinez, former United States Senator, dated June 17, 2009.

With respect to comments by SRO representatives, *see, e.g.,* letter from Janet M. Kissane, Senior Vice President, Legal and Corporate Secretary, NYSE Euronext, dated Sept. 21, 2009 ("NYSE Euronext (Sept. 2009)"); letter from NYSE Euronext (June 2009); statement of Larry Leibowitz, Group Executive Vice President and Head of Global Technology and US Executions, NYSE Euronext, dated May 5, 2009 ("NYSE Euronext (May 2009)"). In addition, prior to (and as cited in) the Proposal, one senior SRO representative endorsed the reinstatement of a short sale price test restriction. *See* Edgar Ortega, *Short-Sale Rule Undermined as Bernanke Backs Review,* Bloomberg News Service, Mar. 4, 2009 (noting comments by Duncan Niederauer, CEO, The NYSE Euronext Group, Inc., that imposing a measure such as former Rule 10a–1, "would go a long way to adding confidence" in our markets).

[100] *See* letter from NYSE Euronext (June 2009).

[101] *See* Proposal, 74 FR at 18047, n.64; *see also* letter from Yavni Bar-Yam, New England Complex Systems Institute, dated June 23, 2009 ("Yavni Bar-Yam"); Dion Harmon and Yaneer Bar-Yam, April 2009, *Technical Report on SEC Uptick Rule Proposals,* New England Complex Systems Institute.

[102] *See, e.g.,* letter from NYSE Euronext (June 2009); letter from Schwab; letter from Richard J. Adler, Managing Director, European Investors, Inc., dated June 19, 2009 ("European Investors (June 2009)"); letter from Richard J. Adler, Managing Director, European Investors, dated Sept. 21, 2009 ("European Investors (Sept. 2009)"); letter from William Furber, High Street Advisors, L.P., dated June 18, 2009 ("High Street Advisors"); letter from Park National; letter from IBC; letter from Daniel P. Amos, Chairman and CEO, Aflac Incorporated, dated June 23, 2009 ("Aflac"); letter from J. Austin Murphy, PhD, Professor of Finance at Oakland University, School of Business Administration, dated Apr. 9, 2009 ("Prof. Murphy"); letter from Martin B. Napor, dated June 17, 2009 ("Martin Napor"); *see also infra* Section II.D. (discussing empirical data submitted in response to the Proposal and the Re-Opening Release).

[103] *See* Proposal, 74 FR at 18047, n.65 (referring to an article by George Soros, *The Game Changer,* available at *http://www.ft.com/cms/s/0/49b1654a-ed60-11dd-bd60-0000779fd2ac.html).* Similarly, in response to the Proposal, commenters raised concerns about CDS and short selling. *See, e.g.,* letter from Edward D. Herlihy, Theodore A. Levine, Wachtell, Lipton, Rosen & Katz, dated June 17, 2009 ("Wachtell"); letter from GE.

[104] *See* Proposal, 74 FR at 18047, n.66 and accompanying text.

[105] *See* Proposal, 74 FR at 18047–18048.

[106] *See* Exchange Act Release No. 58166 (July 15, 2008), 73 FR 42379 (July 21, 2008).

[107] 15 U.S.C. 78*l*(k)(2).

[108] *See* July Emergency Order, 73 FR 42379.

[109] *See id.*

[110] *See* Exchange Act Release No. 58592 (Sept. 18, 2008), 73 FR 55169 (Sept. 24, 2008) ("Short Sale Ban Emergency Order").

[111] *See, e.g.,* July Emergency Order, 73 FR 42379; Short Sale Ban Emergency Order 73 FR 55169; Exchange Act Release No. 58572 (Sept. 17, 2008), 73 FR 54875 (Sept. 23, 2008) ("September Emergency Order").

[112] *See* Short Sale Ban Emergency Order, 73 FR 55169; September Emergency Order, 73 FR 54875.

[113] *See id.*

[114] *See* September Emergency Order, 73 FR 54875.

[115] *See id.* In addition, we issued an emergency order, and subsequent Interim Final Temporary Rule, Rule 10a–3T, to require disclosure of short sales and short positions in certain securities. The temporary rule expired on August 1, 2009. *See*

Rule 204T, among other things, required participants of a registered clearing agency to close-out fails to deliver resulting from short sales of any equity security by purchasing or borrowing the security by no later than the beginning of trading on the day after the fail to deliver occurred. We adopted the provisions of the September Emergency Order as an Interim Final Temporary Rule in October 2008 because of our continued concern about the potentially negative market impact of large and persistent fails to deliver.[116]

Our adoption of Interim Final Temporary Rule 204T followed a series of other steps aimed at reducing such fails to deliver and addressing potentially abusive short selling. These steps included eliminating the "grandfather" and options market maker exceptions to Regulation SHO's close-out requirement,[117] and proposing and subsequently adopting a "naked" short selling anti-fraud rule, Rule 10b–21.[118] Although we recognize that fails to deliver can occur for legitimate reasons, we remained concerned about the impact of large and persistent fails to deliver on market confidence. Results from Staff analysis indicate that our actions to further reduce fails to deliver are having their intended effect. For example, these results indicate that fails to deliver in all equity securities have declined significantly since the adoption of Interim Final Temporary Rule 204T.[119] To help further our goal of reducing fails to deliver by maintaining the reductions in fails to deliver achieved by the adoption of Interim Final Temporary Rule 204T, as well as other actions taken by the Commission, we adopted the substance of Interim Final Temporary Rule 204T as a permanent rule, Rule 204, in July 2009.[120]

Despite the significant decline in fails to deliver and the more recent stability in the securities markets, concerns persist about rapid and steep price declines in securities and erosion of investor confidence in our markets. Thus, we continued to examine whether there are other actions that the Commission should take, including re-evaluating whether a short sale price test should be reintroduced or a circuit breaker rule should be imposed.

As we stated in the Proposal, when we eliminated all short sale price test restrictions in July 2007, we acknowledged that circumstances may develop that could warrant relief from the prohibition in Rule 201 of Regulation SHO for a short sale price test, including a short sale price test of an SRO, to apply to short sales in any security.[121] Thus, in determining whether or not to propose, and now adopt, a short sale price test rule or circuit breaker rule, we have considered the recent turmoil in the financial sector and steep declines and extreme volatility in securities prices.[122]

As discussed in this adopting release, we remain mindful that short selling provides benefits to the market. For example, legitimate short selling can play an important and constructive functional role in the markets, providing liquidity and price efficiency. Short sellers also play an important role in correcting upward stock price manipulation.[123] Because short sale price test restrictions may lessen some of these benefits, it is important that any short sale price test regulation is designed to limit any potentially unnecessary impact on legitimate short selling.

Thus, as discussed in detail below, we are adopting in Rule 201 a targeted short sale price test restriction that will be based on the current national best bid and that will apply only if the price of an individual security declines intra-day by 10% or more from that security's prior day's closing price on the listing market for that security. We are also amending Rule 200(g) of Regulation SHO to address when a broker-dealer may need to mark certain sell orders "short exempt."

D. Empirical Data Regarding Potential Market Impact of Short Sale Price Test Restrictions Submitted in Response to the Proposal and Re-Opening Release

In the Proposal, we requested that commenters provide empirical data to support their views and arguments with respect to the proposed short sale price test rules and the proposed circuit breaker rules.[124] Overall, the interpretations and results of the analyses submitted were mixed and sometimes conflicted with each other. In addition, the methods used in the empirical analyses submitted ranged from simple plots of data points to carefully constructed econometrics. The Pilot Results, while dated, in our view should continue to inform our decisionmaking where relevant, and none of the empirical studies discussed below have given us reason to question the rigor or validity of the Pilot Results.

A number of commenters submitted data or referenced studies in support of their position that a short sale price test restriction would not have a positive impact on the market.[125] In contrast,

Exchange Act Release No 58591 (Sept. 18, 2008) 73 FR 55175 (Sept. 24, 2008); Exchange Act Release No. 58785 (Oct. 15, 2008), 73 FR 61678 (Oct. 17, 2008).

[116] *See* Exchange Act Release No. 58773 (Oct. 14, 2008), 73 FR 61706 (Oct. 17, 2008) ("Interim Final Temporary Rule 204T").

[117] *See* Exchange Act Release No. 56212 (Aug. 7, 2007), 72 FR 45544 (Aug. 14, 2007) (eliminating the "grandfather" exception to Regulation SHO's close-out requirement); September Emergency Order, 73 FR 54875 (eliminating the options market maker exception to Regulation SHO's close-out requirement). Following the issuance of the September Emergency Order, we adopted amendments making permanent the elimination of the options market maker exception. *See* Exchange Act Release No. 58775 (Oct. 14, 2008), 73 FR 61690 (Oct. 17, 2008) ("Options Market Maker Elimination Release").

[118] *See* Exchange Act Release No. 58774 (Oct. 14, 2008), 73 FR 61666 (Oct. 17, 2008); September Emergency Order, 73 FR 54875; Exchange Act Release No. 57511 (Mar. 17, 2008), 73 FR 15376 (Mar. 21, 2008).

[119] *See* Memorandum from the Staff Re: Impact of Recent SHO Rule Changes on Fails to Deliver, Nov. 4, 2009 at *http://www.sec.gov/spotlight/shortsales/oeamemo110409.pdf* (stating, among other things, that the average daily number of aggregate fails to deliver for all securities decreased from 2.21 billion to 0.25 billion for a total decline of 88.5% when comparing a pre-Rule to post-Rule period); Memorandum from the Staff Re: Impact of Recent SHO Rule Changes on Fails to Deliver, Nov. 26, 2008 at *http://www.sec.gov/comments/s7-30-08/s73008–37.pdf;* Memorandum from the Staff Re: Impact of Recent SHO Rule Changes on Fails to Deliver, Mar. 20, 2009 at *http://www.sec.gov/comments/s7-30-08/s73008-107.pdf.*

[120] *See* Exchange Act Release No. 60388 (July 27, 2009), 74 FR 38266 (July 31, 2009) ("Rule 204 Adopting Release"). Rule 204 contained some modifications to address commenters' concerns. *See id.*

[121] *See* Proposal, 74 FR at 18048; *see also* 2007 Price Test Adopting Release, 72 FR at 36348.

[122] *See, e.g.,* Proposal, 74 FR at 18048 (noting the turbulence in the securities markets at the time we issued the Proposal and during the eighteen months prior thereto).

[123] *See, e.g.,* Staff's Summary Pilot Report at 9.

[124] *See, e.g.,* Proposal, 74 FR at 18049.

[125] *See, e.g.,* letter from BATS (May 2009); Autore, Billingsley, and Kovacs, *Short Sale Constraints, Dispersion of Opinion, and Market Quality: Evidence from the Short Sale Ban on U.S. Financial Stocks* (June 19, 2009); letter from CBOE (June 2009); letter from CPIC (June 2009); letter from STANY (June 2009); letter from SIFMA (June 2009); letter from MFA (June 2009); letter from ICI (June 2009); letter from NSCP; letter from AIMA; letter from Credit Suisse (June 2009); letter from T.D. Pro Ex; letter from Citadel *et al.* (June 2009); letter from Allston Trading (June 2009); letter from Knight Capital (June 2009); letter from Wolverine; letter from Pershing Square; letter from GETCO (June 2009); letter from Dialectic Capital (June 2009); letter from Hudson River Trading; memorandum regarding meeting with Credit Suisse (July 2009); letter from CPIC (Sept. 2009); letter from STA (Sept. 2009); letter from SIFMA (Sept. 2009); letter from TD Asset Management; letter from Goldman Sachs (Sept. 2009); letter from EWT (Sept. 2009); letter from Prof. Jones; *see also* letter from NAAIM; letter from Prof. Werner; memorandum regarding meeting with TD Ameritrade; letter from Adam V. Reed, Julian Price Associate Professor of Finance, University of North Carolina at Chapel Hill, dated Sept. 21, 2009 ("Prof. Reed"); letter from RBC (Sept. 2009); letter from Daniel Mathisson, Managing Director, Credit Suisse Securities (USA), LLC, dated Mar. 30, 2009 ("Credit Suisse (Mar. 2009)"); Ana Avramovic, *What Happened When Traders' Shorts Were Pulled Down?,* Credit Suisse Market

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and as we noted in the Proposal, some commenters have indicated that they believe that they have collected data that establishes a possible association between the recent market downturn and the elimination of former Rule 10a–1.[126] Commenters also submitted data or referenced studies in support of the contention that a price test restriction would have a positive impact on the market.[127] We summarize below findings from these studies and discuss our views with respect to the studies.

Several commenters cited empirical evidence showing that short selling contributes to market liquidity, price discovery, and market efficiency and that restrictions on short selling, particularly bans on short selling, may impede liquidity, price discovery, and market efficiency.[128] While we agree with commenters that short selling contributes to market liquidity, price discovery and market efficiency and while these studies provide relevant information with respect to the effects of a short selling ban, they do not address the effects of a short sale price test restriction, or more specifically for purposes of Rule 201, a circuit breaker that, when triggered, imposes the alternative uptick rule.[129] In fact, because Rule 201 does not impose a ban on short selling but instead continues to allow short selling (although at a price above the national best bid) when the short sale price test restriction has been triggered, the Rule's structure will help preserve the benefits of short selling.

Some commenters cited a study (the "Pre-Borrow Study") which did not find a relationship between changes in short interest and changes in trading volume, and which concluded that "short sales do not have a significant effect on market liquidity: Other factors drive liquidity."[130] We note, however, that the correlation between changes in short interest and changes in trading volume may not be an accurate measure of the impact of short sales on liquidity. Economic theory does not tend to support using changes in trading volume as a measure of liquidity.[131] Trading volume itself, as opposed to changes in trading volume, is considered a measure of liquidity, though other measures, such as effective spreads and price impact, are considered by many to be better measures of liquidity and are more commonly used for measuring the liquidity of equities.[132] In addition, changes in short interest do not necessarily measure the volume of short selling. In fact, short interest is a "snapshot" variable, so the change in short interest does not necessarily measure correctly the volume of short selling, which is what the Pre-Borrow Study is trying to examine. Thus, we do not believe that the results in the Pre-Borrow Study cited by commenters should be interpreted to suggest that short sales are unimportant for liquidity. We also note that the Pre-Borrow study does not reconcile its results to a large body of conflicting evidence, including (but not restricted to) analyses in the comments mentioned above, showing that short selling contributes to market liquidity and that restrictions on short selling, particularly bans on short selling, may impede liquidity.[133]

Several commenters provided analyses showing that short interest initially fell immediately after the repeal of former Rule 10a–1 and that either short interest or short selling volume fell for specific stocks over periods leading up to the Short Sale Ban Emergency Order.[134] Overall, these analyses show that the negative returns of financial securities in the weeks both before and during the Short Sale Ban Emergency Order are unlikely to be the result of short selling activities.[135] We note that, although these studies create some doubt about whether certain price declines during that time period were caused by short sellers, because the analyses provided are specific to the Short Sale Ban Emergency Order and to a time period during which there was significant market turmoil, the analyses are less relevant regarding the potential impact on returns of the circuit breaker approach of Rule 201.

Several other commenters stated that the absence of a short sale price test restriction has been detrimental to

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Commentary (Sept. 2008) ("Avramovic (Sept. 2008)").

[126] *See* Proposal, 74 FR at 18047, n.64; *see also* letter from Yavni Bar-Yam; Dion Harmon and Yaneer Bar-Yam, April 2009, *Technical Report on SEC Uptick Rule Proposals,* New England Complex Systems Institute.

[127] *See, e.g.,* letter from Jeff Wang, dated May 7, 2009 ("Jeff Wang"); letter from NYSE Euronext (June 2009); letter from Schwab; letter from European Investors (June 2009); letter from European Investors (Sept. 2009); letter from High Street Advisors; letter from Park National; letter from IBC; letter from Aflac; letter from GE; letter from Michael R. Grupe, Executive Vice President, Research & Investor Outreach, National Association of Real Estate Investment Trusts, dated June 19, 2009 ("NAREIT"); letter from Kurt N. Schacht, Managing Director, Linda L. Rittenhouse, Director, Capital Markets Policy, CFA Institute Centre for Financial Market Integrity, dated Aug. 21, 2009 ("CFA"); letter from Martin Napor.

[128] *See, e.g.,* letter from BATS (May 2009); letter from AIMA; letter from CBOE (June 2009); letter from CPIC (June 2009); letter from Credit Suisse (June 2009); letter from GETCO (June 2009); letter from ICI (June 2009); letter from NSCP; letter from TD Asset Management; letter from T.D. Pro Ex; letter from STANY (June 2009); letter from Hudson River Trading; letter from Allston Trading (June 2009); letter from Knight Capital (June 2009); letter from Pershing Square; letter from Wolverine; letter from Citadel *et al.* (June 2009) (referencing Lawrence E. Harris, Ethan Namvar and Blake Phillips, *Price Inflation and Wealth Transfer during the 2008 SEC Short-Sale Ban,* (Apr. 2009)); Matthew Clifton and Mark Snape, *The Effect of Short-selling Restrictions on Liquidity: Evidence from the London Stock Exchange* (Dec. 19, 2008); *Recent Trends in Trading Activity, Short Sales and Failed Trades* and *Study on the Impact of the Prohibition on the Short Sale of Inter-Listed Financial Sector Issuers* by Investment Industry Regulatory Organization of Canada (IIROC) (February 2009); *See* Autore, Billingsley, and Kovacs, *Short Sale Constraints, Dispersion of Opinion, and Market Quality: Evidence from the Short Sale Ban on U.S. Financial Stocks* (June 19, 2009); memorandum regarding meeting with Credit Suisse (July 2009); *see also* letter from Credit Suisse (Mar. 2009).

[129] *See id.* In addition, several commenters cited research showing that short selling may be beneficial to price discovery and market efficiency, but that did not address the effect of a short sale price test restriction on price discovery or market efficiency. *See* letter from CPIC (June 2009) (citing Jonathan Karpoff and Xiaoxia Lou, *Do Short Sellers Detect Overpriced Firms? Evidence from SEC Enforcement Actions,* Working paper, 2008); letter from Goldman Sachs (Sept. 2009) (citing Jonathan Karpoff and Xiaoxia Lou, *Short Sellers and Financial Misconduct,* Working paper, 2009); letter from Pershing Square (citing Jonathan Karpoff and Xiaoxia Lou, *Do Short Sellers Detect Overpriced Firms? Evidence from SEC Enforcement Actions,* Working paper, 2008); letter from CPIC (Sept. 2009) (citing Jonathan Karpoff and Xiaoxia Lou, *Short Sellers and Financial Misconduct,* Working paper, 2009). Another commenter submitted a study showing that short sellers trade after news stories and that short sellers effectively process publicly available information. *See* letter from Prof. Reed. While this study uses short selling volume data to support its conclusion that short sellers do not disproportionately engage in information-based manipulation, it does not directly examine the impact of a short sale price test restriction, and, therefore, has limited utility for purposes of evaluating the potential market impact of Rule 201.

[130] *See, e.g.,* letter from Patrick M. Byrne, Chairman and CEO, Overstock.com, Inc., dated May 29, 2009 ("Overstock.com (May 2009)") (citing Robert J. Shapiro and Nam D. Pham, *The Impact of a Pre-Borrow Requirement for Short Sales on Failures-to-Deliver and Market Liquidity,* Apr. 2009; letter from Brian D. Pardo, Chairman and CEO, Life Partners Holding, Inc., dated May 28, 2009 ("Life Partners Holding") (citing the Pre-Borrow Study).

[131] The reason why we cannot interpret a change in trading volume as a measure of liquidity can be illustrated by the following example: A less liquid stock can experience an increase (positive change) in trading volume and a more liquid stock can experience a decrease in trading volume. Measuring liquidity by changes in trading volume will mischaracterize the less liquid stock as more liquid and the more liquid stock as less liquid.

[132] *See, e.g.,* Tarun Chordia, Richard Roll, and Avanidhar Subrahmanyam, 2001, *Market Liquidity and Trading Activity,* Journal of Finance, 34: 501–530; Joel Hasbrouck and Duane J. Seppi, 2001, *Common Factors in Prices, Order Flows and Liquidity,* Journal of Financial Economics, 59: 383–411; Yakov Amihud, 2002, *Illiquidity and stock returns: cross-section and time-series effects,* Journal of Financial Markets, 5: 31–56.

[133] *See supra* note 128 (referencing, among others, empirical evidence cited by commenters as showing that short selling contributes to market liquidity).

[134] *See, e.g.,* letter from Dialectic Capital (June 2009); letter from MFA (June 2009); letter from STA (Sept. 2009); Avramovic (Sept. 2008).

[135] *See* Avramovic (Sept. 2008); letter from Credit Suisse (June 2009).

prices and provided information on share prices, volume and/or short interest that they believe support this statement.[136] We note that, while some of the noted price changes coincide with changes in short selling activity, some do not.[137] Moreover, because these studies look at a long horizon (*e.g.,* months instead of minutes), it is not clear that the evidence provided is relevant to support such conclusion. Thus, it is difficult to conclude from these analyses that the absence of a short sale price test restriction and the actions of short sellers resulted in issuer prices falling below their fundamental values.

One commenter cited a study that used intra-day short selling transaction data to examine the impact of short selling on volatility and found that the removal of former Rule 10a–1 did not exacerbate volatility.[138] We note that, while the study analyzed a period prior to and after the removal of former Rule 10a–1, it analyzed only a six-week period following the elimination of former Rule 10a–1, which may minimize the study's statistical significance. We also note that although the Staff found, in the Staff's Summary Pilot Report presenting the Staff's analysis of the data made public during the Pilot, that short sale price tests in effect at that time did not have a significant impact on daily volatility, the Staff also found some evidence that the short sale price tests dampened intra-day volatility for smaller stocks.[139]

In contrast, other commenters submitted data showing an increase in volatility from July 2007 through November 2008 to support the conclusion that the absence of a short sale price test restriction caused an increase in market volatility.[140] As discussed above and in the Proposal,[141] concurrent with the subprime mortgage crises and credit crisis in 2007, U.S. markets experienced increased volatility and steep price declines, particularly in the stocks of certain financial issuers. We are not aware, however, of any empirical evidence that the elimination of short sale price test restrictions contributed to the increased volatility in the U.S. markets. In addition, the data showing an increase in volatility since the elimination of former Rule 10a–1 submitted by commenters in response to the Proposal does not address the extent to which other factors may have influenced the increased volatility. Moreover, because these studies look at a long horizon (*e.g.*, months instead of minutes), it is not clear that the evidence provided is relevant to support such conclusion. Thus, the relationship between the elimination of short sale price test restrictions and the increased volatility remains unclear.

Several commenters submitted data on the percentage of short sales that might be affected by a short sale price test restriction.[142] One commenter submitted data indicating that the alternative uptick rule, adopted on a permanent, market-wide basis, could affect up to 37% of short sale orders.[143] As acknowledged by this commenter, however, this number does not indicate how severely the short sellers would be affected, how the number might change in different market conditions, or whether the number would result in changes in market quality.[144] In addition, as acknowledged by the commenter, the number also does not account for how order submission strategies would differ based on the alternative uptick rule.[145]

In addition, as discussed in more detail below,[146] in response to our request for comment on an appropriate threshold at which to trigger the proposed circuit breaker short sale price restrictions, commenters submitted estimates of the number of securities that would trigger a circuit breaker rule at a 10% threshold.[147] While commenters' analyses (including the facts and assumptions used) and their resulting estimates varied,[148] commenters' estimates reflect that a 10% circuit breaker threshold, on average, should affect a limited percentage of covered securities.[149] Given the variations in the facts and assumptions underlying the estimates submitted by commenters, the Staff also looked at trading data to confirm the reasonableness of those estimates. The Staff found that, during the period covering April 9, 2001 to September 30, 2009,[150] the price test restrictions of Rule 201 would have been triggered, on an average day, for approximately 4% of covered securities.[151] The Staff also found that for a low volatility period, covering January 1, 2004 to December 31, 2006, the 10% trigger level of Rule 201 would have, on an average day, been triggered for approximately 1.3% of covered securities.[152] Thus, we believe that the short sale price test restriction of Rule 201 is structured so that generally it will not be triggered for the majority of covered securities at any given time and, thereby, will not interfere with the provision of market benefits such as liquidity and price efficiency for those securities, including when prices in such securities are undergoing minimal downward price pressure or are stable or rising.

Several commenters submitted data on indexes of investor confidence to argue that investor confidence has been restored and, therefore, short sale price test restrictions are not necessary.[153] In addition, one commenter submitted preliminary data, drawn in part from investor confidence indexes, on the relationship between short selling and investor confidence and stated that "[w]hile it is too early to draw conclusions from this data, the evidence presented * * * does not suggest that there is a negative relationship between short selling activity and investor confidence."[154] Another commenter submitted a survey showing that its clients put more money into the markets between Fall 2008 and Spring 2009 and that many of its clients do not believe that an overhaul of financial services regulation would restore investor confidence.[155]

We also note that some other commenters submitted surveys showing

[136] *See, e.g.,* letter from Park National; letter from GE; letter from Aflac; letter from IBC; letter from Jeff Wang; letter from Martin Napor.

[137] For example, some of the noted price declines coincide with increases in short interest. *See* letter from Aflac; letter from IBC. Other noted price changes do not correlate with changes in short interest or short selling activity. *See* letter from Dialectic Capital (June 2009); letter from MFA (June 2009); letter from Peter J. Driscoll, Chairman, John C. Giesea, President and CEO, Security Traders Association, dated June 19, 2009 ("STA (June 2009)"); Avramovic (Sept. 2008).

[138] *See* letter from Citadel *et al.* (June 2009) (citing Ekkehart Boehmer, Charles M. Jones, and Xioayan Zhang, *Unshackling Short Sellers: The Repeal of the Uptick Rule* (Nov. 2008)).

[139] *See* Staff's Summary Pilot Report at 55.

[140] *See, e.g.,* letter from NAREIT; letter from High Street Advisors; letter from European Investors (June 2009); letter from European Investors (Sept. 2009).

[141] *See* Proposal, 74 FR at 18043.

[142] *See* letter from Prof. Jones; letter from BATS (May 2009) (stating that, on its own market during May, June, September and October 2008, 12% to 13% of all executions were short sellers trading at a price less than the last execution price).

[143] *See* letter from Prof. Jones (stating that, during the period from July 6, 2007 through the end of August 2007, an average of 37% of submitted short sale orders in NYSE-listed Russell 3000 stocks were either market orders or marketable limit orders).

[144] *See id.*

[145] *See id.*

[146] *See infra* Section III.A.5. (discussing the circuit breaker trigger level).

[147] *See supra* note 21.

[148] *See infra* note 306.

[149] *See infra* note 307.

[150] *See infra* note 309.

[151] *See infra* note 310.

[152] *See infra* note 311.

[153] *See, e.g.*, letter from RBC (Sept. 2009); letter from EWT (Sept. 2009); letter from CPIC (June 2009); *see also* letter from NAAIM (citing press articles as evidence of increased investor confidence).

[154] Letter from Prof. Werner.

[155] *See* memorandum regarding meeting with TD Ameritrade.

that reinstituting a short sale price test restriction would improve investor confidence.[156] One commenter submitted a survey showing that over 95% of the issuers participating in the survey believed that the market would function better with a short sale price test restriction and stated that this data "suggests that a price test would boost confidence."[157]

While the analyses of investor confidence indexes submitted by commenters do contain measures of investor confidence, we believe that the investor confidence indexes cited are designed to capture elements of investor confidence not directly affected by regulatory changes. Investor confidence indexes often capture measures of systematic risk or optimism about the economy, as opposed to measures of investor confidence related to regulation designed to provide investor protections. In addition, in light of the surveys that were submitted in support of a short sale price test restriction as a means to restore investor confidence,[158] we do not believe that the surveys submitted to argue that a short sale price test restriction would not improve investor confidence[159] provide strong evidence on this point.

Although in recent months there has been an increase in stability in the securities markets, we remain concerned that excessive downward price pressure on individual securities accompanied by the fear of unconstrained short selling can undermine investor confidence in our markets generally. Further, we are concerned about potential future market turmoil, including significant increases in market volatility and significant price declines, and the impact of any such future market turmoil on investor confidence. Thus, we believe it is appropriate to adopt the targeted short sale price test restrictions contained in Rule 201.

In summary, we have reviewed the empirical data, analyses and studies submitted and carefully considered them in connection with our determination that it is appropriate at this time to adopt in Rule 201 a short sale price test restriction combined with a circuit breaker approach.

[156] *See, e.g.*, letter from NYSE Euronext (June 2009); letter from CFA; *see also* letter from Schwab.

[157] Letter from NYSE Euronext (June 2009).

[158] *See, e.g.*, letter from Schwab; letter from NYSE Euronext (June 2009); letter from CFA.

[159] *See, e.g.*, memorandum regarding meeting with TD Ameritrade.

III. Discussion of Rule 201 of Regulation SHO

In the Proposal, we proposed two approaches to restrictions on short selling: one that would apply on a market-wide and permanent basis and one that would apply only to a particular security during a significant market decline in the price of that security (*i.e.*, a circuit breaker approach).[160] With respect to the permanent, market-wide approach, we proposed two alternative short sale price tests: the proposed modified uptick rule, based on the current national best bid, and the proposed uptick rule, based on the last sale price. With respect to the circuit breaker approach, we proposed two alternative circuit breaker tests: one that would temporarily prohibit short selling in a particular security when there is a significant decline in the price of that security and one that would temporarily impose either the proposed modified uptick rule or the proposed uptick rule on short sales in a particular security when there is a significant decline in the price of that security.

In addition, in the Proposal we inquired whether a short sale price test restriction that would permit short selling at a price above the current national best bid, *i.e.*, the alternative uptick rule, would be preferable to the proposed modified uptick rule and the proposed uptick rule.[161] We sought comment regarding the application of the alternative uptick rule as a market-wide permanent price test restriction or in conjunction with a circuit breaker.[162] We received two comment letters regarding applying the alternative uptick rule on a permanent, market-wide basis[163] and seven comment letters with respect to applying the alternative uptick rule in combination with a circuit breaker.[164] To allow us to further consider the alternative uptick rule, on August 20, 2009, we re-opened the comment period to the Proposal.[165] In addition, on May 5, 2009, we held the May 2009 Roundtable[166] at which panelists discussed the proposed short sale price test restrictions and circuit breaker rules.

As noted above, we received over 4,300 unique comment letters in response to the Proposal and Re-Opening Release.[167] In discussing the provisions of Rule 201, we highlight and address below the main issues, concerns, and suggestions raised by commenters.

A. Operation of the Circuit Breaker Plus Alternative Uptick Rule

We are adopting in Rule 201 a circuit breaker approach combined with the alternative uptick rule. Specifically, Rule 201(b)(1) provides that "[a] trading center shall establish, maintain, and enforce written policies and procedures reasonably designed to: (i) Prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day; and (ii) Impose the requirements of paragraph (b)(1)(i) of this section for the remainder of the day and the following day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan."[168]

Thus, Rule 201 will require a trading center[169] to have policies and

[160] *See* Proposal, 74 FR 18042.

[161] *See* Proposal, 74 FR at 18072, 18081, 18082.

[162] *See id.*

[163] *See* letter from William Hartley, dated May 8, 2009; letter from Glen Shipway, dated June 19, 2009 ("Glen Shipway (June 2009)").

[164] *See* letter from BATS (May 2009); letter from Johnny Peters, ChFC, dated May 20, 2009; letter from Credit Suisse (June 2009); letter from SIFMA (June 2009); letter from Goldman Sachs (June 2009); letter from NYSE Euronext (June 2009); letter from Eric W. Hess, General Counsel, Direct Edge Holdings LLC, dated June 23, 2009 ("Direct Edge (June 2009)"). In addition, in connection with the May 2009 Roundtable, panelists expressed support for the alternative uptick rule. *See* statement from NYSE Euronext (May 2009); opening remarks of James J. Angel, Ph.D., CFA, Associate Professor of Finance, McDonough School of Business, Georgetown University, dated May 5, 2009. We also note that prior to the Proposal, four exchanges, NYSE Euronext, Nasdaq OMX Group, BATS, and National Stock Exchange, submitted a comment letter recommending a circuit breaker combined with a price test that would allow short selling only at an increment above the current national best bid. *See* letter from National Stock Exchange, NYSE Euronext, Nasdaq OMX Group, and BATS, dated Mar. 24, 2009 ("National Stock Exchange *et al.*"). NYSE Euronext, in its subsequent comments, stated that it supported the proposed modified uptick rule applied on a permanent and market-wide basis rather than the position expressed in the earlier March 24, 2009 letter. *See* statement from NYSE Euronext (May 2009); letter from NYSE Euronext (June 2009).

[165] *See* Re-Opening Release, 74 FR 42033.

[166] *See supra* note 14.

[167] *See supra* note 78.

[168] Rule 201(b).

[169] Consistent with the Proposal, Rule 201(a)(9) states that the term "trading center" shall have the same meaning as in Rule 600(b)(78). Rule 600(b)(78) of Regulation NMS defines a "trading center" as "a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading

procedures reasonably designed to prevent it from executing or displaying any short sale order, absent an exception, at a price that is equal to or below the national best bid if the price of that security decreases by 10% or more from the security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day.[170] As discussed in more detail below, we believe that such a Rule will help prevent short sellers from using short selling as a tool to exacerbate a declining market in a security.

1. Covered Securities

Consistent with the proposed permanent, market-wide short sale price test restrictions and proposed circuit breaker rules, Rule 201 will apply to any "covered security." As proposed and as adopted, Rule 201 defines "covered security" to mean any "NMS stock" as defined under Rule 600(b)(47) of Regulation NMS.[171] Rule 600(b)(47) of Regulation NMS defines an "NMS stock" as "any NMS security other than an option."[172] Rule 600(b)(46) of Regulation NMS defines an "NMS security" as "any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options."[173] Thus, Rule 201 will apply to any security or class of securities, except options, for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan. As a result, Rule 201 generally will cover all securities, except options, listed on a national securities exchange whether traded on an exchange or in the OTC market.[174] As discussed further below, it will not include non-NMS stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market.

In response to our requests for comment, some commenters stated that any short sale price test adopted by the Commission for NMS stocks should also apply to non-NMS stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market.[175] One commenter indicated that failure to apply a short sale price test restriction applicable to NMS stocks to non-NMS stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market would cause investors to have inappropriately negative views about the OTC market and the firms whose securities are quoted there.[176] This commenter and another commenter also stated that not including non-NMS stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market in a short sale price test restriction could have a negative impact on the ability of firms whose securities are quoted OTC to raise capital.[177] Commenters noted that many issuers of securities that are quoted OTC are "small, emerging growth companies,"[178] that may have a particular need to raise capital in the equity markets.[179] One commenter noted that "less liquid stocks and the stock of less capitalized firms that trade in the OTC markets are in need of as much, if not more, protection from manipulative behavior than NMS stocks"[180] while another stated that "OTC Bulletin Board and Pink Sheet securities would appear to be prime targets for manipulative shorting practices."[181] Commenters also noted that applying a price test rule uniformly to NMS stocks and to non-NMS stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market could reduce the costs of such a rule because market participants would need only one set of programs and systems designed to ensure compliance with the rule, rather than different programs and systems for securities covered by the rule and securities not covered by the rule.[182]

Several commenters, however, expressed support for the application of a price test only to NMS stocks.[183] Several commenters noted that the current national best bid and offer are not currently collected, consolidated and disseminated for non-NMS stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market.[184] Further, although one commenter indicated that the Commission should plan to phase in application of a price test rule to non-NMS stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market,[185] another commenter expressed concerns that the OTC market is not "robust enough to withstand" such regulation.[186]

At this time, we are not applying Rule 201 to non-NMS stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market because a national best bid and offer currently is not required to be collected, consolidated, and disseminated for such securities.[187] Rule 201 is based on the current national best bid and its implementation requires that the national best bid is collected, consolidated and disseminated to market participants. Although several commenters indicated that it would be possible for non-NMS stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market to join or create a national plan for disseminating consolidated national

as principal or crossing orders as agent." *See* 17 CFR 242.600(b)(78). The definition encompasses all entities that may execute short sale orders. Thus, Rule 201 will apply to any entity that executes short sale orders.

[170] Any such execution or display will also need to be in compliance with applicable rules regarding minimum pricing increments. *See* 17 CFR 242.612. *See also infra* Section III.A.2.

[171] *See* Rule 201(a)(1).

[172] 17 CFR 242.600(b)(47).

[173] 17 CFR 242.600(b)(46).

[174] We note that there may be securities that are listed on a national securities exchange but that are not NMS stocks because they do not meet the definition of "NMS stock." Thus, these securities will not be subject to the short sale price test restrictions of Rule 201.

[175] *See* letter from Peter J. Chepucavage, General Counsel, Plexus Consulting LLC, The International Association of Small Broker Dealers and Advisors, dated Apr. 21, 2009; letter from R. Cromwell Coulson, Chief Executive Officer, Pink OTC Markets, Inc., dated May 26, 2009 ("Pink OTC"); letter from STANY (June 2009); letter from Michael L. Crowl, Managing Director and Global General Counsel, Barclays Global Investors, dated June 19, 2009 ("Barclays (June 2009)").

[176] *See* letter from Pink OTC.

[177] *See* letter from Pink OTC; letter from STANY (June 2009).

[178] Letter from Pink OTC.

[179] *See* letter from Pink OTC; letter from Alan F. Eisenberg, Executive Vice President, Emerging Companies and Business Development, Biotechnology Industry Organization, dated June 29, 2009 ("BIO"). BIO requested that biotechnology companies, many of which BIO stated are emerging companies that are "very dependent on capital, including using the public markets as a source of financing," be covered by any short sale price test restriction. Letter from BIO. We also note that one commenter requested that the Commission adopt a short sale price test or circuit breaker halt restriction specifically applicable to financial sector stocks. *See* letter from IBC. However, another commenter stated, "Restrictions on short selling in only the issues of financial services providers is perhaps the least valuable of all the ideas to be discussed during the short sale debate." *See* letter from STA (June 2009). Another commenter noted that it is not possible to anticipate which industry sectors may be impacted by potentially manipulative short selling in the future. *See* letter from T. Rowe Price (June 2009). Given the lack of a widespread call for industry specific short selling restrictions, and the additional complexities that an industry specific restriction would raise, such as identifying and defining the industry or sector to be covered, we have determined not to apply an industry specific short selling restriction at this time.

[180] Letter from STANY (June 2009).

[181] Letter from T. Rowe Price (June 2009).

[182] *See* letter from Pink OTC; letter from STANY (June 2009).

[183] *See, e.g.*, letter from Wells Fargo (June 2009); letter from T. Rowe Price (June 2009); letter from STA (June 2009); letter from Credit Suisse (Sept. 2009).

[184] *See* letter from Pink OTC; letter from T. Rowe Price (June 2009).

[185] *See* letter from T. Rowe Price (June 2009).

[186] Letter from STA (June 2009).

[187] As noted above, former Rule 10a–1 also did not apply to non-exchange listed securities quoted on the OTC Bulletin Board or elsewhere in the OTC market. *See supra* note 43.

best bid information for such stocks,[188] we are concerned that this would be a significant undertaking that would add greatly to the implementation time and cost of Rule 201, particularly in light of comments that the implementation process may be complex even for those securities for which the national best bid is currently collected, consolidated, and disseminated.[189]

We recognize commenters' concerns, however, regarding not applying Rule 201 to non-NMS stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market. Thus, at a later time, we may reconsider whether applying Rule 201 to non-NMS stocks quoted on the OTC Bulletin Board or elsewhere in the OTC market may be appropriate.

In response to our requests for comment, a number of commenters expressed concerns about the application of a short sale price test to equity securities without also addressing derivative securities.[190] Several commenters indicated that the ability of market participants to create "synthetic" short positions that are the economic equivalent of a short sale through the use of derivative securities would undermine the effectiveness of a short sale price test [191] and/or result in an increased use of derivative products to create "synthetic" short positions.[192] Some commenters indicated that the Commission should apply some sort of restriction to derivative securities with respect to "synthetic" short sales,[193] while others suggested that the Commission should require disclosure of "synthetic" short positions created with derivative securities.[194] Several commenters noted concerns with respect to practical difficulties related to addressing derivative securities and short selling issues, and that the Commission may not have the necessary legislative authority to address certain areas.[195]

As indicated in the Proposal and our requests for comment,[196] we recognize that the ability to obtain a short position through the use of derivative products such as options, futures, contracts for differences, warrants, CDS or other swaps (so-called "synthetic short sales") or other instruments (such as inverse leveraged exchange traded funds) may undermine our goals for adopting short sale price test restrictions. We are also concerned that synthetic short positions may increase as a result of the adoption of Rule 201. Rule 201, however, like former Rule 10a–1 and NASD's former bid test, which also did not apply to derivative securities, is formulated with the specific structure of the equity markets in mind and not for the substantially different market structure applicable to many derivatives securities. In addition, we believe that applying a Rule 201-type rule to derivatives securities would significantly complicate the implementation process. Thus, we have determined at this time not to modify the definition of "covered security" from that proposed and, therefore, the scope of securities to which Rule 201 will apply.

We note, however, that short sales in the equity markets to hedge derivatives transactions are subject to Rule 201. In addition, because we are concerned that the ability to create a short position through the use of derivative securities may undermine the goals of short sale price test restrictions, we may reconsider, at a later time, whether additional regulation of derivative securities and the use of "synthetic" short positions may be appropriate.

The securities covered by Rule 201 will overlap with the securities covered by former Rule 10a–1. Former Rule 10a–1 applied to securities registered on, or admitted to unlisted trading privileges on, a national securities exchange, if trades of the security were reported pursuant to an effective transaction reporting plan and information regarding such trades was made available in accordance with such plan on a real-time basis to vendors of market transaction information. All securities that would have been subject to former Rule 10a–1 will also be subject to Rule 201. In addition, certain securities, *i.e.*, securities traded on Nasdaq prior to its regulation as an exchange, that were not subject to former Rule 10a–1 will be subject to Rule 201.[197]

As we discussed in the Proposal,[198] market information for NMS stocks, including quotes, is disseminated pursuant to three different national market system plans.[199] The national

[188] *See, e.g.*, letter from Pink OTC; letter from STANY (June 2009); letter from T. Rowe Price (June 2009). The comment letter from Pink OTC indicates that it "would be willing to join the current Tape C UTP network or work with FINRA to create an OTC/UTP Plan including the best bid and offer prices for securities quoted on OTCBB and our Pink Quote Inter-Dealer Quotation System." Letter from Pink OTC.

[189] *See infra* Section VII. (discussing implementation time) and Sections X.B.1.b. and X.B.2.b. (discussing implementation costs).

[190] *See, e.g.*, letter from Gregory Bloom, dated Apr. 10, 2009; letter from Peter J. Driscoll, Chairman, John C. Giesea, President and CEO, Security Traders Association, dated Apr. 16, 2009 ("STA (Apr. 2009)"); letter from Jeffrey D. Morgan, President and CEO, National Investor Relations Institute, dated May 29, 2009 ("NIRI"); letter from Douglas Engmann, President, Engmann Options, Inc., dated June 1, 2009 ("Engmann Options"); letter from Dale W.R. Rosenthal, Assistant Professor of Finance, College of Business Administration, University of Illinois at Chicago, dated June 2, 2009 ("Prof. Rosenthal"); letter from Leslie Seff, President, Matthew B. Management, Inc., dated June 5, 2009 ("Matthew B. Management"); letter from Patrick J. Healy, Issuer Advisory Group, dated June 30, 2009 ("IAG"); letter from Barclays (June 2009); letter from Jesse J. Greene, Jr., Vice President, Financial Management and Chief Financial Risk Officer, International Business Machines Corporation, dated June 19, 2009 ("IBM"); letter from Katherine Tew Darras, General Counsel, Americas, International Swaps and Derivatives Association, Inc., dated June 19, 2009 ("ISDA"); letter from STA (June 2009); letter from George U. Sauter, Managing Director and Chief Investment Officer, The Vanguard Group, Inc., dated June 19, 2009 ("Vanguard (June 2009)"); letter from GE; letter from Knight Capital (June 2009); letter from Wachtell; letter from Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, American Bar Association, dated July 8, 2009 ("Amer. Bar Assoc. (July 2009)"); letter from Jeffrey S. Wecker, CEO, Lime Brokerage LLC, dated Sept. 21, 2009 ("Lime Brokerage (Sept. 2009)"); letter from Jonathan E. Johnson III, President, Overstock.com, dated Sept. 24, 2009 ("Overstock.com (Sept. 2009)"); letter from Kevin Holley, dated Sept. 29, 2009 ("Kevin Holley"); *see also* letter from Eric W. Hess, General Counsel, Direct Edge Holdings LLC, dated Mar. 30, 2009 ("Direct Edge (Mar. 2009)").

[191] *See, e.g.*, letter from Prof. Rosenthal; letter from STA (Apr. 2009); letter from Overstock.com (Sept. 2009); letter from Lime Brokerage (Sept. 2009).

[192] *See, e.g.*, letter from Matthew B. Management; letter from Prof. Rosenthal; letter from Barclays (June 2009); letter from STA (June 2009); letter from Vanguard (June 2009); letter from Lime Brokerage (Sept. 2009).

[193] *See, e.g.*, letter from IAG; letter from ISDA; letter from STA (June 2009); letter from Wachtell; letter from Matthew B. Management; letter from James L. Rothenberg, dated Sept. 20, 2009 ("James Rothenberg").

[194] *See, e.g.*, letter from IAG; letter from GE; letter from Wachtell; *see also* letter from Direct Edge (Mar. 2009).

[195] *See* letter from Barclays (June 2009); letter from GE; letter from NIRI; letter from Amer. Bar Assoc. (July 2009). Two commenters stated that the Commission should seek authority from Congress to regulate derivative securities where authority is currently lacking. *See* letter from GE; letter from NIRI.

[196] *See* Proposal, 74 FR at 18071, 18078.

[197] When Nasdaq became a national securities exchange in 2006, absent an exemption from former Rule 10a–1, all Nasdaq securities would have been subject to former Rule 10a–1. The Commission provided Nasdaq with an exemption from the application of the provisions of former Rule 10a–1 to securities traded on Nasdaq because the Pilot was already in progress, and the Commission believed it was necessary and appropriate to maintain the status quo for short sale price tests during the Pilot and to ensure that market participants would not be burdened with costs associated with implementing a price test that might be temporary. *See* Exchange Act Release No. 53128 (Jan. 13, 2006), 71 FR 3550 (Jan. 23, 2006) (order approving application of Nasdaq for registration as a national securities exchange); *see also* letter from James A. Brigagliano Acting Associate Director, Division of Market Regulation, SEC, to Marc Menchel, Executive Vice President and General Counsel, NASD, Inc., dated June 26, 2006.

[198] *See* Proposal, 74 FR at 18050–18051.

[199] The three joint-industry plans are (1) the Consolidated Tape Association Plan ("CTA Plan"), which disseminates transaction information for securities primarily listed on an exchange other than Nasdaq, (2) the Consolidated Quotation Plan

securities exchanges and FINRA participate in these joint-industry plans ("Plans").[200] The Plans establish three separate networks to disseminate market information for NMS stocks.[201] These networks are designed to ensure that, among other things, consolidated bids from the various trading centers that trade NMS stocks are continually collected and disseminated on a real-time basis, in a single stream of information. Thus, all market participants will have access to the consolidated bids for all the securities that will be subject to Rule 201.[202] As discussed in further detail below, however, we note that the national best bid can change rapidly and repeatedly and potentially there might be latencies in obtaining data regarding the national best bid.[203]

2. Pricing Increment

Rule 201(b) provides that a trading center shall establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day. In Rule 201 we have determined not to specify at what price a trading center may execute or display a short sale order of a covered security provided it is not at a price that is less than or equal to the current national best bid. As we stated in the Proposal, however, any such execution or display must be in compliance with applicable rules regarding minimum pricing increments.[204]

In the Proposal and Re-Opening Release, we did not propose a specific increment above the national best bid or last sale price at which short selling would be permissible. In response to our requests for comment regarding pricing increments, however, a number of commenters stated that any increment should be greater than one cent in order to make a price test more restrictive or effective or to address decimal pricing concerns.[205] Several commenters noted, however, that the higher the increment, the more restrictive such an increment could be on short selling and, if high enough, could even be tantamount to a ban on short selling.[206] A study by the Staff found that even moderate changes in bid increments can have a big impact on the constraints imposed on short selling activity and that, for practical purposes, high bid increments, such as five or ten cents, might be equivalent to a ban on short selling in some stocks, especially during periods when prices are not changing rapidly.[207]

Several commenters supported an increment of one trading unit, or one cent,[208] while another commenter suggested that the increment should be consistent with the minimum pricing increments specified in Rule 612 of Regulation NMS.[209] One commenter stated that the Commission should not specify a minimum increment and should permit trades to be executed at the mid-point between the best bid and best offer, even if the price were less than one cent above the best bid.[210] Another commenter expressed concerns that a short sale price test might advantage subpenny executions if, for example, certain trading venues were permitted to comply with the test by executing transactions at less than one cent above the national best bid.[211]

After considering the comments, we have determined at this time to not specify in Rule 201 a particular increment above the national best bid at which a covered security may be sold short. We believe that the goals we are seeking to advance by adopting Rule 201 will be achieved by requiring that when a covered security becomes subject to the short sale price test restrictions of Rule 201, all short selling must be at a price above the current national best bid. As discussed above, a goal of Rule 201 is to help prevent short selling from being used as a tool to exacerbate a declining market in a security. Thus, the price test restriction of Rule 201 does not permit short selling at or below the current national best bid. In addition to achieving this goal, however, we also recognize the need to minimize market disruption as well as the need for the price test restriction in Rule 201 to not be unduly restrictive. We believe that restricting short selling to a price above the current national bid for a particular security when the circuit breaker has been triggered for that security, without specifying at what price such short sales may occur, will best achieve these goals.[212]

3. Alternative Uptick Rule

We have determined to adopt in Rule 201(b) the alternative uptick rule such that when triggered, short selling will be permitted only at a price above the current national best bid. Specifically, Rule 201(b) will require a trading center to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day.[213] As noted above, we have determined to adopt in Rule 201(b) a circuit breaker trigger combined with

("CQ Plan"), which disseminates consolidated quotation information for securities primarily listed on an exchange other than Nasdaq, and (3) the Nasdaq UTP Plan, which disseminates consolidated transaction and quotation information for securities primarily listed on Nasdaq.

[200] Rule 603(b) of Regulation NMS provides that every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, for NMS stocks. *See* 17 CFR 242.603(b).

[201] These networks can be categorized as follows: (1) Network A—securities primarily listed on the NYSE; (2) Network B—securities listed on exchanges other than the NYSE and Nasdaq; and (3) Network C—securities primarily listed on Nasdaq.

[202] *See* Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37503 (June 29, 2005) ("Regulation NMS Adopting Release").

[203] *See infra* Section III.A.7.

[204] *See* Proposal, 74 FR at 18050, n.99, 101 (referencing 17 CFR 242.612).

[205] *See, e.g.*, letter from Franco A. Mortarotti, Managing Director, Zermatt Capital Management, dated Apr. 10, 2009 ("Zermatt"); letter from Neal E. Schear, President, Schear Capital, Inc., dated Apr. 28, 2009 ("Schear"); letter from Dale T. Forte, dated Apr. 14, 2009; letter from Arthur Colman, dated May 4, 2009; letter from Joseph Leegan, dated Mar. 25, 2009; letter from John H. Happke, dated May 7, 2009; letter from Louis G. Marozsan, Jr., dated May 8, 2009; letter from S. Buford Scott, Chairman, Walter S. Robertson, III, President and CEO, John Sherman, Jr., Past President and CEO, William P. Schubmehl, Past President and CEO, Scott & Stringfellow LLC, dated May 14, 2009 ("Scott & Stringfellow"); letter from Martin Napor; letter from Michael Sigmon, Chairman, Sigmon Wealth Management, dated June 10, 2009 ("Sigmon Wealth Management (June 2009)"); letter from Christopher Ailman, Chief Investment Officer, California State Teachers' Retirement System, dated June 17, 2009; letter from IBM; letter from Stan Ryckman, dated June 19, 2009.

[206] *See, e.g.*, letter from Citadel *et al.* (June 2009); letter from SIFMA (June 2009); letter from STA (June 2009)); *see also* letter from Credit Suisse (Mar. 2009).

[207] *See* Staff Analysis (Dec. 17, 2008).

[208] *See, e.g.*, letter from Citadel *et al.* (June 2009); letter from STA (June 2009).

[209] 17 CFR 242.612. *See* letter from NYSE Euronext (Sept. 2009).

[210] *See* letter from Howard Meyerson, General Counsel, Liquidnet, Inc., dated June 18, 2009 ("Liquidnet").

[211] *See* letter from Alec Hanson, dated Sept. 19, 2009.

[212] As noted above, any execution or display of a short sale order must be in compliance with applicable rules of Regulation NMS regarding minimum pricing increments. *See supra* note 204 and accompanying text.

[213] *See* Rule 201(b).

the alternative uptick rule. Thus, while this Section III.A.3. focuses on the alternative uptick rule in the context of comments received about the different price tests that we proposed, the alternative uptick rule operates in conjunction with the circuit breaker approach and should not be considered as an isolated provision.

In the Proposal and the Re-Opening Release, we sought comment on three alternative types of short sale price test restrictions that could be applied on a permanent, market-wide basis or in combination with a circuit breaker: the proposed uptick rule, the proposed modified uptick rule, and the alternative uptick rule.[214] The alternative uptick rule is similar to the proposed modified uptick rule in that it will use the current national best bid, rather than the last sale price, as a reference point for short sale orders. Unlike the proposed modified uptick rule and the proposed uptick rule, the alternative uptick rule will not allow short selling at the current national best bid or last sale price. Instead, the alternative uptick rule will only permit short selling at an increment above the current national best bid, unless an applicable exception applies.

In response to the Proposal and the Re-Opening Release, we received a number of comment letters supporting and opposing the alternative uptick rule. Those that opposed the alternative uptick rule stated, among other things, that because it will allow short selling only at a price above the current national best bid or last sale price, rather than at the current national best bid or last sale price, it will be more disruptive to the market than the proposed modified uptick rule or proposed uptick rule.[215] Some commenters stated that the alternative uptick rule will decrease liquidity, widen bid-ask spreads, decrease pricing efficiency, create inefficiencies in the routing and execution of short sale orders, increase intra-day volatility, and result in higher costs to investors.[216] Some commenters expressed concerns that the alternative uptick rule will exacerbate downward price movements because market participants may perceive the presence of short limit orders as a negative view of a security, causing buyers to withdraw their bids.[217] Other commenters stated that, although easier to implement, the alternative uptick rule would have a more disruptive effect on the market than the proposed modified uptick rule or the proposed uptick rule.[218]

The alternative uptick rule, like former Rule 10a–1 and the proposed uptick rule and proposed modified uptick rule, when triggered will affect all short selling, including some legitimate short selling, as well as abusive or manipulative short selling. The alternative uptick rule is by definition more restrictive than the proposed modified uptick rule, but differences between the operation of the proposed uptick rule and the alternative uptick rule mean that one approach or the other would be more restrictive in particular circumstances.[219] The empirical evidence regarding former Rule 10a–1 tends to demonstrate that it did not have a negative effect on market liquidity and price efficiency.[220] We similarly believe that the alternative uptick rule will have a minimal, if any, negative effect on market liquidity or price efficiency.[221]

In contrast to those commenters opposed to the alternative uptick rule, several commenters expressed support for the alternative uptick rule, stating that the alternative uptick rule is preferable to the proposed modified uptick rule or the proposed uptick rule because it will eliminate sequencing issues, will be easier and less costly to implement, will be more effective in decreasing price pressure on a security,[222] and will reduce the ability of market participants to use short selling as a market manipulation tool.[223] Some commenters stated that because the alternative uptick rule will most effectively prevent short selling from proactively driving the price of a security lower, it will also be the most effective of the proposed short sale price test restrictions at achieving the Commission's goal of helping to restore investor confidence.[224] In discussing the alternative uptick rule, one commenter stated that "[n]ot only does it faithfully replicate the old uptick rule it improves upon it by making each and every short sale a liquidity providing transaction."[225] Another commenter, in supporting the alternative uptick rule, stated that it will "likely be more restrictive on short selling than the original Rule 10a–1 'uptick rule'."[226]

We have determined to adopt the alternative uptick rule in combination with a circuit breaker because we believe the alternative uptick rule will be more effective at meeting our goals than the other proposed rules. Because the alternative uptick rule, when triggered, will generally permit short selling only at a price above the current national best bid, the alternative uptick rule will not allow short sales to get immediate execution at the bid.[227] In other words, short sellers will not be permitted to act as liquidity takers when the alternative uptick rule applies, but will participate, if at all, as liquidity providers (unless an exception applies), adding depth to the market. Put another way, short sale orders will be executed only when purchasers arrive willing to

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[214] *See* Proposal, 74 FR 18042; Re-Opening Release, 74 FR 42033.

[215] *See, e.g.*, letter from William E. McDonnell, Jr., Chief Compliance Officer, Atherton Lane Advisers, LLC, dated Sept. 9, 2009 ("Atherton Lane"); letter from Michael J. Simon, Secretary, International Securities Exchange LLC, dated Sept. 21, 2009 ("ISE (Sept. 2009)"); letter from John Nagel, Managing Director and Deputy General Counsel, Citadel Investment Group, LLC, John Liftin, Managing Director and General Counsel, The D.E. Shaw Group, Mark Silber, Executive Vice President, Renaissance Technologies, dated Sept. 21, 2009 ("Citadel *et al.* (Sept. 2009)"); letter from Bingham McCutchen; letter from Vanguard (Sept. 2009); letter from STA (Sept. 2009).

[216] *See, e.g.*, letter from Karrie McMillan, General Counsel, Investment Company Institute, dated Sept. 21, 2009 ("ICI (Sept. 2009)"); letter from CPIC (Sept. 2009); letter from STA (Sept. 2009); letter from Kimberly Unger, Executive Director, Security Traders Association of New York, Inc., dated Sept. 21, 2009 ("STANY (Sept. 2009)"); letter from RBC (Sept. 2009); letter from EWT (Sept. 2009); letter from MFA (Oct. 2009); letter from Knight Capital (Sept. 2009).

[217] *See, e.g.*, letter from John Gilmartin, Co-CEO and Ben Londergan, Co-CEO, Group One Trading, L.P., dated Sept. 14, 2009 ("Group One Trading (Sept. 2009)"); letter from STANY (Sept. 2009); letter from Glen Shipway (Sept. 2009); letter from Michael L. Crowl, Managing Director, Global General Counsel, Barclays Global Investors, dated Sept. 21, 2009 ("Barclays (Sept 2009)"); letter from Knight Capital (Sept. 2009); letter from MFA (Oct. 2009).

[218] *See, e.g.*, letter from ISE (Sept. 2009); letter from ICI (Sept. 2009).

[219] *See, e g., infra* note 242 and accompanying text (discussing automated trade matching systems).

[220] *See, e.g.*, the Pilot Results.

[221] *See infra* Section X.B.1.a. (discussing the impact of Rule 201 on market liquidity and price efficiency).

[222] *See, e.g.*, letter from Direct Edge (Sept. 2009); letter from BATS (Sept. 2009); letter from Ronald C. Long, Director, Regulatory Affairs, Wells Fargo Advisors, dated Sept. 17, 2009 ("Wells Fargo (Sept. 2009)"); *see also* letter from SIFMA (Sept. 2009) (stating that a circuit breaker coupled with the alternative uptick rule "would limit instances where a security is the subject of severe downward pressure"); letter from Hudson River Trading (expressing support for the alternative uptick rule in conjunction with a circuit breaker as opposed to other proposed price tests in conjunction with a circuit breaker).

[223] *See* letter from BATS (Sept. 2009); letter from Wells Fargo (Sept. 2009); letter from Glen Shipway (Sept. 2009).

[224] Letter from Michael Gitlin, Head of Global Trading, David Oestreicher, Chief Legal Counsel, Christopher P. Hayes, Sr. Legal Counsel, T. Rowe Price Associates, Inc., dated Sept. 21, 2009 ("T. Rowe Price (Sept. 2009)").

[225] Letter from Glen Shipway (Sept. 2009).

[226] Letter from Virtu Financial.

[227] As noted by some commenters, there may be situations in which a short seller could get immediate execution, such as where an order is executed in a facility that provides executions at the mid-point of the national best bid and offer. *See, e.g.*, letter from ISE (Sept. 2009); *see also* letter from BATS (Sept. 2009).

buy at prices above the national best bid. In addition, by not allowing short sellers to sell at the current national best bid, the alternative uptick rule will generally allow long sellers, by selling at the bid, to sell first and, thereby, take liquidity in a declining market for a security. As the Commission has noted previously in connection with short sale price test restrictions, a goal of such restrictions is to allow long sellers to sell first in a declining market.[228] A short seller that is seeking to profit quickly from market moves may find it advantageous to be able to short sell at the current national best bid. By placing long sellers ahead of short sellers in the execution queue under certain circumstances, Rule 201 will help promote capital formation, since investors should be more willing to hold long positions if they know that they may have a preferred position over short sellers when they wish to sell.

In addition, by making bids accessible only by long sellers when a security's price is undergoing significant downward price pressure, Rule 201 will help to facilitate and maintain stability in the markets and help ensure that they function efficiently. It will also help restore investor confidence during times of substantial uncertainty because, once the circuit breaker has been triggered for a particular security, long sellers will have preferred access to bids for the security, and the security's continued price decline will more likely be due to long selling and the underlying fundamentals of the issuer, rather than to other factors.

As we stated in the Proposal, short sale price test restrictions, whether a permanent, market-wide restriction or in combination with a circuit breaker, might help prevent short sellers from accelerating a declining market by exhausting all remaining bids at one price level, and causing successively lower prices to be established by long sellers.[229] Because the alternative uptick rule will only permit short selling at a price above the current national best bid, unless an exception applies, we believe it will be more effective than the proposed uptick rule or the proposed modified uptick rule at helping to prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool to exacerbate a decline in the price of a security by exhausting all remaining bids at one price level.

A number of commenters favored the proposed circuit breaker halt rule, stating, among other things, that they believe it would be the least disruptive of the proposed rules with respect to market functioning, while still achieving the Commission's underlying goals,[230] and would be the easiest of the proposed rules to implement.[231] We are concerned, however, that, as expressed by other commenters, the proposed circuit breaker halt rule could harm the market by preventing short sellers from being able to provide benefits such as liquidity and price efficiency to the impacted security during the duration of the halt or that it could harm investor confidence.[232] We note that in severe conditions, stocks tend to be less liquid. Thus, as a rule that permits short selling only at a price above the national best bid, the alternative uptick rule will require that during the period of time when a covered security is subject to the rule, short sellers in the security must act as liquidity providers, not liquidity takers, in that security.[233] In addition, by restricting the ability of short sellers to take liquidity when a covered security is undergoing significant price pressure, it will allow long sellers to access available liquidity by being able to sell at the current national best bid. This, in turn, may result in an increase in investor confidence during times of crisis as long sellers will have preferred access to bids for a security because when the circuit breaker has been triggered for a covered security, Rule 201 generally will allow only long sellers to sell at the bid.[234]

We have also determined to adopt the alternative uptick rule because, unlike the proposed uptick rule, it will be based on the current national best bid rather than the last sale price. As we stated in the Proposal, we believe that a short sale price test based on the national best bid is more suitable to today's markets than a short sale price test based on the last sale price.[235]

[228] *See supra* note 17.

[229] *See* Proposal, 74 FR at 18050, 18053, 18059, 18061, 18065, 18069; *see also* Securities and Exchange Commission, Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess., at 251 (1963).

[230] *See, e.g.,* letter from Lime Brokerage (Sept. 2009); *see also* letter from Lime Brokerage (June 2009) (stating that "[i]mplementing a "cooling off" period after a steep decline in a given security's price will give market participants a chance to absorb the situation and possibly reassess their desire to continue short selling"); letter from Credit Suisse (June 2009); letter from T.D. Pro Ex.

[231] *See, e.g.,* letter from SIFMA (June 2009); letter from Credit Suisse (June 2009); letter from Liquidnet; letter from Manisha Kimmel, Executive Director, Financial Information Forum, dated June 19, 2009 ("FIF (June 2009)"); letter from Lime Brokerage (Sept. 2009). Some commenters also stated that they believe that the proposed circuit breaker halt rule would be effective at preventing bear raids, reducing volatility in the market, and helpful in restoring investor confidence. *See, e.g.,* letter from Matthew Samelson, Principal, Woodbine Associates, dated May 15, 2009 ("Woodbine"); letter from Credit Suisse (June 2009); letter from IBC; letter from Sigmon Wealth Management (June 2009); letter from Wachtell.

[232] *See, e.g.,* letter from BATS (May 2009); letter from Citadel *et al.* (June 2009); letter from Direct Edge (June 2009); letter from Wolverine; letter from Amer. Bankers Assoc. Other commenters viewed the proposed circuit breaker halt rule as too restrictive. *See, e.g.,* letter from BATS (May 2009); letter from Direct Edge (June 2009). Some commenters argued that the proposed circuit breaker halt rule could harm investor confidence, by reducing volume and increasing bid-ask spreads during the effective period of the halt. *See, e.g.,* letter from ICI (June 2009); letter from Amer. Bankers Assoc.; letter from Citadel *et al.* (June 2009). Other commenters expressed opposition to the concept of short sale halts and bans as a general matter, perceiving such actions as harmful to the markets, citing prior regulatory halts and short sale bans as evidence. *See, e.g.,* letter from Josh Galper, Managing Principal, Finadium LLC, dated Apr. 13, 2009 ("Finadium"); letter from Barclays (June 2009); letter from Citadel *et al.* (June 2009); letter from Dialectic Capital (June 2009); letter from Knight Capital (June 2009); letter from MFA (June 2009).

[233] *See supra* note 29 (discussing the terms "liquidity provider" and "liquidity taker").

[234] Too much investor confidence may also be detrimental to investors because it can lead to investors making inappropriate decisions. Investor over-confidence, however, is less likely during times of crisis. *See, e.g.,* Brad M. Barber and Terrance Odean, 2000, *Trading is Hazardous to Your Wealth: The Common Stock Investment Performance of Individual Investors,* Journal of Finance, 55: 773–806.

[235] *See* Proposal, 74 FR at 18053. In response to our requests for comment in the Proposal and the Re-Opening Release, a number of commenters to the Proposal and Re-Opening Release expressed support for a price test restriction based on the national best bid rather than the last sale price, stating that it would be more suitable to today's markets. *See, e.g.,* letter from BATS (May 2009); letter from SIFMA (June 2009); letter from NYSE Euronext (June 2009); letter from Goldman Sachs (June 2009); letter from Direct Edge (June 2009); letter from GE; letter from Bingham McCutchen; letter from Citadel *et al.* (June 2009); letter from Amer. Bar Assoc. (July 2009); letter from Barry Friedman, Llewellyn Jones, and Derrick Kaiser, Founding Members, Qtrade Capital Partners LLC, dated Sept. 21, 2009 ("Qtrade"); letter from MFA (Oct. 2009). We also note supporting statements made by Larry Leibowitz, Group Executive Vice President at NYSE Euronext, at our May 5, 2009 Roundtable, stating that the proposed uptick rule would be ineffective in today's market "due to improper price sequencing caused by permitted reporting delays and the potential for manipulation." Statement of NYSE Euronext (May 2009). *Available at: http://www.sec.gov/comments/4-581/4581-86.pdf.*

We note, however, that a number of commenters offered support for a price test restriction based on the last sale price. *See, e.g.,* letter from Zermatt; letter from Bruce Lueck, Managing Partner, Zephyr Unicorn Funds, dated Apr. 10, 2009; letter from Walter Cruttenden, Cruttenden Partners, dated Apr. 14, 2009; letter from Larry Chlebina, President, Chlebina Capital Management, LLC, dated Apr. 15, 2009 ("Chlebina (Apr. 2009)"); letter from Chad McCurdy, Managing Partner, Marlin Capital Partners, dated Apr. 20, 2009; letter from David Wagner, CEO, Active Investment Management, LLC, dated Apr. 22, 2009; letter from Bradley Kelly, President, Magnum Opus Financial, dated Apr. 29, 2009; letter from Equity Insight; letter from Tony Wyan, CEO, Tony Wyan and Company, dated May 5, 2009; letter from Aaron Shafter, President, Great

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Although we recognize that a quotation proposes a transaction, whereas the last trade price reflects an actual trade, we note that pursuant to Commission and SRO rules, quotations for all covered securities must be firm.[236] By requiring that quotations be firm, the Commission intended to ensure that quotations provide reliable information to the marketplace to assist broker-dealers in satisfying their best execution obligations to their customers and to assist customers in making informed investment decisions.[237] Moreover, quotation information has significant value to the marketplace because it reflects the various factors affecting the market, including current levels of buying and selling interest.[238] Both retail and institutional investors rely on quotation information to understand the market forces at work at a given time and to assist in the formulation of investment strategies.[239]

Further, we believe that bids generally are a more accurate reflection of current prices for a security because changes in bids are more accurately timed than transactions. Transactions may be reported within a 90 second window, which can easily result in "stale" reports. Even transactions that are executed and reported automatically may be out of sequence if they occur in different trading centers, which can detract from the accuracy and reliability of the last sale. For example, trade reporting for covered securities can involve multiple trading centers reporting trades in the same stock from different locations using different means of reporting. Thus, for those covered securities for which a significant amount of trading occurs manually, or in multiple trading centers, a price test based on the national best bid will be a more accurate and effective means of regulating short selling than a test based on the last sale price because the manner in which trades are reported may create up-ticks and down-ticks that may not accurately reflect actual price movements in the security for the purpose of a test based on the last sale price.

We also note that the national best bid is nearly always a protected bid for the trade-through rule of Rule 611 of Regulation NMS,[240] with which every trading center must comply. Because trading centers' execution procedures must incorporate protected bids, they will also usually include the national best bid. Market participants will also be familiar with using the current national best bid as a reference point because NASD's former bid test, which was in existence from 1994 to mid-2007, was based on the current national best bid.[241]

In addition, another advantage of the alternative uptick rule is that it accommodates trading systems and strategies used in the marketplace today, such as the automated trade matching systems that offer price improvement based on the national best bid and offer. These passive pricing systems often effect trades at an independently-derived price, such as at the mid-point of the bid-offer spread. Such pricing would often not satisfy the tick test of former Rule 10a–1 because matches could potentially occur at a price below the last reported sale price. Thus, we provided a limited exception from former Rule 10a–1 for these trading systems.[242] In response to the Proposal and Re-Opening Release, commenters noted that a short sale price test restriction based on the current national best bid is preferable to a restriction based on the last sale price because it would not impede mid-point and similar derived price trading.[243] One such commenter noted that mid-point trading is beneficial to the markets because it provides price improvement to both sides of the trade.[244] The short sale price test restrictions of Rule 201 will accommodate matching systems that execute trades at an independently-derived price because such systems are designed so that matches occur above the current national best bid.

We have also determined to adopt the alternative uptick rule rather than the proposed uptick rule or the proposed modified uptick rule because it will not require monitoring of the sequence of bids or last sale prices (*i.e.,* whether the current national best bid or last sale price is above or below the previous national best bid or last sale price) and, therefore, will likely be easier to implement and monitor. As we noted in the Re-Opening Release, commenters had stated that the alternative uptick rule would likely be easier to monitor, could likely be implemented more quickly and with less cost, and would be easier to program into trading and surveillance systems than the proposed modified uptick rule or the proposed uptick rule because it would not require bid sequencing.[245] In response to the Re-Opening Release, several commenters made similar statements in comparing the alternative uptick rule to the proposed modified uptick rule and proposed uptick rule.[246]

The requirements of Rule 201 will also not result in the type of disparate short sale regulation that existed under former Rule 10a–1.[247] Rule 201 will apply a uniform rule to trades in the same securities that can occur in multiple, dispersed, and diverse markets. To further this goal of having a uniform short sale price test, consistent with the Proposal, subsection (e) of Rule 201 provides that no SRO shall have any rule that is not in conformity with, or conflicts with, Rule 201.[248] One of the reasons for the elimination of former Rule 10a–1 and the prohibition on any SRO from having a short sale price test in July 2007 was that the application of short sale price tests had become disjointed, with different price tests applying to the same securities trading in different markets. One commenter noted that a rule that does not cover all market centers would result in an unlevel playing field,[249] while another stated that the Commission should not adopt a rule that would create an opportunity

Mountain Capital Management, LLC, dated May 5, 2009; letter from Richard Casey, Chairman and CEO, Casey Securities, LLC, dated May 8, 2009; letter from Scott & Stringfellow; letter from Donald Rembert Sr., President, Rembert Pendelton and Jackson, dated May 28, 2009; letter from Sigmon Wealth Management (June 2009); letter from Sears.

[236] *See, e.g.,* 17 CFR 242.602.

[237] *See, e.g.,* Exchange Act Release No. 43085 (July 28, 2000), 65 FR 47918, 47924–47925 (Aug. 4, 2000).

[238] *See id.* at 47925.

[239] *See id.*

[240] *See* 17 CFR 242.611.

[241] NASD's former bid test referenced the national best bid and was designed to help prevent short selling at or below the current national best bid in a declining market. *See supra* note 43 (discussing NASD's former bid test).

[242] *See, e.g., supra* note 42; letter from James A. Brigagliano, Acting Associate Director, Division of Market Regulation, SEC, to Alan J. Reed, Jr., First Vice President and Director of Compliance, Instinet Group, LLC, dated June 15, 2006 (granting Instinet modified exemptive relief from Rule 10a–1 for certain transactions executed through Instinet's Intra-day Crossing System).

[243] *See* letter from Liquidnet; letter from GE.

[244] *See* letter from Liquidnet.

[245] *See* Re-Opening Release, 74 FR at 42034.

[246] *See, e.g.,* letter from BATS (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from John McCarthy, General Counsel, Global Electronic Trading Company, dated Sept. 21, 2009 ("GETCO (Sept. 2009)"); letter from Hudson River Trading. Some commenters, however, expressed disagreement that a price test restriction that will require sequencing of bids or last sale prices is not technologically feasible. *See, e.g.,* letter from Bingham McCutchen; letter from ISE (Sept. 2009); letter from EWT (Sept. 2009); letter from Vincent Florack and Steve Crutchfield, Matlock Capital LLC, dated Sept. 18, 2009 ("Matlock Capital (Sept. 2009)"); letter from Gary E. Shugrue, President, Ascendant Capital Partners, dated May 11, 2009 ("Ascendant Capital"); letter from Robert P. Porter, President, Paladin Investment LLC, dated May 8, 2009 ("Paladin Investment").

[247] *See* Proposal, 74 FR at 18044–18045 (discussing the history of short sale price test restrictions).

[248] *See* Rule 201(e).

[249] *See* letter from Wells Fargo (June 2009).

for regulatory arbitrage.[250] For this same reason, this commenter supported a prohibition on any SRO having a rule that is not in conformity with or conflicts with Rule 201.[251] We believe that a uniform rule will reduce compliance and surveillance costs because systems and surveillance mechanisms will have to be programmed to consider a single price test based on the national best bid, rather than different tests for different markets. In addition, a uniform test will reduce opportunities for regulatory arbitrage. Accordingly, under Rule 201, all covered securities, wherever traded, will be subject to one short sale price test, the alternative uptick rule.

4. Circuit Breaker Approach Generally

Under Rule 201(b), the alterative uptick rule will apply only if the price of a covered security has declined by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day.[252] In the Proposal, we proposed a permanent, market-wide approach to short sale price test restrictions that would result in the proposed uptick rule or proposed modified uptick rule applying to all covered securities all the time.[253] We also proposed a circuit breaker approach, either as an addition or an alternative to a permanent, market-wide approach, which would temporarily result in either a halt on short selling in a specific security or the proposed modified uptick rule or the proposed uptick rule applying to a specific security if there was a significant decline in the price of that security.[254] In addition, in the Re-Opening Release, we stated that the alternative uptick rule could be implemented market-wide or in combination with a short selling circuit breaker.[255]

A number of commenters stated that if we determined to adopt a short sale price test restriction, it should be in combination with a circuit breaker rather than on a permanent, market-wide basis.[256] For example, one commenter urged us to adopt a circuit breaker approach because it would be more narrowly-tailored to address our concerns about the effects of short selling in a market subject to a significant downturn.[257] This commenter noted that in such a market, circuit breakers likely would be triggered for a large number of securities.[258] Another commenter stated that a circuit breaker is preferable because it "permits normal market activity while a stock is trading in a natural range and short selling is more likely to benefit the market (by, for example, increasing price discovery and liquidity). Conversely, a Circuit Breaker will restrict short selling when prices begin to decline substantially and short selling becomes more likely to be abusive and potentially harmful."[259] One commenter stated that "[a] circuit breaker would better target situations that could result from * * * potential bear raids and other forms of manipulation that may be used to drive down or accelerate the decline in the price of a stock."[260]

Other commenters stated that implementing price test restrictions on a permanent, market-wide basis, rather than in combination with a circuit breaker, would substantially diminish the benefits that short sellers bring to the markets.[261] One commenter stated that a price test restriction should be adopted with a circuit breaker because prior empirical studies did not necessarily include times of severe market events.[262] One commenter stated that a circuit breaker approach was preferable because it would be easier to implement than a permanent, market-wide rule.[263]

Other commenters were not supportive of a circuit breaker approach.[264] One such commenter stated that a permanent, market-wide price test restriction would be preferable to a circuit breaker approach because it is "more predictable for market participants and issuers alike, would raise fewer implementation complexities, and is less likely to have a 'magnet effect' on the pricing of a security as it approaches a circuit breaker trigger point."[265] This commenter stated that a circuit breaker is "unlikely to be perceived as a timely or effective remedy against abusive short selling, since restrictions would only take effect after there had already been a significant intraday price decline in a security."[266] Further, this commenter stated that "[c]ircuit breakers may also undermine investor confidence because they introduce an element of uncertainty in the pricing of securities: At a certain point, the price of a declining security would begin to reflect not the fundamental value of the security, but rather the likelihood that a security will trigger the circuit breaker. This 'magnet effect' could undermine investor confidence, resulting in less buying interest in securities nearing the circuit breaker if there is a perception that professional traders could use sophisticated pricing models to profit from this anomaly while public investors, lacking access to such tools, could not."[267]

Another commenter stated that it believes that a circuit breaker approach is unworkable because it "may exacerbate market dislocations by suddenly and unexpectedly altering the regulatory regime and liquidity

[250] *See* letter from STA (June 2009).

[251] *See id.*

[252] *See* Rule 201(b).

[253] *See* Proposal, 74 FR 18042.

[254] *See id.*

[255] *See* Re-Opening Release, 74 FR 42033.

[256] *See, e.g.,* statement of Justin Schack, Vice President, Market Structure Analysis, Rosenblatt Securities, Inc., at SEC Roundtable on Short Selling (May 5, 2009) ("Rosenblatt Securities"); letter from Richard T. Chase, Managing Director and General Counsel, RBC Capital Markets Corporation, dated June 19, 2009 ("RBC (June 2009)"); letter from Michael J. Simon, Secretary, International Securities Exchange LLC, dated June 19, 2009 ("ISE (June 2009)"); memorandum of a meeting between representatives of Penson Worldwide, Inc., and the Division of Trading and Markets, dated July 21, 2009, and written materials submitted at the meeting ("Penson"); letter from Direct Edge (June 2009); letter from BATS (May 2009); letter from SIFMA (June 2009); letter from MFA (June 2009); letter from ICI (June 2009); letter from Barclays (June 2009); letter from Vanguard (June 2009); letter from Goldman Sachs (June 2009); letter from Credit Suisse (June 2009); letter from Dialectic Capital (June 2009); letter from Allston Trading (June 2009); letter from Knight Capital (June 2009); letter from GETCO (June 2009); letter from Citadel *et al.* (June 2009); letter from William Connell, President and CEO, Allston Trading, LLC, dated Sept. 21, 2009 ("Allston Trading (Sept. 2009)"); letter from GETCO (Sept. 2009); letter from Dialectic Capital (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from ICI (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from Direct Edge (Sept. 2009); letter from RBC (Sept. 2009); letter from Goldman Sachs (Sept. 2009); letter from BATS (Sept. 2009); letter from SIFMA (Sept. 2009); letter from MFA (Oct. 2009); letter from AIMA; letter from IAG; letter from Fidelity; letter from T.D. Pro Ex; letter from Finadium; letter from Matthew B. Management; letter from Millennium; letter from Liquidnet; letter from Qtrade; letter from Hudson River Trading; letter from Virtu Financial; *see also* letter from Credit Suisse (Mar. 2009).

[257] *See* letter from Citadel *et al.* (Sept. 2009).

[258] *See id.*

[259] Letter from Nasdaq OMX Group (Oct. 2009); *see also* letter from Goldman Sachs (June 2009); letter from MFA (June 2009); letter from BATS (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from Virtu Financial.

[260] Letter from Hudson River Trading; *see also* letter from MFA (June 2009).

[261] *See, e.g.,* letter from Direct Edge (Sept. 2009); letter from Credit Suisse (Sept. 2009).

[262] *See* letter from Virtu Financial.

[263] *See* letter from SIFMA (June 2009).

[264] *See, e.g.,* letter from Glen Shipway (June 2009); letter from T. Rowe Price (Sept. 2009); letter from NYSE Euronext (Sept. 2009); letter from EWT (Sept. 2009).

[265] Letter from NYSE Euronext (Sept. 2009).

[266] *Id.*

[267] *Id.; see also* letter from Amer. Bankers Assoc. (referencing the "stigmatizing effect" on stocks subject to a circuit breaker); letter from T. Rowe Price (Sept. 2009) (expressing support for the alternative uptick rule that would apply on a permanent, market-wide basis).

characteristics of a particular security, precisely when it is under duress." [268] One commenter stated that it did not support a circuit breaker approach because it "would still allow abusive short sellers to drive down the price of a stock at least 10% on any given day even before the circuit breaker would kick in." [269] This commenter also stated that it was concerned that during periods of extreme volatility, "circuit breakers could potentially impact far too many stocks on any given day and damage the benefits of short selling." [270] Another commenter stated that it did not support a circuit breaker approach because, among other things, it would add "an additional element of trading risk that could result in a decrease in certain market participant's [*sic*] willingness to supply liquidity in securities perceived to be potentially subject to triggering of a circuit breaker." [271]

In line with the Commission's position that market impediments should be minimized, we believe the short selling circuit breaker approach of Rule 201 will benefit the market as a narrowly-tailored response to severe circumstances.[272] As discussed above, due to the changes in market conditions and erosion of investor confidence that occurred recently, investors have become increasingly concerned about sudden and excessive declines in prices that appear to be unrelated to issuer fundamentals.[273] We believe that a circuit breaker that is triggered by a significant intra-day decline in price of an individual security is a targeted response to address these concerns. Although a permanent, market-wide approach that would apply to all covered securities all the time may, as one commenter stated,[274] provide an element of predictability, we believe that the circuit breaker approach of Rule 201 is appropriate because it provides a balance between achieving our goals for adopting a short sale price test restriction and limiting impediments to the normal operations of the market.

As noted above, some commenters expressed concerns regarding the effectiveness and workability of a circuit breaker approach because the price test restriction will apply only after there has already been a significant intra-day price decline in a security, and because it may exacerbate market dislocations when a security is under duress. The Commission has previously noted that circuit breakers may benefit the market by allowing participants an opportunity to re-evaluate circumstances and respond to volatility.[275] Unlike a price test restriction that would apply on a permanent, market-wide basis, Rule 201 will restrict short selling for an individual covered security for a specified period of time. As we stated in the Proposal, in discussing a short selling circuit breaker, one commenter noted that such a measure could address the issue of "bear raids" while limiting the market impact that may arise from other forms of short sale price test restrictions.[276] In addition, although we agree that a circuit breaker combined with a halt on short selling may cause or exacerbate market dislocations, we do not believe that the circuit breaker approach of Rule 201 will have the same impact because it will continue to allow short selling, although at a price above the national best bid, even when the price test restriction is in effect. Further, to the extent that the circuit breaker approach results in market dislocations, we believe any such dislocations are justified by the benefits provided by the Rule.

We have designed the alternative uptick rule implemented through a circuit breaker to strike the appropriate balance between our goal of preventing potential short sale abuse and the need to limit impediments to the normal operations of the market. The Commission has long held the view that circuit breakers may help restore investor confidence during times of substantial uncertainty.[277] We believe that the requirements of Rule 201 will produce similar benefits. By imposing the alternative uptick rule once a security's price is experiencing a significant intra-day price decline, the short selling circuit breaker rule in Rule 201(b) is designed to target only those securities that experience such declines and, therefore, will help to prevent short selling from being used as a tool to exacerbate a declining market in a security. This approach establishes a narrowly-tailored Rule that will target only those securities experiencing such a decline. We believe that addressing short selling in connection with such a decline in an individual security will help restore investor confidence in the markets generally.

As discussed above, short selling is an important tool in price discovery and the provision of liquidity to the market, and we recognize that imposition of a short selling circuit breaker that when triggered imposes the alternative uptick rule could restrict otherwise legitimate short selling activity during periods of significant volatility. To the extent that the alternative uptick rule may negatively impact the ability of short sellers to provide liquidity to the markets and contribute to price efficiency, we believe any such negative impact is justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from driving down further the price of a security that has already experienced a significant intra-day price decline.

In addition, we believe that any such negative impact will be limited both in duration and reach. First, the circuit breaker will apply for a limited period of time, that is, through the end of the day on which it is triggered and the following day. Second, because the restrictions of Rule 201 will apply only when the price of a covered security has experienced a significant intra-day price decline, the circuit breaker approach of Rule 201 will preserve the potential benefits of short selling, such as the provision of liquidity and price efficiency, for those securities for which prices are undergoing minimal downward pressure, or are stable or rising.[278] To the extent that the markets are experiencing periods of extreme volatility, we expect that the circuit breaker will be triggered for more securities than during periods of low volatility. We believe this is an appropriate result of Rule 201 because it is designed to impose restrictions on short selling when individual securities are undergoing significant intra-day price declines. Because Rule 201 does not impose a halt on short selling, however, short selling will be possible even when the circuit breaker has been triggered, although it will be limited to a price above the current national best bid. A circuit breaker approach will also allow regulatory, supervisory and compliance resources to focus on, and address, those situations where a

[268] Letter from EWT (Sept. 2009).

[269] Letter from Atherton Lane.

[270] *Id.*

[271] Letter from NYSE Euronext (June 2009).

[272] *See* Exchange Act Release No. 39846 (Apr. 9, 1998), 63 FR 18477 (Apr. 15, 1998) (order approving proposals by Amex, BSE, CHX, NASD, NYSE, and Phlx) ("1998 Release").

[273] *See supra* Section II.C. (discussing investor confidence); *see also* Proposal, 74 FR at 18046–18049.

[274] *See* letter from NYSE Euronext (Sept. 2009).

[275] *See* 1998 Release, 63 FR 18477.

[276] *See* Proposal, 74 FR at 18067, n.252 (noting a letter from Peter Brown, dated Dec. 12, 2008).

[277] *See, e.g.,* 1998 Release, 63 FR 18477; *see also* Proposal, 74 FR at 18067.

[278] In addition, as discussed above, based on the empirical evidence regarding former Rule 10a–1 that tends to demonstrate that it did not have an effect on market liquidity and price efficiency, we similarly believe that the alternative uptick rule will have a minimal, if any, effect on market liquidity or price efficiency. *See supra* note 220 and accompanying text.

specific security is experiencing significant downward price pressure.[279]

As we stated in the Proposal, we understand that there are concerns about a potential "magnet effect" that could arise as an unintended consequence of a circuit breaker that imposes a short selling price test restriction.[280] This "magnet effect" could result in short sellers driving down the price of an equity security in a rush to execute short sales before the circuit breaker is triggered. We are also concerned about short selling demand building until the circuit breaker is lifted. In response to our requests for comments, several commenters stated that a short sale circuit breaker could exacerbate downward pressure on stocks as their value reached the threshold level.[281] Commenters also discussed the possibility that short selling demand could be built up until the short selling restriction is lifted.[282] Other commenters, however, discounted the possibility or impact of a "magnet effect," [283] including some commenters who cited empirical studies that question whether a circuit breaker would result in artificial pressure on the price of individual securities.[284]

After considering the comments, including studies cited by commenters, we do not believe that the evidence is clear regarding a "magnet effect." In fact, many academic studies that have analyzed circuit breakers in other contexts found no evidence of such trading patterns.[285] We recognize, however, that some of these studies were conducted in markets dissimilar from the highly automated markets currently existing in the United States and, therefore, that limits their utility in this context. Overall, however, the most relevant studies fail to demonstrate a magnet effect and we believe that adopting the circuit breaker approach best serves our goals.

5. Circuit Breaker Trigger Level and Duration

In the Proposal, we proposed that if the price of a covered security declined by at least 10% from the prior day's closing price for that covered security, as measured by the closing price of the covered security on the consolidated system, then all short selling in the covered security would be subject to a halt or a price test restriction for the remainder of the trading day.[286] To avoid market disruption that might occur if a circuit breaker were triggered late in the trading day, the circuit breaker rules, as proposed, would not have been triggered if the specified market decline threshold was reached in a covered security within thirty minutes of the end of regular trading hours.[287]

In Rule 201(b), we are adopting a 10% trigger level measured from the closing price determined by the covered security's listing market as of the end of regular trading hours on the prior day.[288] This differs from the Proposal, under which the price decline would have been measured from the covered security's last price reported in the consolidated system during regular trading hours on the prior day.[289] In addition, we are modifying the proposed duration of the price test restriction once the circuit breaker is triggered. Under Rule 201(b), as adopted, once the circuit breaker has been triggered, the price test restriction will remain in place for the remainder of the day and for the following day.[290] In addition, as discussed in more detail below, because the price test restriction will remain in place for the remainder of the day and for the following day, we are not adopting in Rule 201 a provision that the short sale price test restriction of the Rule will not be triggered if the 10% trigger level is reached in a covered security within thirty minutes of the end of regular trading hours.

In the Proposal, we noted our preliminary belief that a 10% decline in a security's price from the prior day's closing price would be an appropriate level at which to trigger the proposed circuit breaker rules.[291] We also noted that a 10% threshold would be consistent with current SRO rules that restrict or halt trading if key market indexes fall by specified amounts ("SRO Circuit Breakers") [292] and had been recommended by certain commenters.[293] The Commission solicited comment on whether a 10% decline from the prior day's closing price would be an appropriate threshold

[279] *See* letter from Nasdaq OMX Group (Oct. 2009); letter from SIFMA (Sept. 2009).

[280] *See, e.g.,* Proposal, 74 FR at 18067.

[281] *See, e.g.,* letter from Vincent Florack and Steve Crutchfield, Matlock Capital LLC, dated May 26, 2009 ("Matlock Capital (May 2009)"); letter from Schwab; letter from Lime Brokerage (June 2009); letter from STA (June 2009); letter from Glen Shipway (June 2009); letter from NYSE Euronext (June 2009); letter from Wolverine; letter from Direct Edge (June 2009); letter from Amer. Bankers Assoc.; letter from NYSE Euronext (Sept. 2009); *see also* letter from SIFMA (June 2009) (indicating that an "on/off" circuit breaker trigger could dampen any magnet effect); letter from Direct Edge (Mar. 2009).

[282] *See* letter from STA (June 2009); letter from Wolverine.

[283] *See* letter from BATS (May 2009); letter from Credit Suisse (June 2009); letter from Credit Suisse (Sept. 2009); letter from Hudson River Trading; letter from Virtu Financial; *see also* letter from Credit Suisse (Mar. 2009).

[284] *See* letter from Credit Suisse (June 2009); letter from Credit Suisse (Sept. 2009); *see also* letter from Credit Suisse (Mar. 2009); letter from Nasdaq OMX Group (Oct. 2009).

[285] *See, e.g.,* letter from Credit Suisse (June 2009); *see also* David Abad and Roberto Pascual, *On the Magnet Effect of Price Limits,* European Financial Management, 13:833–852 (2007) (studying the Spanish stock exchange); Chan *et al., Price limit performance: Evidence from transactions data and the limit order book,* Journal of Empirical Finance, 12: 269–290 (2005) (studying the Kuala Lumpur Stock Exchange); Anthony D. Hall and Paul Korfman, *Limits to linear price behavior: Futures prices regulated by limits,* Journal of Futures Markets, 21:463–488 (2001) (studying five agriculture futures contracts); Henk Berkman and Onno Steenbeek, *The influence of daily price limits on trading in Nikkei futures,* Journal of Futures Markets, 18:265–279 (1998) (studying futures contracts on the Osaka Securities Exchange); Marcelle Arak and Richard E. Cook, *Do daily price limits act as magnets? The case of treasury bond futures,* Journal of Financial Services Research, 12:5–20 (1997) (studying treasury bond futures).

[286] *See* Proposal, 74 FR at 18066.

[287] *See id.*

[288] "Regular trading hours" is defined in Rule 201 to have the same meaning as in Rule 600(b)(64) of Regulation NMS. *See* Rule 201(a)(7). Rule 600(b)(64) provides that "*Regular trading hours* means the time between 9:30 a.m. and 4:00 p.m. Eastern Time, or such other time as is set forth in the procedures established pursuant to § 242.605(a)(2)." 17 CFR 242.600(b)(64).

[289] *See* Proposal, 74 FR at 18066.

[290] Rule 201(b). We note that if the price of a covered security declines intra-day by at least 10% on a day on which the security is already subject to the short sale price test restriction of Rule 201, the restriction will be re-triggered and, therefore, will continue in effect for the remainder of that day and the following day. For example, if on Monday, the price of XYZ security declines intra-day by at least 10%, XYZ security will be subject to the alternative uptick rule for the remainder of Monday and for the following day, Tuesday. If then on Tuesday, the price of XYZ security again declines intra-day by at least 10%, the circuit breaker will be re-triggered for that security such that the alternative uptick rule will apply for the following day, *i.e.,* Wednesday, as well as for the remainder of the day on Tuesday.

[291] *See* Proposal, 74 FR at 18066, 18069.

[292] *See* Proposal, 74 FR at 18065–18066. To protect investors and the markets, the Commission has approved proposals to restrict or halt trading if key market indexes fall by specified amounts. Currently, all stock exchanges and FINRA have rules or policies to implement coordinated circuit breaker halts. *See* 1998 Release, 63 FR 18477; *see also* NYSE Rule 80B. The circuit breaker procedures call for cross-market trading halts when the Dow Jones Industrial Average ("DJIA") declines by 10%, 20%, and 30% from the previous day's closing value. *See, e.g.,* BATS Exchange Rule 11.18. The options markets also have rules applying circuit breakers. *See* Amex Rule 950 (applying Amex Rule 117, Trading Halts Due to Extraordinary Market Volatility, to options transactions); CBOE Rule 6.3B; ISE Rule 703; NYSE Arca Options Rule 7.5; and Phlx Rule 133. The futures exchanges that trade index futures contracts have adopted circuit breaker halt procedures in conjunction with their price limit rules for index products. *See, e.g.,* CME Rule 35102.I. The CME will implement a trading halt on S&P 500 Index futures contracts if a NYSE Rule 80B trading halt is imposed in the primary securities market. Trading of S&P 500 Index futures contracts will resume upon lifting of the NYSE Rule 80B trading halt. Finally, security futures products are required to have cross-market circuit breaker regulatory halt procedures in place. *See* Exchange Act Release No. 45956 (May 17, 2002), 67 FR 36740 (May 24, 2002).

[293] *See* Proposal, 74 FR at 18066.

at which to trigger the proposed circuit breaker short sale price restrictions.[294] We noted that the threshold level would affect the balance of the costs and benefits of the Rule; a low trigger level could result in more securities being subject to the proposed short sale price test restrictions, or subject to them more frequently, and a high trigger level could result in securities facing more significant declines before the benefits of the short sale price test restrictions applied.[295]

In response to our request for comment, several commenters expressed support for a 10% trigger level.[296] One commenter did not specifically object to the 10% threshold, but stated that 10% should be the minimum trigger level considered.[297] One commenter expressed support for a lower, 5% trigger level.[298]

Several commenters expressed support for a trigger level higher than 10%.[299] Several of these commenters stated that a circuit breaker threshold of 10% would be too narrow or restrictive.[300] Other commenters indicated that a circuit breaker should only be triggered in extraordinary circumstances and asked that we consider a trigger level higher than 10% due to concerns that a 10% trigger level would capture "normal" trading activity.[301] Several commenters indicated that a higher trigger level would be particularly important for lower priced securities because a 10% trigger level would likely be reached frequently even in the absence of abnormal activity for such securities.[302] Other commenters indicated that, in addition to price, the trigger level should factor in other characteristics of individual securities, such as volume and volatility.[303] One commenter stated that a higher trigger level would be especially important for a circuit breaker in conjunction with the alternative uptick rule because the alternative uptick rule is more restrictive than the other proposed price tests.[304]

In addition, several commenters submitted estimates of the number of securities that would trigger a circuit breaker rule at a 10% threshold.[305] While commenters' analyses (including the facts and assumptions used) and their resulting estimates varied,[306] commenters' estimates reflect that a 10% circuit breaker threshold, on average, should affect only a limited percentage of covered securities.[307] For example, one commenter submitted an estimate that slightly more than 5% of a universe of 4,800 NMS common stocks would have "tripped the 10% threshold on average each day" during roughly the first half of 2009.[308] In determining that a 10% threshold is appropriate, we considered other thresholds and the data presented by commenters regarding the numbers of securities that they believed would be subject to a short sale price test restriction at those different thresholds. Given the variations in the facts and assumptions underlying the estimates submitted by commenters, the Staff also looked at trading data to confirm the reasonableness of those estimates. The Staff found that, over the period covering April 9, 2001 to September 30, 2009,[309] the 10% trigger level of Rule 201 would have, on an average day, been triggered for approximately 4% of covered securities.[310] The Staff also found that for a low volatility period, covering January 1, 2004 to December 31, 2006, the 10% trigger level of Rule 201 would have, on an average day, been triggered for approximately 1.3% of covered securities.[311]

After considering the comments, we believe that a 10% decline in a security's price, as measured from the security's closing price on the prior day, is an appropriate level at which to trigger a circuit breaker. As discussed in the Proposal, the circuit breaker short sale price test restrictions were designed to target a security experiencing a significant intra-day price decline, where the concerns about the potential harmful effects of short selling would be greatest. In this way, they would be tailored to help prevent short selling, including potentially abusive or manipulative short selling, from being used as a tool to exacerbate the declining market in those securities

[294] *See* Proposal, 74 FR at 18066, 18069, 18070.

[295] *See* Proposal, 74 FR at 18079, 18081.

[296] *See, e.g.,* letter from BATS (May 2009); letter from Allston Trading (June 2009); letter from IBC.

[297] *See* letter from Direct Edge (June 2009).

[298] *See* letter from James J. Angel, Ph.D., CFA, Associate Professor of Finance, McDonough School of Business, Georgetown University, dated Sept. 21, 2009 ("Prof. Angel (Sept. 2009)").

[299] *See, e.g.,* letter from MFA (June 2009); letter from Goldman Sachs (June 2009); letter from ISDA; letter from ISE (June 2009); letter from SIFMA (June 2009); letter from Citadel *et al.* (June 2009); letter from Dialectic Capital (Sept. 2009); letter from Goldman Sachs (Sept. 2009); letter from ISE (Sept. 2009); letter from SIFMA (Sept. 2009); letter from Virtu Financial; letter from Nasdaq OMX Group (Oct. 2009).

[300] *See, e.g.,* letter from MFA (June 2009); letter from ISDA; letter from ISE (June 2009); letter from Virtu Financial; letter from Jordan & Jordan; letter from Credit Suisse (June 2009).

[301] *See, e.g.,* letter from MFA (June 2009); letter from Citadel *et al.* (June 2009); letter from Goldman Sachs (June 2009); letter from ISDA; letter from ISE (June 2009); letter from SIFMA (June 2009); letter from Dialectic Capital (Sept. 2009); letter from SIFMA (Sept. 2009); letter from Virtu Financial.

[302] *See, e.g.,* letter from Barclays (June 2009); letter from ISDA; letter from SIFMA (June 2009); letter from SIFMA (Sept. 2009).

[303] *See* letter from Direct Edge (June 2009); letter from Barclays (June 2009); letter from Goldman Sachs (June 2009); letter from Lime Brokerage (June 2009); letter from Direct Edge (Sept. 2009); letter from Goldman Sachs (Sept. 2009).

[304] *See* letter from ISE (Sept. 2009).

[305] *See, e.g.,* letter from Jordan & Jordan; letter from Citadel *et al.* (June 2009); letter from MFA (June 2009); letter from SIFMA (June 2009); letter from Credit Suisse (Sept. 2009).

[306] *See, e.g.,* letter from Jordan & Jordan (providing estimated percentages of exchange listed stocks impacted by a 10% circuit breaker threshold on sample days); letter from MFA (June 2009) (providing the average daily number and percentage of Russell 3000 stocks impacted by a 10% circuit breaker threshold over a ten year period); letter from Credit Suisse (Sept. 2009) (providing the number of times, by month, a circuit breaker with a 10% threshold would have been triggered for S&P 500 stocks and for Russell 2000 stocks); letter from SIFMA (June 2009) (referencing two member firms' estimates, one that provided the average number of stocks out of 4,800 NMS common stocks that would have triggered the 10% threshold during roughly the first half of 2009 and another that measured the average number of Russell 3000 stocks per day that declined by 10% from their opening price from November 2008 to March 2009).

[307] *See, e.g.,* letter from MFA (June 2009) (reflecting that approximately 5% of Russell 3000 stocks would have been impacted at any one time by a circuit breaker with a 10% threshold during the period of October 1998 to September 2008); letter from SIFMA (June 2009) (reflecting that approximately 3% of Russell 3000 stocks trading above $10 and 16.5% of Russell 3000 stocks trading below $10 would have been impacted by a 10% threshold measured from the security's opening price during the period of November 2008 through March 2009); *but cf* letter from Jordan & Jordan. We note that the sample of days in the data reflected in the letter from Jordan & Jordan is not representative of typical trading.

[308] Letter from SIFMA (June 2009).

[309] This time period constitutes the period after full implementation of decimal increments.

[310] The Staff estimates that on the average day during this period, approximately 6.0% of stocks would have been impacted by the Rule, which is comprised of 3.4% of stocks that would have triggered the circuit breaker on a given day, plus an additional 2.6% of stocks that would have been affected as a result of having triggered the circuit breaker on the previous day. We note that the actual percentage of stocks affected by the Rule in the future could be different from the historical average, particularly under different market conditions. In particular, the percentage of stocks affected by the Rule is likely to be higher under crisis conditions. For example, the Staff estimates that on October 10, 2008 approximately 68.1% of stocks would have traded under a short sale price test during part or all of the day while on November 24, 2006 approximately 0.6% of stocks would have traded under a short sale price test during part or all of the day. The S&P 500 Index was down nearly 15% on October 10, 2008 from the closing price two days earlier while the S&P 500 Index was nearly flat on November 24, 2006 from the closing price two days earlier. The estimates are calculated based on data from CRSP US Stock Database ©2009 Center for Research in Security Prices (CRSP), The University of Chicago Booth School of Business.

[311] The period from 2004 to 2006 exhibited low daily volatility as measured by the S&P 500 Index. The estimates are calculated based on data from CRSP US Stock Database ©2009 Center for Research in Security Prices (CRSP), The University of Chicago Booth School of Business.

experiencing a significant intra-day decline and, thereby, help stabilize the market in those securities and help address concerns about the erosion in investor confidence.[312] At the same time, we explained, the proposed circuit breaker price test restrictions would not impact trading in the majority of securities, and so would preserve the benefits of legitimate short selling, such as the provision of liquidity and price efficiency, in those securities.[313]

Although we recognize commenters' concerns that a 10% trigger level may capture some "normal" trading activity, commenters' estimates and the Staff's analysis show that a 10% circuit breaker threshold generally should affect only a limited percentage of covered securities. This supports the conclusion that Rule 201 provides a tailored approach that reaches a limited subset of covered securities that are experiencing a significant intra-day price decline, while generally not restricting short selling in the majority of covered securities. Thus, by including a 10% trigger level in Rule 201, the Rule will not interfere with trading in the majority of securities most of the time, including when prices in such securities are undergoing minimal downward price pressure or are stable or rising. In addition, we note that a circuit breaker approach is more targeted than applying a short sale price test restriction on a permanent, market-wide basis, and that any circuit breaker approach needs to have a line drawn.

Further, we are concerned that setting a trigger level higher than 10% would undermine our goals of helping to prevent short selling from being used as a tool to exacerbate a price decline in a particular security and of increasing investor confidence because so few securities would, on average, trigger a threshold higher than 10%.[314] The 10% threshold for a circuit breaker that, when triggered, results in all short selling in a covered security being subject to the alternative uptick rule strikes a balance between the need to restrict short selling in moments of significant intra-day price declines in a covered security and the market participant's expectation that its short selling strategy will normally be available in an efficient and open marketplace. Thus, we have determined that a 10% trigger level strikes the right balance among our goals of facilitating the smooth functioning of the markets, preserving investor confidence, and preventing abusive market practices.

Although we recognize commenters' concerns that a 10% trigger level may be reached more frequently for lower priced securities, at this time we have determined not to set a higher trigger level for lower priced securities, or to base the trigger on other characteristics of a security. Varying the trigger level according to characteristics of individual securities would complicate and increase costs with respect to implementation of, compliance with, and regulatory oversight of, Rule 201. Moreover, contrary to the concerns of commenters, we believe that having a trigger level that is reached more frequently for lower priced stocks may be beneficial. As stated in the Staff's Summary Pilot Report, during the Pilot, the Staff found some evidence that short sale price tests dampened intra-day volatility in the smallest market capitalization stocks, which tend to have lower share prices than larger market capitalization stocks.[315] Thus, a trigger level that is reached more frequently for lower priced stocks may impose the alternative uptick rule in those situations where it is more likely to dampen volatility and achieve our goals in adopting short sale price test restrictions.

In response to our request for comment,[316] some commenters asked that we clarify how to determine the official price from which to measure a price decline and to designate from where that price will come.[317] In addition, a number of commenters expressed concerns that measuring the trigger level from the prior day's closing price for a security would result in a short selling restriction being applied as the result of a price change caused by the overnight release of material news or other significant events outside of trading hours.[318] Several commenters asked that the percentage decline be measured from the covered security's opening price rather than the prior day's closing price.[319] One commenter specified that the opening price should be the official opening price distributed by a SIP,[320] while other commenters stated that it should be the opening price on the covered security's primary market.[321] One commenter stated that the opening print should not be included in the measurement of the trigger level.[322] Other commenters, however, supported our proposal to measure the decline from the previous day's closing price.[323] One commenter noted that measuring the trigger level from the previous day's closing price might be easier to implement in connection with a policies and procedures approach.[324]

As discussed in more detail in Section III.A.6. below, Rule 201(b)(3) provides that the listing market for each covered security must determine whether a covered security's price has declined by 10% or more such that it is subject to the short sale price test restrictions of Rule 201 and such information must be disseminated to the trading centers via the applicable single plan processor.[325]

As set forth in Rule 201(b)(1), we have determined that it is appropriate to measure the price decline from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day. In the proposed circuit breaker rules, we proposed that the decline in a covered security's price would be measured from the security's last price as reported in the consolidated system during

[312] *See, e.g.,* Proposal, 74 FR at 18065, 18069.

[313] *See, e.g.,* Proposal, 74 FR at 18065, 18069; *see also* Proposal, 74 FR at 18104 ("By targeting only those securities that experience severe intraday declines, all three proposed circuit breaker rules would be narrowly tailored so that most stocks would not fall under any new short sale restrictions.").

[314] *See supra* notes 305 to 311 (discussing the limited number of securities that would, on an average day, trigger a circuit breaker with a 10% threshold).

[315] *See* Staff's Summary Pilot Report at 55–56, 81.

[316] *See* Proposal, 74 FR at 18066, 18079.

[317] *See, e.g.,* letter from SIFMA (June 2009).

[318] *See, e.g.,* letter from Citadel *et al.* (June 2009); letter from GETCO (June 2009); letter from Goldman Sachs (June 2009); letter from Lime Brokerage (June 2009); letter from SIFMA (June 2009); letter from Credit Suisse (June 2009); letter from Credit Suisse (Sept. 2009); letter from Hudson River Trading; letter from Virtu Financial; *see also* letter from CBOE (June 2009) (stating that the opening price would take into account after hours news and avoid disorderly openings, particularly on options settlement dates).

[319] *See, e.g.,* letter from Knight Capital (June 2009); letter from Citadel *et al.* (June. 2009); letter from GETCO (June 2009); letter from Goldman Sachs (June 2009); letter from Lime Brokerage (June 2009); letter from SIFMA (June 2009); letter from Credit Suisse (June 2009); letter from Credit Suisse (Sept. 2009); letter from Goldman Sachs (Sept. 2009); letter from Hudson River Trading.

[320] *See* letter from Virtu Financial.

[321] *See, e.g.,* letter from Goldman Sachs (June 2009); letter from SIFMA (June 2009).

[322] *See* letter from SIFMA (June 2009).

[323] *See, e.g.,* letter from IBC; letter from Nasdaq OMX Group (Oct. 2009).

[324] *See* letter from SIFMA (June 2009); *see also* letter from Glen Shipway (June 2009) (noting that basing the trigger level on the previous day's closing price "certainly would be a price mechanism easier to track and to comprehend by market participants").

[325] *See* Rule 201(b)(3); *see also infra* Section III.A.6. Rule 201(a)(6) provides that "[t]he term *plan processor* shall have the same meaning as in § 242.600(b)(55)." Rule 600(b)(55) of Regulation NMS states: "*Plan processor* means any self-regulatory organization or securities information processor acting as an exclusive processor in connection with the development, implementation and/or operation of any facility contemplated by an effective national market system plan." The single plan processors are "exclusive processors" as defined under Section 3(a)(22) of the Exchange Act. 17 CFR 242.600(b)(55). *See* 15 U.S.C. 78c(a)(22).

regular trading hours on the prior day.[326] After considering the comments, we believe that the closing price as determined by the covered security's listing market as of the end of regular trading hours on the prior day will provide a more accurate price from which to measure a decline in price than the last price reported in the consolidated system. We believe that the last price reported in the consolidated system is more likely to reflect an anomalous trade, *e.g.,* a trade that is not consistent with the current market due to, for example, the 90 second reporting window, or an uncorrected error. Listing markets generally have in place specific procedures designed to ensure the accuracy and reliability of their closing prices.[327] Thus, we believe it is appropriate to use the more accurate closing price as determined by the covered security's listing market rather than the last price reported in the consolidated system.

We also believe that the price decline in a covered security under Rule 201(b)(1)(i) should be measured from the covered security's closing price reported on the prior day rather than from each day's opening price for the covered security because the closing price provides a clearly discernible price and time from which to measure the decline. The closing price of a covered security will be known by or shortly after the end of regular trading hours such that the listing markets will have a price on the following day from which to determine if a covered security is subject to the short sale price test restrictions of Rule 201. An opening price, on the other hand, is established only if there is opening interest for a security, which, for thinly traded securities, may present issues. In addition, as noted by one commenter, we believe that measuring the price decline from the closing price on the prior day is preferable because it should be easier to implement than a requirement to measure the decline from the covered security's opening price.[328] For example, should any uncertainties in price occur, using the closing price as a measurement will provide time to resolve any such uncertainties before the requirements of Rule 201 will potentially apply. If the Rule required that the decline must be measured from the opening price, any uncertainties would have to be resolved in real time, so that if a 10% or more price decline were to occur, the short sale price test restrictions of Rule 201 could be applied that day in accordance with the Rule.

As noted above, under Rule 201(b), once the circuit breaker has been triggered, the price test restriction will remain in place for the remainder of the day and for the following day. This requirement differs from the proposed circuit breaker rules that would have applied a short selling halt or short sale price test restriction for the remainder of the day only.

In response to our request for comment on the duration of the proposed circuit breaker rules, comments were mixed. For example, one commenter suggested that the Commission should consider extending the duration of the short selling restriction through the close of trading on the trading day following the triggering of the circuit breaker to allow sufficient time to achieve the Commission's intended purpose of "halting or slowing a price decline in a security."[329] Some commenters supported the proposed period for the circuit breaker of the remainder of the trading day[330] for various reasons, including that the limited duration would mitigate the potential adverse impact of a short selling restriction.[331] In addition, several commenters supported a circuit breaker with a duration of less than the remainder of the trading day.[332]

One commenter, however, stated that the circuit breaker should not be in effect for multiple days, but also that it should not be in effect for a matter of hours because "frequent changes in the status of a security would create more disruption."[333] Several commenters who supported a circuit breaker with a duration of less than the remainder of the trading day stated that the circuit breaker should be lifted if the security's price has recovered and the price decline is less than 10% before the end of the trading day.[334] These commenters stated, among other things, that such a recovery may be a common occurrence[335] and that lifting the circuit breaker would take into account the resilience of the markets.[336] Another commenter stated that the circuit breaker should only be in effect long enough to re-establish equilibrium between buying and selling interests and further noted that the duration of the circuit breaker should depend on the time of day when the threshold is triggered.[337]

Some commenters supported the Commission's proposal that a circuit breaker would not be triggered if the 10% trigger level were reached in a covered security within thirty minutes of the end of regular trading hours.[338] Other commenters, however, stated that the last thirty minutes of the day has become the most volatile part of the day and that this is exactly the time that a rule that would slow short selling and reduce volatility would be most needed.[339]

After considering the comments, we believe it is appropriate to apply the alternative uptick rule, when triggered, for the remainder of the day and the day following the day on which the circuit breaker is triggered. We believe that a circuit breaker that is in effect for the remainder of the day and the following day will have the advantage of being more effective at preventing short selling from being used as a tool to exacerbate a security's decline in price. As we, and several commenters, have noted, because the alternative uptick rule will permit short selling only at a price above the current national best bid, it will likely be the most effective of the proposed price tests at preventing short selling from driving down further a security's price or from exacerbating a price decline.[340] A circuit breaker that will impose a short selling restriction for only the remainder of the trading day, or as some commenters suggested, for less than the remainder of the trading day, may not allow sufficient time for the short selling restriction to have its desired effect. To the extent that short selling is causing or contributing

[326] *See* Proposal, 74 FR at 18110–18113.

[327] *See, e.g.,* NYSE Rule 116.40; NYSE Rule 123C(3).

[328] *See* letter from SIFMA (June 2009).

[329] *See* letter from RBC (June 2009); *see also* letter from Credit Suisse (Mar. 2009).

[330] *See, e.g.,* letter from Direct Edge (June 2009) (stating that the circuit breaker should be limited in duration to the end of the trading day with respect to the proposed circuit breaker halt rule); letter from AIMA; letter from Goldman Sachs (June 2009).

[331] *See, e.g.,* letter from AIMA; *see also* letter from Direct Edge (June 2009) (opposing a circuit breaker duration beyond one trading day specifically with respect to a circuit breaker triggering a short selling halt); letter from Barclays (June 2009); letter from Goldman Sachs (June 2009).

[332] *See* letter from Barclays (June 2009); letter from Citadel *et al.* (June 2009); letter from SIFMA (June 2009); *see also* letter from Jordan & Jordan (providing data regarding the extent to which securities with an "on/off" trigger recovered by the end of trading).

[333] Letter from Goldman Sachs (June 2009).

[334] *See* letter from Barclays (June 2009); letter from SIFMA (June 2009).

[335] *See* letter from SIFMA (June 2009).

[336] *See* letter from Barclays (June 2009).

[337] *See* letter from Citadel *et al.* (June 2009).

[338] *See* letter from Barclays (June 2009); letter from Citadel *et al.* (June 2009).

[339] *See, e.g.,* letter from Jibralta Merrill, dated May 5, 2009; letter from Arthur Porcari, dated May 11, 2009; letter from IBC; letter from STA (June 2009).

[340] *See* letter from Wells Fargo (Sept. 2009); letter from STA (Sept. 2009); letter from Glen Shipway (Sept. 2009); letter from BATS (Sept. 2009).

to downward price pressure, a longer duration will provide additional time during which the security will be subject to reduced downward price pressure from short selling. In addition, we note that the circuit breaker could be triggered at any point during regular trading hours. Further, as noted by one commenter, we are concerned that if the circuit breaker is triggered late in the day, such that it would be in effect for only a short period of time, this would in fact create more disruption rather than achieving our goals with respect to short sale price test restrictions for that security.[341] By applying the short sale price test restriction for the day following the day on which it is triggered, the time period will help ensure that there is not unnecessary disruption caused by the triggering of the circuit breaker.

As discussed above, the Commission has previously noted that circuit breakers may benefit the market by allowing participants an opportunity to re-evaluate circumstances and respond to volatility.[342] We believe that imposing a short selling restriction for the remainder of the day and the following day will help ensure that market participants have a reasonable opportunity to become aware of, and respond to, a significant decline in a security's price, and will provide sufficient time to re-establish market efficiency in the individual security. Although, for the reasons discussed above, we believe it is necessary to impose the short sale price test restriction of Rule 201 for longer than the remainder of the day, we do not believe it is appropriate to extend the duration beyond the time period specified in Rule 201 because we believe that the duration specified in Rule 201 strikes the appropriate balance between achieving our goals in adopting Rule 201 and not causing unnecessary market disruption.

In the Proposal, we stated that to avoid market disruption that may occur if a circuit breaker is triggered late in the trading day, the proposed circuit breaker rules would not be triggered if the specified market decline threshold is reached in a covered security within thirty minutes of the end of regular trading hours.[343] As noted above, because the short sale price test restriction of Rule 201 will remain in place for the remainder of the day and the following day, we have determined not to include a provision in Rule 201 stating that the Rule's restrictions will not be triggered if the 10% trigger level is reached in a covered security within thirty minutes of the end of regular trading hours. We believe it is appropriate to apply Rule 201 during the last thirty minutes of regular trading hours because, due to potential volatility during this period, it is a time period when a covered security's price may experience a significant decline.

Consistent with the Proposal, we have determined to apply the price test restriction, if triggered, during periods when the national best bid is calculated and disseminated on a current and continuing basis by a plan processor.[344] As discussed above and as we discussed in the Proposal,[345] market information for quotes in covered securities is disseminated pursuant to two different national market system plans, the CQ Plan and Nasdaq UTP Plan.[346] Quotation information is made available pursuant to the CQ Plan between 9 a.m. and 6:30 p.m. ET, while one or more participants is open for trading. In addition, quotation information is made available pursuant to the CQ Plan during any other period in which any one or more participants wish to furnish quotation information to the Plan.[347] Quotation information is made available by the Nasdaq UTP Plan between 9:30 a.m. and 4 p.m. ET. The Nasdaq UTP Plan also collects, processes, and disseminates quotation information between 4 a.m. and 9:30 a.m. ET, and after 4 p.m. when any participant is open for trading, until 8 p.m. ET.[348] During the time periods in which these Plans do not operate, real-time quote information is not collected, calculated and disseminated.

In response to our request for comment,[349] one commenter stated that any price test restriction should be applied during regular trading hours only because the period when the current national best bid is calculated, collected and disseminated "can vary depending on whether a participant in the particular national market system governing quote consolidation for a security decides to pay the consolidator to extend the hours of the calculation of the bid." [350] In contrast, other commenters stated that the proposed price test restrictions should apply at all times during after-hours trading.[351] Because the short sale price test restrictions of Rule 201 are based on the current national best bid, we believe that the restrictions should apply at all times when the current national best bid is collected, calculated and disseminated even though this period can vary depending on whether a participant in the particular national market system governing quote consolidation for a security decides to pay the consolidator to extend the hours of the calculation of the bid.[352] Thus, the price test restrictions of Rule 201 will apply at times when quotation information and, therefore, the national best bid, is collected, processed, and disseminated pursuant to a national market system plan. We note, however, that at a later time we may reconsider whether any changes to Rule 201 would be necessary to also apply the Rule to short selling during times when the national best bid is not collected, calculated and disseminated, in light of any new information on short selling activity during these times.

6. Determination Regarding Securities Subject to Rule 201 and Dissemination of Such Information

In the Proposal, we requested comment regarding who should be responsible for monitoring the price declines of individual securities to determine if they trigger the short selling circuit breaker, such as broker-dealers or SROs, how such information should be disseminated to the market, and who should be responsible for disseminating the information.[353] In response to our request for comment, some commenters stated that if we were to adopt a circuit breaker rule, securities subject to the Rule should be tracked and disseminated by the SIP for the covered security in question, noting that SIPs currently track and disseminate

[341] *See supra* note 333 and accompanying text.

[342] *See supra* note 275 and accompanying text.

[343] *See* Proposal, 74 FR at 18066.

[344] *See* Rule 201(b).

[345] *See* Proposal, 74 FR at 18060, 18064–18065.

[346] *See supra* note 199 and accompanying text. *See also* 17 CFR 242.603(b). Rule 603 of Regulation NMS requires that every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks.

[347] *See http://www.nyxdata.com/cta.*

[348] *See http://www.utpdata.com/docs/UTP_PlanAmendment.pdf.*

[349] *See, e.g.,* Proposal, 74 FR at 18060.

[350] Letter from Credit Suisse (Sept. 2009); *see also* letter from SIFMA (June 2009); letter from Goldman Sachs (June 2009); letter from T. Rowe Price (June 2009).

[351] *See, e.g.,* letter from Michael Sigmon, Chairman, Sigmon Wealth Management, dated Apr. 14, 2009; letter from IBC.

[352] We note that currently, the period during which the current national best bid is collected, calculated and disseminated can vary depending on whether a participant in the particular national market system governing quote consolidation for a security has decided to pay the consolidator to extend the hours of the calculation of the bid.

[353] *See* Proposal, 74 FR at 18078.

percentage moves [354] and that such a role would be consistent with the responsibilities of a SIP to collect, process, distribute and publish information with respect to transactions in, or quotations for, any security for which it acts as a SIP on a current and continuing basis.[355] One commenter stated that it would be inappropriate to allow each market to perform its own calculation or to impose the responsibility on a particular market due to the importance of ensuring that triggering of a circuit breaker is communicated to all markets and market participants on a fair, impartial and timely basis.[356] Other commenters stated that the listing market for a covered security should communicate the triggering of the circuit breaker to the SIP for the covered security, which would then redistribute such information to the market.[357] Another commenter stated that the exchanges should be required to develop and maintain "a centralized real-time list of all securities subject to the circuit breaker price test." [358] This commenter stated that it believes this centralization "would ensure consistent treatment of orders and help reduce the costs of compliance for market participants." [359] One commenter stated that as an alternative to the listing market notifying the SIP for a covered security when the circuit breaker has been triggered, trading centers could arrange to receive this information directly from the listing market.[360]

After considering the comments, we have determined that the listing market for each covered security must determine whether that covered security is subject to Rule 201.[361] Rule 201(a)(3) defines the term "listing market" to have the same meaning as the term "listing market" as defined in the effective transaction reporting plan for the covered security.[362] Because the definition of "listing market" is a currently-used definition, we believe users of the Rule will not have difficulty identifying for a security which entity is its listing market.

Currently, there are two effective transaction reporting plans, the CTA Plan, which disseminates transaction information for securities primarily listed on an exchange other than Nasdaq, and the Nasdaq UTP Plan, which disseminates consolidated transaction and quotation information for securities primarily listed on Nasdaq.[363] Each of these Plans includes a definition of "listing market," which definitions we are incorporating by reference into Rule 201. We have determined to incorporate by reference into Rule 201 the definition of "listing market," as that term is defined in the CTA Plan and the Nasdaq UTP Plan,[364] to provide the markets with uniformity with respect to decisions regarding trading restrictions for individual NMS stocks because the listing markets are already familiar with making determinations regarding, and imposing trading restrictions on, individual NMS stocks. For example, listing markets already have rules or policies in place to coordinate trading suspensions or halts in individual NMS stocks.[365]

In addition, requiring the listing market for a covered security to determine whether the security has become subject to the short sale price test restrictions of Rule 201 will help ensure consistency for each covered security with respect to such determinations as only the listing market for that covered security will be making the determination. In addition, we believe that listing markets will be in the best position to respond to anomalous or unforeseeable events that may impact a covered security's price, such as an erroneous trade, because the listing markets generally have in place specific procedures designed to address such events.

As discussed above, in response to our request for comment,[366] some commenters provided comments regarding how information that a covered security has become subject to the short sale price test restrictions of Rule 201 should be disseminated to the markets.[367] In order that all market participants receive information regarding when a security has become subject to Rule 201 on a fair, impartial and timely basis, after considering the comments we have determined to provide in Rule 201(b)(3) that once the listing market has determined that a security has become subject to the requirements of Rule 201, the listing market shall immediately notify the single plan processor responsible for consolidation of information for the covered security in accordance with Rule 603(b) of Regulation NMS [368] of the fact that a covered security has become subject to the short sale price test restriction of Rule 201. The plan processor must then disseminate this information.[369]

As discussed above, the CTA Plan disseminates transaction information for securities primarily listed on an exchange other than Nasdaq and the Nasdaq UTP Plan disseminates consolidated transaction and quotation information for securities primarily listed on Nasdaq. In accordance with Rule 603(b) of Regulation NMS, these plans, together with the CQ Plan, provide for the dissemination of all consolidated information for individual

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[354] *See, e.g.,* letter from Virtu Financial (also stating that the SIPs would add a flag to their data feeds that would announce when the circuit breaker is in effect).

[355] *See* letter from NYSE Euronext (Sept. 2009); *see also* letter from SIFMA (June 2009) (stating that some of its member firms "believe that exchange-controlled SIPs should monitor prices and disseminate information flags when a security is in short sale mode * * *").

[356] *See* letter from NYSE Euronext (Sept. 2009).

[357] *See, e.g.,* letter from Direct Edge (June 2009); letter from Liquidnet; letter from FIF (June 2009); letter from Manisha Kimmel, Executive Director, Financial Information Forum, dated Sept. 23, 2009 ("FIF (Sept. 2009)").

[358] Letter from RBC (June 2009).

[359] *Id.*

[360] *See* letter from Liquidnet.

[361] *See* Rule 201(b)(3).

[362] Rule 201(a)(2). Rule 201(a)(2) provides that "[t]he term *effective transaction reporting plan for a covered security* shall have the same meaning as in § 242.600(b)(22)." Rule 201(a)(2).

[363] *See supra* note 199 (discussing the joint-industry plans).

[364] We note that although the definition of a "listing market" in the CTA Plan and Nasdaq UTP Plan is similar, the Plans differ with respect to how they treat dually listed securities. The CTA Plan states that "the 'listing market' for any Eligible Security shall be that exchange Participant on which the Eligible Security is listed. If an Eligible Security is dually listed, 'listing market' shall be that exchange Participant on which the Eligible Security was originally listed." The Nasdaq UTP Plan states that "'Listing Market' for an Eligible Security means the Participant's Market on which the Eligible Security is listed. If an Eligible Security is dually listed, Listing Market shall mean the Participant's Market on which the Eligible Security is listed that also has the highest number of the average of the reported transactions and reported share volume for the preceding 12-month period. The Listing Market for dually-listed Eligible Securities shall be determined at the beginning of each calendar quarter." Although there are differences between how each of the Plans determines the listing market for dually listed securities, we do not believe this difference will impact the rule operationally because participants are already familiar with determining the applicable listing market for a covered security.

[365] *See, e.g.,* Nasdaq Rule 4120 (relating to trading halts in Nasdaq-listed securities); NYSE Rule 123D (relating to delayed openings and trading halts in NYSE-listed securities).

[366] *See supra* note 353 and accompanying text.

[367] *See, e.g.,* letter from Direct Edge (June 2009); letter from FIF (June 2009); letter from Liquidnet; letter from RBC (June 2009); letter from SIFMA (June 2009); letter from FIF (Sept. 2009); letter from NYSE Euronext (Sept. 2009); letter from Virtu Financial.

[368] Rule 603(b) of Regulation NMS provides that "Every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor." 17 CFR 242.603(b).

[369] *See* Rule 201(b)(3); 17 CFR 242.603(b).

NMS stocks through a single plan processor. The single plan processors currently receive information from listing markets regarding trading restrictions (*i.e.,* Regulatory Halts as defined in those plans) on individual securities and disseminate such information. Thus, the requirements of Rule 201(b)(3) are similar to existing obligations on plan processors pursuant to the requirements of Regulation NMS, the CTA and CQ Plans and the Nasdaq UTP Plan.

We recognize that the requirements of Rule 201(b)(3) may require changes to systems currently supported by the single plan processors.[370] Thus, in considering the appropriate implementation period for Rule 201, we have factored into our considerations time to allow the single plan processors to determine any changes to their systems requirements and to make any necessary changes.

7. Policies and Procedures Approach

In the Proposal, we stated that the proposed price test restrictions could be applied in combination with a policies and procedures approach, a prohibition approach, or a combination thereof.[371] We have determined to adopt a policies and procedures approach in Rule 201(b). Rule 201(b) will require trading centers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of the security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day.[372] In addition, such policies and procedures must be reasonably designed to impose the short sale price test restriction in Rule 201(b)(1) for the remainder of the day on which it is triggered and on the following day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan.[373]

Several commenters stated that any short sale price test restriction should be implemented through a policies and procedures approach.[374] One such commenter stated that a policies and procedures approach "would help promote compliance by all affected parties, distribute compliance and monitoring responsibility, allow flexibility to address inadvertent violations (thus likely resulting in fewer cancellations and trade breaks), and conserve the enforcement resources of agencies and other self-regulatory organizations."[375] Another commenter noted the "smooth implementation" and "successful operation" of Regulation NMS, which also uses a policies and procedures approach, and stated that a policies and procedures approach for Rule 201 will "allow for a smoother transition into full implementation as well as a more flexible rule where triggers based on circuit breakers are being contemplated."[376]

Some commenters stated that any short sale price test restriction should be implemented with a policies and procedures approach as well as a straight prohibition approach.[377] In supporting this combination approach, one such commenter noted that a policies and procedures approach would be consistent with Regulation NMS, permit trading centers the flexibility to tailor such policies and procedures to their particular markets, and permit broker-dealers to manage their order flow. At the same time, this commenter stated that a prohibition approach would be familiar to market participants and will give the Commission direct enforcement authority over violations.[378]

In contrast, some commenters stated that a short sale price test restriction, if adopted, should be implemented with a straight prohibition approach only. For example, one commenter stated that a straight prohibition approach is preferable because "[v]ariations in policies and procedures would lead some to believe certain market participants are less vigilant than others."[379] Another said a straight prohibition approach would be easier for market participants to implement and understand.[380] In addition, several commenters expressed support for a rule that would "prohibit" short selling on a down-bid (or down-tick)[381] or expressed that they did not support a policies and procedures approach.[382]

We recognize some commenters' preference that a short sale price test restriction be adopted with a straight prohibition approach or in combination with a straight prohibition approach because it is the approach taken under former Rule 10a–1 and, therefore, is familiar to market participants. Further, some commenters noted there can be variations in policies and procedures. As discussed in more detail below, however, we have determined to adopt in Rule 201(b)(1) a policies and procedures approach rather than a straight prohibition approach (or a combination thereof) because this alternative is similar to the policies and procedures approach under Regulation NMS and, therefore, market participants are familiar with a policies and procedures approach and can build on such policies and procedures in implementing Rule 201. In addition, a policies and procedures approach provides flexibility to trading centers and their customers in managing order flow because it allows trading centers, together with their customers, to determine how to handle orders that are not immediately executable or displayable by the trading center because the order is impermissibly priced. This flexibility potentially allows for the more efficient functioning of the securities markets than a rule that applies a straight prohibition approach.

In addition, we note that the Commission and SROs will carefully monitor whether trading centers' policies and procedures are reasonably designed to prevent short selling in violation of Rule 201. To the extent that a trading center's policies and procedures permit any execution or display of a short sale order not in accordance with the requirements of the

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[370] *See* letter from FIF (June 2009).

[371] *See* Proposal, 74 FR at 18049.

[372] *See* Rule 201(b)(1)(i).

[373] *See* Rule 201(b)(1)(ii).

[374] *See, e.g.,* letter from SIFMA (June, 2009); letter from Goldman Sachs (June 2009); letter from NYSE Euronext (June 2009); letter from T. Rowe Price (June 2009); letter from RBC (June 2009); letter from Schwab; letter from BATS (Sept. 2009); letter from SIFMA (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from Virtu Financial; letter from Goldman Sachs (Sept. 2009); letter from NYSE Euronext (Sept. 2009); letter from Qtrade; letter from Citadel *et al.* (Sept. 2009); letter from MFA (Oct. 2009).

[375] Letter from Citadel *et al.* (Sept. 2009); *see also* letter from AIMA.

[376] Letter from Virtu Financial; *see also* letter from MFA (Oct. 2009) (stating that it believes that "implementation concerns would be minimized if executing market centers (or any broker using an intermarket sweep order) surveil for compliance as they could leverage existing architecture developed to comply with the order protection rule in Reg. NMS (Rule 611)").

[377] *See, e.g.,* letter from GE; letter from Wachtell; letter from Amer. Bankers Assoc.

[378] *See* letter from GE; *see also* letter from Wachtell.

[379] Letter from Wells Fargo (Sept. 2009).

[380] *See, e.g.,* letter from Amer. Bankers Assoc. We note that this commenter also expressed support for a policies and procedures requirement for trading centers.

[381] *See, e.g.,* letter from Sigmon Wealth Management (June 2009); letter from James V. Kelly, President, Kelly Capital Management, LLC, dated June 2, 2009 ("Kelly Capital"); letter from Larry Chlebina, President, Ryan Stine, VP Portfolio Strategist, Chlebina Capital Management, LLC, dated May 29, 2009.

[382] *See, e.g.,* letter from Theresa Kinley, dated May 14, 2009; *see also* letter from James Rothenberg.

Rule, such trading center's policies and procedures may not be reasonable and could subject the trading center to enforcement action. Further, any conduct by trading centers, or other market participants, that facilitates short sales in violation of Rule 201 could also lead to liability for aiding and abetting or causing a violation of Regulation SHO, as well as potential liability under the anti-fraud and anti-manipulation provisions of the Federal securities laws, including sections 9(a), 10(b), and 15(c) of the Exchange Act, and Rule 10b–5 thereunder.

Under Rule 201(b)(1), a trading center will be required to have written policies and procedures reasonably designed to prevent the execution or display of short sale orders at a price that is less than or equal to the current national best bid when the price of a covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day. In addition, such policies and procedures must be reasonably designed to impose the short sale price test restriction of Rule 201(b)(1)(i) for the remainder of the day and the following day. Thus, a trading center's policies and procedures must require that a trading center be able to determine when a covered security is subject to the short sale price test restriction of Rule 201. As discussed above, due to the importance of ensuring that the triggering of the requirements of Rule 201 is communicated to all market participants on a fair, impartial and timely basis, we believe it is appropriate for the listing market for the covered security to determine whether that security is subject to the requirements of Rule 201 and, if it is, for such information to be disseminated to the market by the single plan processor. Thus, a trading center's policies and procedures must be reasonably designed so that the trading center is able to obtain such information from the single plan processor if the covered security becomes subject to the Rule's requirements.

Upon receipt of a short sale order for a covered security that is subject to the Rule's requirements, a trading center's policies and procedures must ensure that the trading center is able to determine whether or not the short sale order can be executed or displayed in accordance with the provisions of Rule 201(b)(1). If the order is marketable at a permissible price, the trading center may present the order for immediate execution or, if not immediately marketable, hold it for execution later at its specified price.

Rule 201(b)(1) permits a trading center to display an order provided it is permissibly priced at the time the trading center displays the order. If an order is impermissibly priced, the trading center could, in accordance with policies and procedures reasonably designed to prevent the execution or display of a short sale order at a price that is less than or equal to the current national best bid, re-price the order upwards to the lowest permissible price and hold it for later execution at its new price or better.[383] As quoted prices change, in accordance with Rule 201(b)(1), a trading center may repeatedly re-price and display an order at the lowest permissible price down to the order's original limit order price (or, if a market order, until the order is filled).

In addition, paragraph (b)(1)(iii)(A) of Rule 201 requires a trading center's policies and procedures to be reasonably designed to permit a trading center to execute a displayed short sale order at a price that is less than or equal to the current national best bid provided that, at the time the order was initially displayed by the trading center it was permissibly priced, *i.e.,* not at a price that was less than or equal to the then-current national best bid.[384] As discussed in the Proposal, this exception for properly displayed short sale orders will help avoid a conflict between Rule 201 and the "Quote Rule" under Rule 602 of Regulation NMS.[385] The Quote Rule requires that, subject to certain exceptions, the broker-dealer responsible for communicating a quotation shall be obligated to execute any order to buy or sell presented to him, other than an odd lot order, at a price at least as favorable to such buyer or seller as the responsible broker-dealer's published bid or published offer in any amount up to his published quotation size.[386] Thus, pursuant to this exception, a trading center will be able to comply with the "firm quote" requirement of Rule 602 of Regulation NMS by executing a presented order to buy against its displayed offer to sell as long as the displayed offer to sell was permissibly priced under Rule 201 at the time it was first displayed, even if the execution of the transaction will be at a price that is less than or equal to the current national best bid at the time of execution.[387]

Because a trading center can re-price and display a previously impermissibly priced short sale order, the policies and procedures approach of Rule 201, as noted by one commenter,[388] potentially allows for the more efficient functioning of the markets than a rule that applies a straight prohibition approach. Another commenter noted that while a prohibition approach could provide "bright lines" as to the acceptability of trades, such an approach would result in an "inordinate number" of trades being cancelled by trading centers.[389] Because trading centers will not have to reject or cancel impermissibly priced orders unless instructed to do so by the trading center's customer submitting the short sale order, we believe that the policies and procedures approach of Rule 201 will provide more flexibility to trading centers and their customers and result in more efficient markets. We recognize, however, that some trading centers might not want to re-price an impermissibly priced short sale order. Thus, re-pricing is not a requirement under Rule 201.

In addition, as noted by commenters, Rule 201 will provide trading centers and their customers with flexibility in determining how to handle orders that are not immediately executable or displayable by the trading center because the order is impermissibly priced. For example, trading centers can offer their customers various order types regarding the handling of impermissibly priced orders such that a trading center can either reject an impermissibly priced order or re-price the order

[383] For example, if a trading center receives a short sale order priced at $47.00 when the current national best bid in the security is $47.00, the trading center could re-price the order at the permissible offer price of $47.01, and display the order for execution at this new limit price.

[384] *See* Rule 201(b)(1)(iii)(A).

[385] *See* Proposal, 74 FR at 18051.

[386] *See* 17 CFR 242.602(b)(2). We note that to the extent that a short sale order is un-displayed, Rule 201 will prevent the trading center from executing the order unless at the time of execution, the execution price complies with the Rule.

[387] We note that such a conflict between the Quote Rule and Rule 201 should be relatively infrequent. If a displayed order to sell shares is at a price that is less than or equal to the national best bid, this would result in a crossed or locked market. In accordance with Rule 610(d) of Regulation NMS, each national securities exchange and national securities association must establish, maintain, and enforce written rules that require its members reasonably to avoid: Displaying quotations that lock or cross any protected quotation in an NMS stock, displaying manual quotations that lock or cross any quotation in an NMS stock disseminated pursuant to an effective national market system plan; are reasonably designed to assure reconciliation of locked or crossed quotations in an NMS stock; and prohibit its members from engaging in a pattern or practice of displaying quotations that lock or cross any protected quotation, or other quotation, in an NMS stock, unless an exception in such rules applies. *See* 17 CFR 242.610(d).

[388] *See, e.g.,* letter from Citadel *et al.* (Sept. 2009) (noting that a policies and procedures approach is favorable to a strict prohibition approach in that it "would help promote compliance" and "address inadvertent violations" of Rule 201).

[389] Letter from STA (June 2009).

upwards to the lowest permissible price until the order is filled.

As proposed and as adopted, Rule 201(b)(2) requires trading centers to regularly surveil to ascertain the effectiveness of the policies and procedures required by Rule 201(b)(1) and to take prompt action to remedy deficiencies in such policies and procedures.[390] As one commenter noted, this provision places trading centers in the position of determining whether an execution complies with the requirements of Rule 201(b)(1).[391] Thus, short sale orders executed or displayed at impermissible prices will require the trading center that executed or displayed the short sales to take prompt action to remedy any deficiencies.

The policies and procedures requirements of Rule 201(b)(1) are similar to those set forth under Regulation NMS.[392] In accordance with Regulation NMS, trading centers must have in place written policies and procedures in connection with that Regulation's Order Protection Rule.[393] Thus, as we stated in the Proposal, trading centers are already familiar with establishing, maintaining, and enforcing trading-related policies and procedures, including programming their trading systems in accordance with such policies and procedures.[394] Several commenters agreed with the Commission's view that this familiarity should reduce the implementation time and costs of the Rule on trading centers.[395]

As discussed in the Proposal,[396] similar to the requirements under Regulation NMS in connection with the Order Protection Rule, at a minimum, a trading center's policies and procedures must enable a trading center to monitor, on a real-time basis, the national best bid, so as to determine the price at which the trading center may execute or display a short sale order. In addition, as proposed, a trading center must have policies and procedures reasonably designed to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a price that is less than or equal to the current national best bid.[397] A trading center's policies and procedures will not, however, have to include mechanisms to determine on which provision a broker-dealer is relying in marking an order "short exempt" in accordance with paragraph (c) or (d) of Rule 201.[398] We note that we did not receive comments that specifically discussed a trading center's policies and procedures with respect to the monitoring, on a real-time basis, of the national best bid, or its policies and procedures related to orders marked "short exempt."

As discussed in the Proposal,[399] a trading center must also take such steps as will be necessary to enable it to enforce its policies and procedures effectively. For example, trading centers may establish policies and procedures that include regular exception reports to evaluate their trading practices. If a trading center's policies and procedures include exception reports, any such reports will need to be examined by the trading center to affirm that a trading center's policies and procedures have been followed by its personnel and properly coded into its automated systems and, if not, promptly identify the reasons and take remedial action. In addition, we note that one commenter stated, and we agree, that as a means for developing an effective set of policies and procedures for compliance with the provisions of Rule 201, trading centers should conduct "regular post-trade analysis."[400] Another commenter stated that significant oversight of policies and procedures is necessary to prevent trades from being directed toward venues that become known for lax supervision regarding compliance with Rule 201.[401]

To help ensure compliance with Rule 201, as discussed in the Proposal,[402] trading centers may also have policies and procedures that will enable a trading center to have a record identifying the current national best bid at the time of execution or display of a short sale order. Such "snapshots" of the market will aid SROs in evaluating a trading center's written policies and procedures and compliance with Rule 201. In addition, such snapshots will aid trading centers in verifying that a short sale order was priced in accordance with the provisions of proposed Rule 201(b)(1) if bid "flickering," *i.e.,* rapid and repeated changes in the current national best bid during the period between identification of the current national best bid and the execution or display of the short sale order, creates confusion regarding whether or not the short sale order was executed or displayed at a permissible price. Snapshots of the market at the time of execution or display of an order will also aid trading centers in dealing with time lags in receiving data regarding the national best bid from different data sources. A trading center's policies and procedures will be required to address latencies in obtaining data regarding the national best bid. In addition, to the extent such latencies occur, a trading center's policies and procedures will need to implement reasonable steps to monitor such latencies on a continuing basis and take appropriate steps to address a problem should one develop.

Some commenters requested clarification regarding whether, in determining the current national best bid, trading centers and/or broker-dealers, as applicable, may rely on the current national best bid as disseminated by proprietary feeds as well as the current national best bid disseminated by SIPs.[403] In addition, several commenters indicated that trading centers and/or broker-dealers should be required to rely on one source of the national best bid,[404] such as the current national best bid disseminated by SIPs.[405] One commenter stated that "[s]uch centralization would ensure consistent treatment of orders,"[406] and another commenter stated that it would "eliminate redundant effort across broker-dealers and maintain uniformity across exchanges."[407] Other

[390] *See* Rule 201(b)(2).

[391] *See* letter from Wolverine.

[392] *See* Regulation NMS Adopting Release, 70 FR 37496; *see also* 17 CFR 242.611.

[393] *See id.*

[394] *See* Proposal, 74 FR at 18051–18052.

[395] *See, e.g.,* letter from Amer. Bankers Assoc.; letter from Schwab; letter from Credit Suisse (Sept. 2009); letter from GE; letter from Goldman Sachs (June 2009); letter from NYSE Euronext (June 2009); letter from SIFMA (June 2009); letter from T. Rowe Price (June 2009); letter from Virtu Financial (noting familiarity with the policies and procedures approach of Regulation NMS should reduce the implementation costs of Rule 201).

[396] *See* Proposal, 74 FR at 18052.

[397] *See* Rule 201(b)(1)(iii)(B); *see also infra* Section III.B. (discussing short sale orders marked "short exempt").

[398] *See infra* Section III.B.; *see also* Rules 201(c) and 201(d)

[399] *See* Proposal, 74 FR at 18052.

[400] *See* letter from Jordan & Jordan.

[401] *See* letter from STA (June 2009). We note that to the extent that a trading center is lax with respect to its supervision regarding Rule 201, such trading center could be subject to enforcement action. In addition, the Commission and SROs will monitor whether trading centers adequately monitor their compliance with Rule 201 as part of their examinations.

[402] *See* Proposal, 74 FR at 18052.

[403] *See, e.g.,* letter from Glen Shipway (Sept. 2009); *see also* letter from Credit Suisse (June 2009); letter from FIF (June 2009); letter from Goldman Sachs (June 2009); letter from Lime Brokerage (June 2009); letter from RBC (June 2009); letter from SIFMA (June 2009); letter from Direct Edge (June 2009); letter from BATS (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from Lime Brokerage (Sept. 2009); letter from Qtrade.

[404] *See, e.g.,* letter from FIF (June 2009); letter from RBC (June 2009); letter from NYSE Euronext (Sept. 2009).

[405] *See, e.g.,* letter from FIF (June 2009); letter from NYSE Euronext (Sept. 2009); *see also* letter from Direct Edge (June 2009).

[406] Letter from RBC (June 2009).

[407] Letter from FIF (June 2009).

commenters, however, questioned whether a unitary data feed would be beneficial, stating that "[e]ven utilizing a unitary data feed would be problematic, however, given the 'flickering' that occurs,"[408] and that latencies in the receipt of data by market participants is of concern, "even if they are working with the same SIP or exchange feed."[409] Another commenter noted concerns with respect to market disruption as a result of a single mandated data feed, stating that "the entire market could be disrupted significantly by a single point of failure at the aggregator."[410]

We recognize commenters' concerns regarding the potential impact that receiving national best bid information from different data feeds might have on the application of Rule 201, including latencies that may occur in receiving such information from different data feeds.[411] We do not believe, however, that it is appropriate to mandate that the receipt of the current national best bid must be from any one particular data feed because a policies and procedures approach that provides for a "snapshot" of the applicable current national best bid will allow trading centers to deal with time lags in receiving data regarding the national best bid from different data sources. Thus, Rule 201 does not require modifications to how data feeds are currently received.

As discussed in the Proposal, trading centers will be required to conduct regular surveillance of their policies and procedures under Rule 201. Specifically, Rule 201(b)(2) provides that a trading center must regularly surveil to ascertain the effectiveness of the policies and procedures required under the Rule and must take prompt action to remedy deficiencies in such policies and procedures.[412] This provision will reinforce the requirement of Rule 201(b)(1) to maintain and enforce policies and procedures by explicitly assigning an affirmative responsibility to trading centers to surveil to ascertain the effectiveness of their policies and procedures.[413] Thus, under the Rule, trading centers may not merely establish policies and procedures that may be reasonable when created and assume that such policies and procedures will continue to satisfy the requirements of Rule 201(b). Rather, trading centers will be required to regularly assess the continuing effectiveness of their policies and procedures and take prompt action when needed to remedy deficiencies. In particular, trading centers will need to engage in regular and periodic surveillance to determine whether executions or displays of short sale orders on impermissible bids are occurring without an applicable exception and whether the trading center has failed to implement and maintain policies and procedures that would have reasonably prevented such impermissible executions or displays of short sale orders. We note that, although discussed in the Proposal, we did not receive comments that specifically addressed the requirement that trading centers must conduct regular surveillance of their policies and procedures under Rule 201.

B. "Short Exempt" Provisions of Rule 201

In the Proposal, we proposed that a trading center's policies and procedures must be reasonably designed to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order otherwise met the short sale price test restrictions.[414] In addition, we included provisions in the Proposal that set out circumstances under which a broker-dealer could mark a sale order as "short exempt."[415]

After considering the comments and consistent with the Proposal, we have determined to include in Rule 201(b)(1)(iii)(B) a requirement that a trading center's policies and procedures must be reasonably designed to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a price that is less than or equal to the current national best bid.[416] We have also determined to include in Rule 201(c) and (d) provisions that specify the circumstances under which a broker-dealer may mark certain sale orders as "short exempt" so that a trading center may execute or display such orders without regard to whether they are priced in accordance with the requirements of Rule 201(b).[417] The provisions contained in paragraphs (c) and (d) of Rule 201 are designed to promote the workability of the Rule, while at the same time furthering the Commission's goals.

The provisions contained in paragraph (d) of Rule 201 parallel exceptions to former Rule 10a–1 and exemptive relief granted pursuant to that rule.[418] These exceptions and exemptions from former Rule 10a–1 had been in place for several years. As we noted in the Proposal, we believe that the rationales underlying these exceptions and exemptions from former Rule 10a–1 still hold true today.[419] Moreover, due to the limited scope of these exceptions and exemptions, we do not believe that including them will undermine the Commission's goals for adopting Rule 201. To the extent that commenters addressed our inclusion of these exceptions and exemptions, we discuss such comments below.

A number of commenters stated that if we were to adopt a form of short sale price test restriction, it should include exceptions beyond those that we proposed in the Proposal and Re-Opening Release, particularly if we were to adopt a short sale price test restriction based on the alternative uptick rule.[420] Some commenters stated that the exceptions included in the Proposal and the Re-Opening Release were insufficient, stating that broader and/or additional exceptions would be necessary to, among other things, provide stability and liquidity to the market[421] and so as not to impair price discovery.[422] For example, commenters requested exceptions for activity excepted from, or necessary to comply with, Regulation NMS.[423] Commenters

[408] Letter from Direct Edge (June 2009).

[409] Letter from Lime Brokerage (June 2009); *see also* letter from Lime Brokerage (Sept. 2009).

[410] Letter from Credit Suisse (June 2009).

[411] *See infra* Section X.B.1.b.i. and Section X.B.1.b.ii. (discussing the potential impact of not mandating receipt of the current national best bid from one particular data feed on the implementation costs of Rule 201).

[412] *See* Rule 201(b)(2).

[413] We note that Rule 611(a)(2) of Regulation NMS contains a similar provision for trading centers. *See* 17 CFR 242.611(a)(2).

[414] *See, e.g.,* Proposal, 74 FR at 18107, 18111.

[415] *See, e.g.,* Proposal, 74 FR at 18108, 18111–18112. We note that we proposed provisions relating to when a broker-dealer may mark a sale order as "short exempt." In discussing the "short exempt" marking provisions in paragraphs (c) and (d) of Rule 201, we set forth below how and why the provisions, as adopted, differ from the provisions as set forth in the proposed circuit breaker with modified uptick rule because that rule most closely resembles Rule 201, as adopted. To that end, we note that the circumstances under which a sale order may be marked as "short exempt" are contained in paragraphs (c) and (d) of Rule 201, as adopted, whereas such circumstances were contained in paragraphs (d) and (e) of the proposed circuit breaker with modified uptick rule.

[416] *See* Rule 201(b)(1)(iii)(B).

[417] *See* Rule 201(c); 201(d).

[418] *See* Proposal, 74 FR at 18054 (discussing how the "short exempt" marking provisions of the proposed modified uptick rule would parallel exceptions to former Rule 10a–1 and exemptive relief granted pursuant to that rule).

[419] *See* Proposal, 74 FR at 18054–18059.

[420] *See, e.g.,* letter from SIFMA (Sept. 2009); letter from NYSE Euronext (Sept. 2009); letter from EWT (Sept. 2009); letter from GETCO (Sept. 2009).

[421] *See, e.g.,* letter from SIFMA (June 2009); letter from NYSE Euronext (June 2009).

[422] *See, e.g.,* letter from NYSE Euronext (June 2009).

[423] *See, e.g.,* letter from SIFMA (June 2009); letter from RBC (June 2009); letter from Goldman Sachs (June 2009). We note that where a broker-dealer is

also requested an exception for exchange traded funds ("ETFs") and similar broad-based indices and baskets of stocks.[424] Some commenters requested exceptions for short sales in connection with the facilitation of capital raising transactions, through stock issuances and convertible instruments, by issuers and selling shareholders.[425] In connection with convertible instruments, commenters stated that there needs to be an exception from any short sale price test restriction to allow investors purchasing a convertible instrument to hedge their long exposure.[426] Other exceptions requested relate to automated electronic buy-side trading,[427] bona fide hedging generally,[428] "exchange for physicals" transactions,[429] index expirations,[430] and market on open [431] and market on close orders.[432]

In addition, as discussed in more detail in Section III.B.9. below, commenters requested an exception for short sales by market makers engaged in bona fide market making activities, including market makers in OTC and listed derivatives, options, convertibles and ETFs, and block positioners.[433]

Several commenters, however, stated that the Commission should be cautious of adopting numerous exceptions and discussed problems that may arise from adopting a short sale price test restriction with many or complex exceptions, such as additional implementation difficulties, greater compliance costs, lack of uniformity that may cause unfair application of the rule, increased opportunities for gaming and abuse, and, overall, a less effective rule that only applies to a limited numbers of short sales.[434] Commenters stated that a short sale price test restriction with numerous exceptions will create loopholes and a rule that is easy to circumvent, thus resulting in a rule that applies to little trading activity and fails to serve the purpose for which it was adopted.[435] One commenter stated that emphasis should first be placed on "a sales price restriction on short sales, its possible effects on helping restore a measure of price continuity, and its possible deleterious effects on informational efficiency * * * with exceptions to be evolved as time goes by and as the industry petitions for them."[436] Another commenter noted that a short sale price test restriction with many exceptions will impose additional burdens on the Commission's inspection staff, which will be tasked with "retracing transactions to discern which were eligible for exceptions, which were not, and if any were disguised."[437]

In addition, one commenter noted that the exceptions that accompany any price test restriction will be driven by the approach adopted.[438] This commenter noted that a permanent, market-wide approach may necessitate more exceptions than one triggered by a temporary circuit breaker.[439] This commenter further noted that "a circuit breaker short sale ban may necessitate more or different exceptions than a circuit breaker that still permits short selling to occur."[440]

Although, as noted above, commenters requested a variety of exceptions in addition to those set forth in the Proposal, at this time, we have determined to include in Rule 201(c) and (d) only the "short exempt" marking provisions that we proposed. We believe that these limited provisions will help ensure the smooth functioning of the markets while at the same time not undermining our goals for adopting Rule 201.

In addition, we note that a number of commenters that discussed the need for additional and/or broader exceptions referenced the absence of some of the requested exceptions during the Short

routing an inter-market sweep order ("ISO") solely to facilitate its execution of a customer's long sale in compliance with Rule 611, such ISOs may be marked as "short exempt." This will allow the destination trading centers to execute the orders against better-priced protected quotations without regard to the short sale price test restrictions of Rule 201. Such ISOs must not be marked as "long."

[424] *See, e.g.,* letter from SIFMA (June 2009); letter from NYSE Euronext (June 2009); letter from MFA (June 2009); letter from RBC (June 2009); letter from ICI (June 2009); letter from Citadel *et al.* (June 2009); letter from Credit Suisse (June 2009); letter from ISDA; letter from NYSE Euronext (Sept. 2009); letter from Direct Edge (Sept. 2009); letter from Knight Capital (Sept. 2009); letter from Virtu Financial; letter from EWT (Sept. 2009).

[425] *See, e.g.,* letter from SIFMA (June 2009); *see also* letter from ISDA.

[426] *See, e.g.,* letter from SIFMA (June 2009).

[427] *See, e.g.,* letter from MFA (June 2009).

[428] *See, e.g.,* letter from MFA (June 2009); letter from Credit Suisse (June 2009); letter from ISDA; letter from John K. Robinson, General Counsel, P. Schoenfeld Asset Management LP, dated July 2, 2009 ("P. Schoenfeld Asset Management").

[429] *See, e.g.,* letter from SIFMA (June 2009); letter from RBC (June 2009).

[430] *See, e.g.,* letter from SIFMA (June 2009).

[431] *See, e.g.,* letter from RBC (June 2009); letter from Goldman Sachs (June 2009); letter from Goldman Sachs (Sept. 2009).

[432] *See, e.g.,* letter from SIFMA (June 2009); letter from RBC (June 2009); letter from Credit Suisse (June 2009); letter from EWT (Sept. 2009); letter from Goldman Sachs (June 2009); letter from Goldman Sachs (Sept. 2009). We also note that some commenters stated that we should include a marking error exception in connection with any short sale price test restriction we adopt. *See, e.g.,* letter from RBC (June 2009); letter from SIFMA (June 2009). In connection with the proposed uptick rule, we proposed an exception for any sale by a broker-dealer of a covered security for an account in which it has no interest, pursuant to an order marked "long." *See* Proposal, 74 FR at 18109. This exception would have applied where a broker-dealer effects a sale of an order marked "long" by another broker-dealer, but the order was mis-marked such that it should have been marked as a short sale order. We do not believe that a similar exception is necessary under Rule 201 because Rule 201, unlike the proposed uptick rule, is based on a policies and procedures approach rather than a straight prohibition approach. Thus, if a trading center's written policies and procedures are reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid, it is unlikely that such trading center's participation in any violation of the Rule due to a mis-marking by a broker-dealer could be knowing or reckless. *See* Proposal, 74 FR at 18063. As we stated in the Proposal, knowledge may be inferred where a broker-dealer has previously accepted orders marked "long" from the same counterparty that required borrowed shares for delivery or that resulted in a "fail to deliver." *See* Proposal, 74 FR at 18063 n.212; *see also* 2004 Regulation SHO Adopting Release, 69 FR at 48019, n.111 (stating that "[i]t may be unreasonable for a broker-dealer to treat a sale as long where orders marked 'long' from the same customer repeatedly require borrowed shares for delivery or result in 'fails to deliver.' A broker-dealer also may not treat a sale as long if the broker-dealer knows or has reason to know that the customer borrowed shares being sold.").

[433] *See, e.g.,* letter from SIFMA (June 2009); letter from NYSE Euronext (June 2009); letter from Knight Capital (June 2009); letter from EWT (June 2009); letter from STANY (June 2009); letter from Credit Suisse (June 2009); letter from CBOE (June 2009); letter from RBC (June 2009); letter from Citadel *et al.* (June 2009); letter from NYSE Euronext (Sept. 2009); letter from Direct Edge (Sept. 2009); letter from Virtu Financial; letter from EWT (Sept. 2009); letter from Credit Suisse (Sept. 2009). Some commenters also asked for an exception for, or clarification that, a short sale price test restriction would not apply to short sales pursuant to all options assignments and exercises. *See, e.g.,* letter from SIFMA (June 2009); letter from CBOE (June 2009); letter from Boston Options Exchange, Chicago Board Options Exchange, International Securities Exchange, Nasdaq Options Market, Nasdaq OMX PHLX, NYSE Amex, NYSE Arca and The Options Clearing Corporation, dated June 22, 2009 ("Boston Options Exchange *et al.* (June 2009)"); letter from RBC (June 2009). We note that because short sales pursuant to options exercises and assignments (whether or not automatic) are unrelated to the current national best bid, Rule 201 does not apply to such sales.

[434] *See, e.g.,* letter from Paladin Investment; letter from Douglas M. Branson, W. Edward Sell Professor of Business Law, University of Pittsburgh School of Law, dated June 10, 2009 ("Prof. Branson"); letter from Wells Fargo (June 2009); letter from CPIC (June 2009); letter from IAG; letter from IBC; letter from Jordan & Jordan; letter from Kelly Capital; letter from Lime Brokerage (June 2009); letter from Millennium; letter from Hudson River Trading; letter from Lime Brokerage (Sept. 2009); letter from Glen Shipway (Sept. 2009); letter from Qtrade.

[435] *See, e.g.,* letter from Paladin Investment; letter from Prof. Branson; letter from CPIC (June 2009); letter from Wells Fargo (June 2009); letter from IBC (June 2009); letter from Jordan & Jordan; letter from Lime Brokerage (June 2009); letter from Millennium.

[436] Letter from Prof. Branson.

[437] Letter from CPIC (June 2009).

[438] *See, e.g.,* letter from ICI (June 2009).

[439] *See* letter from ICI (June 2009).

[440] Letter from ICI (June 2009).

Sale Ban Emergency Order[441] and the effect on market quality of the Short Sale Ban Emergency Order in the absence of such exceptions.[442] These commenters noted the absence from the Short Sale Ban Emergency Order of exceptions for certain convertible arbitrage or hedging activities[443] and for automated electronic buy-side trading.[444] We note, however, that unlike the Short Sale Ban Emergency Order, which halted all short selling in the securities subject to the emergency order for its three-week duration, the short sale restrictions of Rule 201 will apply for a limited duration and will only apply to a covered security if such security has experienced a significant intra-day price decline (of 10% or more). Thus, Rule 201 will not impact trading in the vast majority of covered securities on an average day.[445] If a covered security becomes subject to the short sale price test restrictions of Rule 201 it will occur because that security's price is experiencing extreme downward price pressure and it is these securities that Rule 201 is designed to address by helping to prevent short selling from being used as a tool to exacerbate its price decline. If, as requested by commenters, we were to expand the scope of short selling activities that would not be subject to Rule 201, we are concerned such exceptions could undermine this goal of Rule 201.

In addition, although short selling will be restricted if the price of a covered security decreases by 10% or more, in contrast to securities subject to the Short Sale Ban Emergency Order, Rule 201 will still permit short selling in the covered security even when the restriction is in place, although at a price above the current national best bid. Thus, short sellers engaged in the various activities for which commenters are requesting additional or expanded exceptions will continue to be able to sell short even when the price test restriction is in effect. In addition, the restriction on short selling will be in place for a limited duration, that is, the remainder of the day on which the circuit beaker level is triggered and the following day, further reducing the need for additional exceptions.

We also note that with respect to ETFs, although under former Rule 10a–1 the Commission issued limited exemptive relief for certain ETFs via authority delegated to the Staff, that relief was issued on a case-by-case basis for a permanent, market-wide short sale price test rule.[446] Since the elimination of former Rule 10a–1, there has been a significant growth in ETF trading volume and an expansion in different structures of ETF products.[447] Commenters who opposed an exception for these products noted the growth in ETF trading volume and new ETF products among the reasons not to provide an exception for ETFs from any short sale price test restriction.[448] We do not believe that a general ETF exception is necessary because the circuit breaker approach of Rule 201 will generally result in the majority of ETFs not being subject to its short sale price test restrictions because ETFs are generally diversified, whereas single stocks are not. If such securities do become subject to its restrictions, the restrictions will be in place for a limited duration and will continue to permit short selling even when in place.

For the reasons discussed above, at this time we believe it is appropriate to limit the scope and number of circumstances under which a broker-dealer may mark a sell order as "short exempt." We recognize, however, the concerns raised by commenters and note that to help ensure the future workability of Rule 201, or for other reasons, we may reconsider whether certain exceptions or exemptions are warranted.

1. Broker-Dealer Provision

After the 10% circuit breaker is triggered for a covered security, Rule 201(c) will permit a broker-dealer submitting a short sale order for the covered security to a trading center to mark the order "short exempt" if the broker-dealer identifies the order as being at a price above the current national best bid at the time of submission.[449] We have modified this provision from the Proposal to clarify that a broker-dealer may only mark an order as "short exempt" after the circuit breaker has been triggered for a covered security.[450] In addition, consistent with the Proposal, Rule 201(c) requires any broker-dealer relying on this provision to establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent the incorrect identification of orders as being priced in accordance with the requirements of Rule 201(c) and requires the broker-dealer regularly to surveil to ascertain the effectiveness of these policies and procedures, and to take prompt action to remedy deficiencies.[451]

As discussed above, in response to our request for comment,[452] several commenters stated that if we were to adopt a short sale price test restriction, it should include a broker-dealer provision.[453] One commenter stated that the broker-dealer provision is necessary to prevent contradictory requirements for broker-dealers under Regulation NMS and Regulation SHO.[454]

Other commenters disagreed, stating that they do not think that the broker-dealer provision is necessary. One commenter pointed to problems that may arise from the provision, such as increasing the potential for confusion in the marketplace, creating an unlevel playing field, and penalizing participants who have the most efficient market data infrastructures.[455] Commenters also noted that the broker-dealer provision has the potential to

[441] *See supra* Section II.C. (discussing the Short Sale Ban Emergency Order).

[442] *See, e.g.,* letter from SIFMA (June 2009); letter from RBC (June 2009); letter from CPIC (June 2009); letter from Goldman Sachs (June 2009); letter from MFA (June 2009).

[443] *See, e.g.,* letter from RBC (June 2009) (attaching and discussing letter from Philip Taylor and Scott DeCanio, Directors, RBC Capital Markets Corp., dated Sept. 25, 2008); letter from CPIC (June 2009); letter from Goldman Sachs (June 2009); letter from SIFMA (June 2009); letter from MFA (June 2009).

[444] *See, e.g.,* letter from MFA (June 2009).

[445] *See supra* Section III.A.5. (discussing analyses regarding the number of securities that will trigger the circuit breaker on an average day).

[446] *See, e.g.*, letter from Racquel L. Russell, Esq., Branch Chief, Office of Trading Practices and Processing, Division of Market Regulation, to George T. Simon, Esq., Foley & Lardner LLP, dated June 21, 2006; letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, to Claire P. McGrath, Vice President and Special Counsel, Amex, dated Aug. 17, 2001. We note that each of the approvals for relief under former Rule 10a–1 was conditioned on the ETF meeting certain enumerated conditions, either specific to certain products or included as part of a broader "class exemption."

[447] *See, e.g.*, Investment Company Institute, *2009 Investment Company Fact Book*, (49 ed.); National Stock Exchange, *NSX Annouces Record January ETF Trading Volume Surpasses $2.2 Trillion*, News & Views, Feb. 14, 2008 available at *http://www.nsx.com/content/news/story/90*.

[448] *See, e.g.,* letter from Robert E. Koza, dated May 4, 2009; letter from Robert W. Angove, President, Santiam Mountain Investment, dated May 5, 2009; letter from David Tarrell, dated May 6, 2009; letter from Mitchel Schlesinger, Principal, FBB Capital Partners, dated May 8, 2009; letter from Paladin Investment; letter from Shelby Frisch, dated May 15, 2009; letter from Robert Cannataro, dated June 5, 2009; letter from High Street Advisors; letter from European Investors (June 2009); letter from Ascendant Capital; letter from Kelly Capital; letter from European Investors (Sept. 2009); letter from NAREIT.

[449] *See* Rule 201(c).

[450] We have also made technical modifications to Rule 201(c) to reflect that it is the broker-dealer submitting the order that must also mark the order as "short exempt" and to reflect the difference in operation of the alternative uptick rule from the proposed circuit breaker with modified uptick rule.

[451] *See* Rule 201(c).

[452] *See* Proposal, 74 FR at 18073–18074.

[453] *See, e.g.*, letter from SIFMA (June 2009); letter from BATS (May 2009); letter from EWT (Sept. 2009); letter from Qtrade.

[454] *See* letter from EWT (Sept. 2009).

[455] *See* letter from Lime Brokerage (June 2009).

greatly increase costs to the industry and to adversely impact the ability of smaller broker-dealers to compete.[456] One commenter stated that, what it termed a "requirement," that broker-dealers maintain "snapshots," may impose significant costs, including costs associated with technology, data storage, and surveillance and review and that the Commission's cost estimates of over $100,000 per broker-dealer "seem to underestimate the cost to large, full service broker-dealers, since the volume of orders handled by these firms are likely to lead to significantly greater technology and storage costs alone as well as more frequent reviews."[457] We note that, as discussed in the Proposal and in more detail below, we believe that "snapshots" of the market could aid broker-dealers in complying with Rule 201(c), but Rule 201 does not "require" such snapshots.[458]

Another commenter expressed the belief that a majority of broker-dealer participants that service customer orders will want to take advantage of the provision to remain competitive and to ensure that client orders receive the best possible execution, which will result in many non-trading center participants becoming subject to market data "snapshotting" and other compliance-related changes.[459]

After considering the comments, as discussed above, we have determined to include in Rule 201(c) a provision to permit a broker-dealer submitting a short sale order for a covered security to a trading center after the circuit breaker is triggered for a covered security, to mark the order "short exempt" if the broker-dealer identifies the order as being at a price above the current national best bid at the time of submission.[460] Rule 201(c) will provide broker-dealers with the option to manage their order flow, rather than having to always rely on their trading centers to manage their order flow on their behalf.

Although we recognize commenters' concerns, including regarding potential increased costs to the industry with respect to technology, data storage and surveillance, we note that most broker-dealers may already have developed "snapshot" capability in connection with Regulation NMS's Order Protection Rule. We also agree that "snapshot" capability will require data storage by broker-dealers; however, as noted by one commenter,[461] because the alternative uptick rule does not require sequencing of the national best bid, the data storage requirements under the alternative uptick rule are lower than they would be under the proposed modified uptick rule or the proposed uptick rule. In addition, we believe that the costs of a policies and procedures approach that provides for a snapshot of the applicable current national best bid of the security are justified because snapshot capability will aid broker-dealers in dealing with time lags in receiving data regarding the national best bid from different data sources and facilitate verification of whether a short sale order was executed or displayed at a permissible price.

In addition, we note that this provision will not undermine our goals for short sale regulation because any broker-dealer marking an order "short exempt" in accordance with this provision must have mechanisms in place to enable the broker-dealer to identify the short sale order as priced in accordance with the provisions of Rule 201(c). In accordance with Rule 201(c)(1), these mechanisms must include written policies and procedures reasonably designed to prevent the incorrect identification of orders as being permissibly priced in accordance with the provisions of 201(c).[462] Thus, although a broker-dealer relying on this provision in marking an order "short exempt" will not need to identify the order as permissibly priced to the trading center, it will need to have written policies and procedures in place reasonably designed to enable it to identify that an order was permissibly priced at the time of submission of the order to a trading center.[463] We believe these policies and procedures will further our goals by helping to ensure that short sale orders are not incorrectly marked as "short exempt," and, thereby, helping to preclude impermissible short sales from being executed when the price test restriction has been triggered.[464]

At a minimum, a broker-dealer's policies and procedures must be reasonably designed to enable a broker-dealer to monitor, on a real-time basis, the national best bid, so as to determine the price at which the broker-dealer may submit a short sale order to a trading center in compliance with the provisions of Rule 201(c). To ensure compliance with Rule 201(c), a broker-dealer may also have policies and procedures that will enable it to have a record identifying the current national best bid at the time of submission of a short sale order. Such "snapshots" of the market will also aid SROs in evaluating a broker-dealer's written policies and procedures and compliance with Rule 201(c). In addition, such snapshots will aid broker-dealers in verifying that a short sale order was priced in accordance with the provisions of Rule 201(c) if bid flickering during the period between identification of the current national best bid and the submission of the short sale order to a trading center creates confusion regarding whether or not the short sale order was submitted at a permissible price. Snapshots of the market at the time of submission of an order will also aid broker-dealers in dealing with time lags in receiving data regarding the national best bid from different data sources. Under Rule 201(c)(2), latencies in obtaining data regarding the national best bid will need to be addressed.[465] In addition, to the extent such latencies occur, a broker-dealer's policies and procedures will need to implement reasonable steps to monitor such latencies on a continuing basis and take appropriate steps to address a problem should one develop.

Surveillance will be a required part of a broker-dealer's satisfaction of its legal obligations. Rule 201(c)(2) provides that a broker-dealer must regularly surveil to ascertain the effectiveness of the policies and procedures required under Rule 201(c)(1) and must take prompt action to remedy deficiencies in such policies and procedures.[466] This provision will reinforce the on-going maintenance and enforcement requirements of Rule 201(c) by explicitly assigning an affirmative responsibility to broker-dealers to surveil to ascertain the effectiveness of their policies and procedures.[467] Thus, under paragraphs (c)(1) and (c)(2) of Rule 201, broker-dealers may not merely establish policies and procedures that may be reasonable when created and assume that such policies and procedures will continue to satisfy the requirements of the Rule. Rather, broker-dealers will be required to regularly assess the continuing effectiveness of their procedures and

[456] *See* letter from STANY (June 2009); letter from Lime Brokerage (June 2009); letter from NSCP.

[457] Letter from NSCP.

[458] *See* Proposal, 74 FR at 18054–18055.

[459] *See* letter from Lime Brokerage (June 2009).

[460] *See* Rule 201(c).

[461] *See* letter from STA (Sept. 2009).

[462] *See* Rule 201(c)(1).

[463] Such policies and procedures should be similar to those required for trading centers complying with paragraph (b) of Rule 201.

[464] We also note that it would be a violation of Rule 200(g) to mark a short sale order as "short exempt" when a security is not subject to the alternative uptick rule.

[465] *See* Rule 201(c)(2).

[466] *See id.*

[467] We note that Rule 611(a)(2) of Regulation NMS contains a similar surveillance provision. *See* 17 CFR 242.611(a)(2).

take prompt action when needed to remedy deficiencies. In particular, each broker-dealer will need to engage in regular and periodic surveillance to determine whether it is submitting short sale orders marked "short exempt" without complying with the requirements of Rule 201(c) and whether the broker-dealer has failed to implement and maintain policies and procedures that would have reasonably prevented such impermissible submissions.

A broker-dealer will also need to take such steps as will be necessary to enable it to enforce its policies and procedures effectively.[468] For example, broker-dealers may establish policies and procedures that include regular exception reports to evaluate their trading practices. If a broker-dealer's policies and procedures include exception reports, any such reports will need to be examined to affirm that a broker-dealer's policies and procedures have been followed by its personnel and properly coded into its automated systems and, if not, promptly identify the reasons and take remedial action.

2. Seller's Delay in Delivery [469]

We are adopting Rule 201(d)(1) without modification to provide that a broker-dealer may mark an order "short exempt" if the broker-dealer has a reasonable basis to believe that the seller owns the security being sold and that the seller intends to deliver the security as soon as all restrictions on delivery have been removed.[470] Specifically, Rule 201(d)(1) provides that a broker-dealer may mark a short sale order "short exempt" if the broker-dealer has a reasonable basis to believe the short sale order of a covered security is by a person that is "deemed to own" the covered security pursuant to Rule 200 of Regulation SHO,[471] provided that the person intends to deliver the security as soon as all restrictions on delivery have been removed.[472]

Rule 200(g)(1) of Regulation SHO provides that a sale can be marked "long" only if the seller is deemed to own the security being sold and either (i) the security is in the broker-dealer's physical possession or control; or (ii) it is reasonably expected that the security will be in the broker-dealer's possession or control by settlement of the transaction.[473] Thus, even where a seller owns a security, if delivery will be delayed, such as in the sale of formerly restricted securities pursuant to Rule 144 of the Securities Act of 1933,[474] or where a convertible security, option, or warrant has been tendered for conversion or exchange, but the underlying security is not reasonably expected to be received by settlement date, such sales must be marked "short." As a result, Rule 201(d)(1) is necessary to allow for sales of securities that, although owned, are subject to the provisions of Regulation SHO governing short sales due solely to the seller being unable to deliver the covered security to its broker-dealer prior to settlement based on circumstances outside the seller's control. In response to our request for comment, commenters that specifically addressed this provision were supportive of it.[475]

After considering the comments, we believe it is appropriate to adopt Rule 201(d)(1) as proposed. This provision is consistent with the goals of Rule 201 and with other provisions of Regulation SHO related to sales of securities that although owned are subject to the provisions of Regulation SHO governing short sales. Thus, we are adopting Rule 201(d)(1) such that the provision will apply to the sale of any covered securities that a seller is deemed to own pursuant to Rule 200 of Regulation SHO and cannot deliver by settlement date based on circumstances outside the seller's control, provided the seller intends to deliver the securities as soon as all restrictions on delivery have been removed.[476]

3. Odd Lot Transactions

We are adopting in Rule 201(d)(2), without modification, the ability for a broker-dealer to mark a short sale order as "short exempt" if the broker-dealer has a reasonable basis to believe that the short sale order is by a market maker to offset a customer odd-lot [477] order or to liquidate an odd-lot position that changes such broker-dealer's position by no more than a unit of trading.[478] In response to our request for comment, commenters that specifically addressed this provision were supportive of

[468] *See* Rule 201(c)(2).

[469] We note that we have modified paragraph (d) of Rule 201 from that provision as proposed to reflect that a broker-dealer may only mark an order as "short exempt" pursuant to the provisions in paragraph (d) after the circuit breaker has been triggered for a covered security.

[470] Subsection (e)(1) of former Rule 10a–1 contained an exception relating to a seller's delay in the delivery of securities. The provision in Rule 201(d)(1) parallels the exception in former Rule 10a–1(e)(1).

[471] *See* 17 CFR 242.200(a)–(f) (defining the term "deemed to own").

[472] *See* Rule 201(d)(1). This provision is also consistent with Rule 203(b)(2)(ii) and Rule 204(a)(2) of Regulation SHO. Rule 203(b)(2)(ii) provides an exception from the "locate" requirement of Rule 203(b)(1) of Regulation SHO for "[a]ny sale of a security that a person is deemed to own pursuant to § 242.200, provided that the broker or dealer has been reasonably informed that the person intends to deliver such security as soon as all restrictions on delivery have been removed * * *". Rule 204(a)(2) provides additional time to close out fails to deliver "[i]f a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in any equity security resulting from a sale of a security that person is deemed to own pursuant to § 242.200 and that such person intends to deliver as soon as all restrictions on delivery have been removed, the participant shall, by no later than the beginning of regular trading hours on the thirty-fifth consecutive calendar day following the trade date for the transaction, immediately close out the fail to deliver position by purchasing securities of like kind and quantity." We note that to the extent that an exception to Regulation SHO's locate requirement applies to a short sale order, such order must be marked "short" in accordance with Rule 200(g) of Regulation SHO unless the order can be marked "short exempt" pursuant to Rule 200(g)(2) of Regulation SHO.

[473] *See* 17 CFR 242.200(g)(1).

[474] 17 CFR 230.144.

[475] *See, e.g.*, letter from BATS (May 2009); letter from SIFMA (June 2009); letter from Jesse D. Hill, Director of Regulatory Relations, Office of Regulatory Counsel, Edward Jones, dated Sept. 21, 2009 ("Edward Jones"); letter from NYSE Euronext (Sept. 2009).

[476] Such circumstances could include the situation where a convertible security, option or warrant has been tendered for conversion or exchange, but the underlying security is not reasonably expected to be received by settlement date. *See* Regulation SHO Adopting Release, 69 FR at 48015; *see also* 17 CFR 242.200(b) (defining when a person shall be "deemed to own" a security). In addition, we understand that sellers that own restricted equity securities that wish to sell such securities pursuant to an effective registration statement pursuant to Rule 415 under the Securities Act of 1933 experience similar types of potential settlement delays as those persons selling Rule 144 securities. Thus sales of such securities pursuant to Rule 415 may be marked "short exempt" in accordance with Rule 201(d)(1) if the securities subject to the sale are outstanding at the time they are sold, and the sale occurs after the registration statement has become effective. In addition, and as noted by one commenter, we understand that sales made pursuant to broker-dealer assisted cashless exercises of compensatory options to purchase a company's securities may result in potential settlement delays that would otherwise require the seller to mark such sales "short" pursuant to the definition under Rule 200(g) of Regulation SHO. Such sales may be marked "short exempt" pursuant to Rule 201(d)(1). *See* Rule 204 Adopting Release, 74 FR at 38277, n.141; *see also* 17 CFR 230.415.

[477] Rule 201(a)(5) provides that the term "odd lot" shall have the same meaning as in 17 CFR 242.600(b)(49). Rule 600(b)(49) defines an "odd lot" as "an order for the purchase or sale of an NMS stock in an amount less than a round lot." 17 CFR 242.600(b)(49).

[478] *See* Rule 201(d)(2). SRO rules define a "unit of trading" or "normal unit of trading," and the term generally means 100 shares, *i.e.*, a round lot. For example, FINRA Rule 6320A(a)(7) defines a "normal unit of trading" to mean "100 shares of a security unless, with respect to a particular security, FINRA determines that a normal unit of trading shall constitute other than 100 shares." NYSE Rule 55 states that "[t]he unit of trading in stocks shall be 100 shares, except that in the case of certain stocks designated by the Exchange the unit of trading shall be such lesser number of shares as may be determined by the Exchange, with respect to each stock so designated. * * *"

inclusion of this provision in any short sale price test restriction.[479]

Under former Rule 10a–1, an exception for certain odd-lot transactions was created in an effort to reduce the burden and inconvenience that short sale restrictions would place on odd-lot transactions. In 1938, the Commission found that odd-lot transactions played a very minor role in potential manipulation by short selling.[480] Initially, sales of odd-lots were not subject to the restrictions of former Rule 10a–1.[481] However, the Commission became concerned over the volume of odd-lot transactions, which possibly indicated that the exception was being used to circumvent the rule. As a result, the exception was changed to include the two odd lot exceptions described below.[482]

Former Rule 10a–1(e)(3) contained a limited exception that allowed short sales by odd-lot dealers registered in the security and by third market makers of covered securities to fill customer odd lot orders. Former Rule 10a–1(e)(4) provided an exception under the rule for any sale to liquidate an odd-lot position by a single round lot sell order that changed the broker-dealer's position by no more than a unit of trading.

Rule 201(d)(2), as proposed and adopted, generally parallels the exceptions in subsections (e)(3) and (e)(4) of former Rule 10a–1. In addition, however, as proposed, we are extending the provision to cover all market makers acting in the capacity of an odd-lot dealer. When former Rule 10a–1 was adopted, odd-lot dealers dealt exclusively with odd-lot transactions, and were so registered. Today, market makers registered in a security typically also act as odd-lot dealers of the security. Thus, as proposed, we are broadening the provision in Rule 201(d)(2) to all broker-dealers acting as "market makers" in odd lots.[483]

We believe that a provision that will allow a broker-dealer to mark a short sale order "short exempt" if it has a reasonable basis to believe that the short sale order is by a market maker to offset a customer odd-lot order or liquidate an odd-lot position that changes such broker-dealer's position by no more than a unit of trading, will continue to be of utility under Rule 201 and will not be in conflict with the goals of the Rule.

Because odd-lot transactions by market makers to facilitate customer orders are not of a size that could facilitate a downward movement in the particular security, we do not believe that Rule 201(d)(2) will adversely affect the goals of short sale regulation that Rule 201 seeks to advance. Thus, we believe that a broker-dealer should be able to mark such orders "short exempt" so that those acting in the capacity of a "market maker," with the commensurate negative and positive obligations, will be able to offset a customer odd-lot order and liquidate an odd-lot position without a trading center's policies and procedures preventing the execution or display of such orders at a price that is less than or equal to the current national best bid.

4. Domestic Arbitrage

We are adopting in Rule 201(d)(3) without modification the ability for a broker-dealer to mark as "short exempt" short sale orders associated with certain bona fide domestic arbitrage transactions. Although commenters generally stated that a domestic arbitrage provision should be included in any short sale price test restriction, some commenters also stated that the provision, as proposed, should be expanded to cover more trading scenarios.[484] However, one commenter stated that arbitrage activities are not unique in contributing to market efficiency and any short sale price test restriction that the Commission adopts should require few, if any, exceptions to maintain market quality.[485]

As discussed above, the short sale price test restriction adopted in Rule 201(b) will apply to a covered security only after the security has experienced a significant intra-day price decline, will remain in place for a limited period of time, and will continue to permit short selling at a price above the national best bid (rather than, for example, halting all short selling in that security). As such, we do not believe it is appropriate at this time to broaden the scope of the domestic arbitrage provision. Due to the already limited scope and applicability of Rule 201, we believe that expanding the domestic arbitrage provision to cover more trading scenarios would undermine our goals in adopting Rule 201. Thus, we are adopting the provision as proposed.

Subsection (e)(7) of former Rule 10a–1 contained an exception related to domestic arbitrage.[486] That exception applied to bona fide arbitrage undertaken to profit from a current difference in price between a convertible security and the underlying common stock.[487] The term "bona fide arbitrage" describes an activity undertaken by market professionals in which essentially contemporaneous purchases and sales are effected in order to lock in a gross profit or spread resulting from a current differential in pricing of two related securities.[488] For example, a person may sell short securities to profit from a current price differential based upon a convertible security that entitles him to acquire a number of securities equivalent to the securities sold short. We continue to believe that bona fide arbitrage activities are beneficial to the markets because

[479] *See, e.g.*, letter from BATS (May 2009); letter from SIFMA (June 2009); letter from NYSE Euronext (Sept. 2009).

[480] *See* Former Rule 10a–1 Adopting Release, 3 FR 213.

[481] The Commission initially adopted three exceptions for odd-lot transactions. While the first one, excepting all odd-lot transactions, seemed to make other odd-lot exceptions unnecessary, the 1938 adopting release included all three exceptions without discussion. *See* Former Rule 10a–1 Adopting Release, 3 FR 213.

[482] *See* Exchange Act Release No. 11030 (Sept. 27, 1974), 39 FR 35570 (Oct. 2, 1974) ("1974 Release").

[483] Section 3(a)(38) of the Exchange Act defines the term "market maker," and includes specialists. *See* 15 U.S.C. 78c(a)(38).

[484] *See, e.g.*, letter from SIFMA (June 2009) (stating that the exception should cover convertible arbitrage strategies); letter from AIMA (stating that the provisions relating to domestic and international arbitrage are too narrow in scope, and that they should be broadened to include: (1) Bona fide strategies and risk management tools that provide necessary market liquidity and efficiency, and (2) other forms of convertible securities that differ from standard American-style convertibles); letter from Credit Suisse (June 2009); letter from Citadel *et al.* (June 2009) (stating that the exception should be broadened to cover any transaction in connection with domestic arbitrage, even if not contemporaneous in time); letter from RBC (June 2009) (stating that the exception should accommodate convertible arbitrage strategies as well as arbitrage strategies that do not meet the contemporaneous requirement of this provision); letter from MFA (June 2009) (stating that we should broaden the domestic arbitrage provision to include "bona fide hedging transactions," such as risk arbitrage and statistical arbitrage transactions).

[485] *See* letter from Hudson River Trading; *see also* letter from Liquidnet (expressing concern regarding the complexity of the arbitrage and other exceptions to a short sale price test restriction and concern that the exceptions could result in different rules applying to different industry participants).

[486] *See* Exchange Act Release No. 1645 (Apr. 8, 1938).

[487] *See* 1999 Concept Release, 64 FR 57996.

[488] 1999 Concept Release, 64 FR at 58001, n.54 and accompanying text (discussing the domestic arbitrage exception under former Rule 10a–1). *See also* Section 220.6(b) of Regulation T, which states that the term "bona fide arbitrage" means: "(1) A purchase or sale of a security in one market together with an offsetting sale or purchase of the same security in a different market at as nearly the same time as practicable for the purpose of taking advantage of a difference in prices in the two markets; or (2) A purchase of a security which is, without restriction other than the payment of money, exchangeable or convertible within 90 calendar days of the purchase into a second security together with an offsetting sale of the second security at or about the same time, for the purpose of taking advantage of a concurrent disparity in the prices of the two securities." 12 CFR 220.6(b). *See also* Exchange Act Release No. 15533 (Jan. 29, 1979), 44 FR 6084 (Jan. 31, 1979) ("1979 Release") (interpretation concerning the application of Exchange Act Section 11(a)(1) to bona fide arbitrage).

they tend to reduce pricing disparities between related securities and, thereby, promote market efficiency.[489]

Rule 201(d)(3) parallels the exception in former Rule 10a–1(e)(7). Specifically, Rule 201(d)(3) provides that a broker-dealer may mark a short sale order of a covered security "short exempt" if the broker-dealer has a reasonable basis to believe that the short sale order is "for a good faith account of a person who then owns another security by virtue of which he is, or presently will be, entitled to acquire an equivalent number of securities of the same class as the securities sold; provided such sale, or the purchase which such sale offsets, is effected for the bona fide purpose of profiting from a current difference between the price of the security sold and the security owned and that such right of acquisition was originally attached to or represented by another security or was issued to all the holders of any such securities of the issuer."[490]

The domestic arbitrage exception in former Rule 10a–1 was intended to be consistent with the arbitrage provision of Regulation T.[491] Thus, consistent with that provision, former Rule 10a–1(e)(7) referred to a "special arbitrage account" and not a "good faith account."[492] The Federal Reserve Board amended Regulation T in 1998 to eliminate the "special arbitrage account" and to allow the functions formerly effected in that account to be effected in a "good faith account." Consistent with that language, Rule 201(d)(3) refers to a "good faith account."

Because allowing domestic arbitrage at a price that is less than or equal to the current national best bid will potentially promote market efficiency, we have included in Rule 201 a limited provision to allow broker-dealers to mark short sale orders "short exempt" where the broker-dealer has a reasonable basis to believe that the conditions in proposed Rule 201(d)(3) have been met. Thus, Rule 201 is designed to permit the execution or display of such orders in connection with bona fide arbitrage transactions involving convertible, exchangeable, and other rights to acquire the securities sold short, where such rights of acquisition were originally attached to, or represented by, another security, or were issued to all the holders of any such class of securities of the issuer.

5. International Arbitrage

We are adopting Rule 201(d)(4) without modification to allow a broker-dealer to mark as "short exempt" short sale orders associated with certain international arbitrage transactions. In response to our request for comment, commenters were generally supportive of this provision relating to international arbitrage.[493] Some commenters, however, stated that they believe that the provision should be expanded to cover more trading scenarios.[494]

As discussed above, the short sale price test restriction of Rule 201(b) will apply to a covered security only after the security has experienced a significant intra-day price decline, will remain in place for a limited period of time, and will continue to permit short selling at a price above the current national best bid (rather than, for example, halting all short selling in that security). As such, we do not believe it is appropriate at this time to broaden the scope of the international arbitrage provision. Due to the already limited scope and applicability of Rule 201, we believe that expanding the scope of the international arbitrage provision to cover more trading scenarios would undermine our goals in adopting Rule 201 because its scope would be even further limited, thereby risking not achieving our goals in adopting Rule 201. Thus, we are adopting the provision as proposed.

Former Rule 10a–1(e)(8) included an international arbitrage exception that was adopted in 1939.[495] In adopting the exception, the Commission stated that it was necessary to facilitate "transactions which are of a true arbitrage nature, namely, transactions in which a position is taken on one exchange which is to be immediately covered on a foreign market."[496] We believe likewise that such transactions will have utility under Rule 201. As discussed above in connection with domestic arbitrage, bona fide arbitrage transactions promote market efficiency because they equalize prices at an instant in time in different markets or between relatively equivalent securities.

Rule 201(d)(4) parallels the exception contained in former Rule 10a–1(e)(8). Specifically, Rule 201(d)(4) provides that a broker-dealer may mark a short sale order of a covered security "short exempt" if the broker-dealer has a reasonable basis to believe that the short sale order is "for a good faith account and submitted to profit from a current price difference between a security on a foreign securities market and a security on a securities market subject to the jurisdiction of the United States, provided that the short seller has an offer to buy on a foreign market that allows the seller to immediately cover the short sale at the time it was made."[497]

In Rule 201(d)(4), we have simplified the language of former Rule 10a–1(e)(8) to make it more understandable.[498] In addition, we have changed the reference in former Rule 10a–1(e)(8) from a "special international arbitrage account" to a "good faith account." As discussed above in connection with the domestic arbitrage provision of Rule 201(d)(3), this revision will make the provision consistent with the arbitrage provision in Regulation T.

In addition, as proposed, we have incorporated language from the exception in former Rule 10a–1(e)(12) that provided that, for purposes of the international arbitrage exception, a depository receipt for a security shall be deemed to be the same security represented by the receipt. This language was originally included in the Commission's 1939 release adopting the international arbitrage exception, but was incorporated separately in former Rule 10a–1(e)(12).[499] Although we requested comment in the Proposal regarding whether a depository receipt for a security should be deemed to be the same security represented by the receipt, we did not receive comments specific to this request.[500] As proposed,

[489] *See* 1979 Release, 44 FR 6084.

[490] Rule 201(d)(3).

[491] *See* 12 CFR 220.6.

[492] *See* Proposal, 74 FR at 18056.

[493] *See, e.g.*, letter from SIFMA (June 2009); letter from RBC (June 2009); letter from NYSE Euronext (Sept. 2009); letter from STANY (Sept. 2009).

[494] *See, e.g.*, letter from RBC (June 2009) (stating that the exception should accommodate convertible arbitrage strategies as well as arbitrage strategies that do not meet the contemporaneous requirement of this provision); letter from Credit Suisse (June 2009); *see also supra* note 484 (discussing comments regarding the domestic arbitrage provision).

[495] *See* Exchange Act Release No. 2039 (Mar. 10, 1939), 4 FR 1209 (Mar. 14, 1939).

[496] *See id.*

[497] Rule 201(d)(4).

[498] Former Rule 10a–1(e)(8) provided that the short sale price test restrictions of that rule shall not apply to: "Any sale of a security registered on, or admitted to unlisted trading privileges on, a national securities exchange effected for a special international arbitrage account for the bona fide purpose of profiting [sic] from a current difference between the price of such security on a securities market not within or subject to the jurisdiction of the United States and on a securities market subject to the jurisdiction of the United States; provided the seller at the time of such sale knows or, by virtue of information currently received, has reasonable grounds to believe that an offer enabling him to cover such sale is then available to him in such foreign securities market and intends to accept such offer immediately."

[499] *See supra* note 495.

[500] *See* Proposal, 74 FR at 18057.

we are incorporating in Rule 201(d)(4) the language from the exception in former Rule 10a–1(e)(12).[501]

As with the exception in former Rule 10a–1(e)(8), Rule 201(d)(4) will apply only to bona fide arbitrage transactions. Thus, this provision will only be applicable if at the time of the short sale there is a corresponding offer in a foreign securities market, so that the immediate covering purchase will have the effect of neutralizing the short sale. We believe Rule 201(d)(4) is necessary to facilitate arbitrage transactions in which a position is taken in a security in the U.S. market, and which is to be immediately covered in a foreign market.[502] Thus, we do not believe that permitting broker-dealers to mark these orders "short exempt" will undermine our goals for adopting Rule 201, and, as described above, we believe facilitating or permitting these transactions has utility in terms of promoting market and pricing efficiency.

6. Over-Allotments and Lay-Off Sales

We have determined to adopt without modification in Rule 201(d)(5) a provision that will permit a broker-dealer to mark as "short exempt" short sale orders by underwriters or syndicate members participating in a distribution in connection with an over-allotment, and any short sale orders for purposes of lay-off sales by such persons in connection with a distribution of securities through a rights or standby underwriting commitment.[503] In response to our request for comment, commenters were generally supportive of inclusion of this provision relating to certain syndicate activity.[504] Some commenters, however, asked that we expand this provision beyond over-allotment and lay-off sales.[505]

As discussed above, the short sale price test restriction of Rule 201(b) will apply to a covered security only after the security has experienced a significant intra-day price decline, will remain in place for a limited period of time, and will continue to permit short selling at a price above the national best bid (rather than, for example, halting all short selling in that security). As such, we do not believe it is appropriate at this time to broaden the scope of the provision relating to over-allotment and lay-off sales. Due to the already limited scope and applicability of Rule 201, we believe that expanding the scope of this provision to cover other sales effected in connection with a distribution would undermine our goals in adopting Rule 201 because it would further limit the scope of the Rule, thereby risking not achieving our goals in adopting Rule 201. Thus, we are adopting the provision as proposed. In addition, we note that we are including a "short exempt" marking provision for syndicate and lay-off sales in part because, as discussed further below, we have historically excepted such activity from short sale rules.

Former Rule 10a–1(e)(10) contained an exception for over-allotment and lay-off sales.[506] Although the exception was not adopted until 1974, the Commission's approval of the concept of excepting over-allotments and lay-off sales from short sale rules is long-standing.[507] In addition, we note that recently we excepted these sales from the July Emergency Order, which among other things required that short sellers borrow or arrange to borrow securities prior to effecting a short sale, stating that it was not necessary for the Order to cover such sales because such activity is covered by Regulation M under the Exchange Act,[508] an anti-manipulation rule.[509] In accordance with the long-standing Commission position regarding these sales, we are including in Rule 201(d)(5) a provision to permit broker-dealers to mark as "short exempt" short sale orders in connection with over-allotment and lay-off sales, which provision also parallels the exception in former Rule 10a–1(e)(10).

7. Riskless Principal Transactions

We have determined to adopt without modification in Rule 201(d)(6) a provision that will permit a broker-dealer to mark as "short exempt" short sale orders where broker-dealers are facilitating customer buy orders or sell orders where the customer is net long, and the broker-dealer is net short but is effecting the sale as riskless principal.[510] In response to our request for comment, commenters that specifically addressed this provision supported its inclusion.[511]

As discussed in the Proposal,[512] in 2005, the Commission, via authority delegated to the Staff, granted exemptive relief under former Rule 10a–1 for any broker-dealer that facilitates a customer buy or long sell order on a riskless principal basis.[513] In granting the relief, the Commission noted representations made in the letter requesting relief that, in the situation where the amount of securities that the broker-dealer purchases for the customer may not be sufficient to give the broker-dealer an overall net "long" position, former Rule 10a–1 would constrain the ability of the broker-dealer to fill the customer buy order. Further, the Commission noted representations in the letter requesting relief that, because such short sales would be effected only in response to a customer buy order, this should vitiate any concerns about such sales having a depressing impact on the security's price.[514]

In addition, the Commission noted representations made in the letter requesting relief that where a broker-dealer is facilitating a customer long sale order in a riskless principal transaction, because the ultimate seller is long the shares being sold, these transactions present none of the potential abuses that former Rule 10a–1 was designed to address.[515] The Commission also noted representations that the application of former Rule 10a–1 to riskless principal transactions involving a customer long sale can inhibit the broker-dealer's ability to provide timely (or any) execution to such customer long sale. Specifically, if the broker-dealer has a net short position, the broker-dealer will be restricted from executing its own principal trade to complete the first leg of the riskless principal transaction.[516]

[501] To the extent that the short sale is of a depository receipt and the seller intends to purchase the same security represented by the depository receipt to immediately cover the short sale of the depository receipt, the sale may be marked "short exempt" provided that the seller reasonably believes at the time of the sale that it will be able to convert the security to be purchased into the depository receipt and deliver the depository receipt by settlement date for the sale.

[502] We note that the requirement that the transaction be "immediately" covered on a foreign market requires the foreign market to be open for trading at the time of the transaction. *See* Proposal, 74 FR at 18057, n.166; *see also* 2003 Regulation SHO Proposing Release, 68 FR at 62986, n.119.

[503] *See* Rule 201(d)(5).

[504] *See, e.g.,* letter from BATS (May 2009); letter from SIFMA (June 2009); letter from NYSE Euronext (Sept. 2009).

[505] *See, e.g.,* letter from SIFMA (June 2009).

[506] *See* 1974 Release, 39 FR 35570.

[507] *See, e.g.,* Exchange Act Release No. 3454 (July 6, 1946), in which the Commission approved the NYSE's special offering plan, which permitted short sales in the form of over-allotments to facilitate market stabilization.

[508] 17 CFR 242.100 *et seq.*

[509] *See* Exchange Act Release No. 58190 (July 18, 2008), 73 FR 42837 (July 23, 2008) (amending the July Emergency Order to include exceptions for certain short sales).

[510] *See* Rule 201(d)(6).

[511] *See, e.g.,* letter from BATS (May 2009); letter from SIFMA (June 2009); letter from Credit Suisse (June 2009); letter from NYSE Euronext (Sept. 2009).

[512] *See* Proposal, 74 FR at 18057–18058.

[513] *See* letter from James A. Brigagliano, Assistant Director, Division of Market Regulation, SEC, to Ira Hammerman, Senior Vice President and General Counsel, Securities Industry Association, dated July 18, 2005 ("Riskless Principal Letter").

[514] *See id.*

[515] *See id.*

[516] *See id.*

Thus, compliance with former Rule 10a–1 would adversely affect a broker-dealer's ability to provide best execution to a customer order.[517]

Taken together, Rules 201(a)(8) and (d)(6) parallel the conditions for relief in the Riskless Principal Letter.[518] Consistent with the relief granted in the Riskless Principal Letter, we believe that including a provision to permit a broker-dealer to mark "short exempt" short sale orders in connection with riskless principal transactions is appropriate and will not undermine our goals in adopting short sale price test regulation. In particular, we note that such a provision will facilitate a broker-dealer's ability to provide best execution to customer orders. In addition, such provision will apply only where the customer is selling long.

Rule 201(a)(8) defines the term "riskless principal" to mean "a transaction in which a broker or dealer, after having received an order to buy a security, purchases the security as principal at the same price to satisfy the order to buy, exclusive of any explicitly disclosed markup or markdown, commission equivalent, or other fee, or, after having received an order to sell, sells the security as principal at the same price to satisfy the order to sell, exclusive of any explicitly disclosed markup or markdown, commission equivalent, or other fee."[519]

Rule 201(d)(6) provides that a broker-dealer may mark a short sale order "short exempt" if the broker-dealer has a reasonable basis to believe that the short sale order is to effect the execution of a customer purchase or the execution of a customer "long" sale on a riskless principal basis.[520] In addition, Rule 201(d)(6) requires the broker-dealer, if it marks an order "short exempt" under this provision, to have written policies and procedures in place to assure that, at a minimum: (i) The customer order was received prior to the offsetting transaction; (ii) the offsetting transaction is allocated to a riskless principal or customer account within 60 seconds of execution; and (iii) that it has supervisory systems in place to produce records that enable the broker-dealer to accurately and readily reconstruct, in a time-sequenced manner, all orders on which the broker-dealer relies pursuant to this provision.[521]

We believe that Rule 201(d)(6) will provide broker-dealers with additional flexibility to facilitate customer orders and provide best execution. In addition, we believe that the conditions set forth in Rule 201(d)(6) will provide a mechanism for the surveillance of the provision's use by linking it to specific incoming orders and executions, and by requiring broker-dealers to establish procedures for handling such transactions. These requirements will help ensure that broker-dealers are complying with Rule 201(d)(6).

8. Transactions on a Volume-Weighted Average Price Basis

We have determined to adopt in Rule 201(d)(7) without modification the ability for a broker-dealer to mark as "short exempt" certain short sale orders executed on a volume-weighted average price ("VWAP") basis. In response to the Proposal, commenters to this provision were supportive of the provision. Some commenters, however, requested that we expand this provision to, for example, cover all benchmark orders, similar to the exception in Rule 611 of Regulation NMS.[522] As discussed above, the short sale price test restriction of Rule 201(b) will apply to a covered security only after the security has experienced a significant intra-day price decline, will remain in place for a limited period of time, and will continue to permit short selling at a price above the current national best bid (rather than, for example, halting all short selling in that security). As such, we do not believe it is appropriate at this time to broaden the scope of the provision relating to transactions on a VWAP basis. Due to the already limited scope and applicability of Rule 201, we believe that expanding the scope of this provision to cover other transactions would undermine our goals in adopting Rule 201 because it would further limit the scope of the Rule, thereby risking not achieving our goals in adopting Rule 201. Thus, we are adopting the provision as proposed.

Under former Rule 10a–1, the Commission, via authority delegated to the Staff, granted limited relief from that rule in connection with short sales executed on a VWAP basis.[523] The relief was limited to VWAP transactions that are arranged or "matched" before the market opens at 9:30 a.m., but are not assigned a price until after the close of trading when the VWAP value is calculated. The Commission granted the exemptions based, in part, on the fact that these VWAP short sale transactions appeared to pose little risk of facilitating the type of market effects that former Rule 10a–1 was designed to prevent.[524] In particular, the Commission noted that the pre-opening VWAP short sale transactions do not participate in or affect the determination of the VWAP for a particular security.[525] Moreover, the Commission stated that all trades used to calculate the day's VWAP would continue to be subject to former Rule 10a–1.[526]

Consistent with the relief granted under former Rule 10a–1 and with the Proposal, we are providing that a broker-dealer may mark as "short

[517] *See id.*

[518] These conditions are also consistent with the definition of "riskless principal transactions" under Rule 10b–18 of the Exchange Act. *See* 17 CFR 240.10b–18(a)(12).

[519] Rule 201(a)(8). In addition to being consistent with the conditions in the Riskless Principal Letter and Rule 10b–18(a)(12) of the Exchange Act, this definition is consistent with the definition of "riskless principal" in FINRA Rule 6642. *See* FINRA Rule 6642(d). We note that Rule 201(a)(8), as adopted, is slightly modified from the definition in the Proposal in that we have added language to clarify that the term "same price" shall be exclusive of any explicitly disclosed markup or markdown, commission equivalent, or other fee. This language is consistent with the conditions in the Riskless Principal Letter and Rule 10b–18(a)(12). It is also consistent with FINRA's trade reporting rules which require a riskless principal transaction in which both legs are executed at the same price to be reported once, in the same manner as an agency transaction, exclusive of any markup, markdown, commission equivalent, or other fee. *See* FINRA Rule 6380A(d)(3)(B).

[520] *See* Rule 201(d)(6). Due to the modification to the definition of "riskless principal" in Rule 201(a)(8), we have not included in Rule 201(d)(6) the proposed language that stated that the purchase or sell order must be given the same per-share price at which the broker-dealer sold or bought shares to satisfy the facilitated order, exclusive of any explicitly disclosed markup or markdown, commission equivalent or other fee. *See also supra* note 519.

[521] *See* Rule 201(d)(6). We note that we determined to adopt, as proposed, in Rule 201(d)(6) an explicit requirement that broker-dealers must establish policies and procedures for handling such transactions to be consistent with the conditions in the Riskless Principal Letter and Rule 10b–18(a)(12), which also contain such a requirement.

[522] *See, e.g.,* letter from SIFMA (June 2009); letter from RBC (June 2009); *see also* letter from Goldman Sachs (June 2009); letter from ICI (June 2009) (stating that a broadened exception would be necessary to facilitate execution of the types of large orders executed by institutional investors and that such benchmark orders do not raise concerns of manipulation or negative market effects that a short sale price test restriction would be designed to prevent); letter from Credit Suisse (Sept. 2009) (positing that the exception should be extended to cover any orders executed on a similar formulaic basis as VWAP orders).

[523] *See e.g.* letter from Larry E. Bergmann, Senior Associate Director, Division of Market Regulation, SEC, to Edith Hallahan, Associate General Counsel, Phlx, dated Mar. 24, 1999; letter from Larry E. Bergmann, Senior Associate Director, Division of Market Regulation, SEC, to Soo J. Yim, Wilmer, Cutler & Pickering, dated Dec. 7, 2000; letter from James Brigagliano, Assistant Director, Division of Market Regulation, SEC, to Andre E. Owens, Schiff Hardin & Waite, dated Mar. 30, 2001; letter from James Brigagliano, Assistant Director, Division of Market Regulation, SEC, to Sam Scott Miller, Esq., Orrick, Herrington & Sutcliffe LLP, dated May 12, 2001; letter from James Brigagliano, Assistant Director, Division of Market Regulation, SEC, to William W. Uchimoto, Esq., Vie Institutional Services, dated Feb. 12, 2003.

[524] *See id.*

[525] *See id.*

[526] *See id.*

exempt" certain short sale orders executed at the VWAP. Rule 201(d)(7) differs from the relief granted under former Rule 10a–1, however, in that it is not limited to VWAP transactions that are arranged or "matched" before the market opens at 9:30 a.m., or that are not assigned a price until after the close of trading when the VWAP value is calculated. As noted in the Proposal, we believe this restriction is not necessary because VWAP short sale transactions appear to pose little risk of facilitating the type of market effects that a short sale price test restriction is designed to prevent. In addition, in contrast to the Proposal, we have not included in Rule 201 the requirement that no short sale orders marked "short exempt" may be used to calculate the VWAP. We have not incorporated this condition into Rule 201(d)(7) because the information used to calculate the VWAP will not contain information regarding whether an order was marked "short exempt."

Thus, pursuant to Rule 201(d)(7), a broker-dealer may mark a short sale order of a covered security "short exempt" if the broker-dealer has a reasonable basis to believe that the short sale order is for the sale of a covered security at the VWAP that meets the following conditions: [527] (1) The VWAP for the covered security is calculated by: Calculating the values for every regular way trade reported in the consolidated system for the security during the regular trading session, by multiplying each such price by the total number of shares traded at that price; compiling an aggregate sum of all values; and dividing the aggregate sum by the total number of reported shares for that day in the security; (2) the transactions are reported using a special VWAP trade modifier; (3) the VWAP matched security qualifies as an "actively-traded security" (as defined under Rules 101(c)(1) and 102(d)(1) of Regulation M), or where the subject listed security is not an "actively-traded security," the proposed short sale transaction will be permitted only if it is conducted as part of a basket transaction of twenty or more securities in which the subject security does not comprise more than 5% of the value of the basket traded; (4) the transaction is not effected for the purpose of creating actual, or apparent, active trading in or otherwise affecting the price of any security; and (5) a broker or dealer will act as principal on the contra-side to fill customer short sale orders only if the broker-dealer's position in the covered security, as committed by the broker-dealer during the pre-opening period of a trading day and aggregated across all of its customers who propose to sell short the same security on a VWAP basis, does not exceed 10% of the covered security's relevant average daily trading volume, as defined in Regulation M.[528]

Except as discussed above, the conditions set forth in Rule 201(d)(7) parallel the conditions contained in the exemptive relief from former Rule 10a–1 granted for VWAP short sale transactions. We believe that these conditions worked well in restricting the exemptive relief to situations that generally would not raise the harms that short sale price tests are designed to prevent. We believe they will be similarly effective in serving that function today and, therefore, we have incorporated them into Rule 201(d)(7).

9. Decision Not To Adopt a Provision That a Broker-Dealer May Mark an Order "Short Exempt" in Connection With Bona Fide Market Making Activity

As discussed in the Proposal, former Rule 10a–1(e)(5) provided a limited exception from the restrictions of that rule for "[a]ny sale * * * by a registered specialist or registered exchange market maker for its own account on any exchange with which it is registered for such security, or by a third market maker for its own account over-the-counter, (i) Effected at a price equal to or above the last sale, regular way, reported for such security pursuant to an effective transaction reporting plan * * *. *Provided, however,* That any exchange, by rule, may prohibit its registered specialist and registered exchange market makers from availing themselves of the exemption afforded by this paragraph (e)(5) if that exchange determines that such action is necessary or appropriate in its market in the public interest or for the protection of investors." [529] Unless prohibited by exchange rule, this exception was intended to permit registered specialists or market makers to protect customer orders against transactions in other markets in the consolidated system by allowing them to sell short at a price equal to the last trade price reported to the consolidated system, even if that sale was on a minus or zero-minus tick.[530] Although former Rule 10a–1 included this exception for market makers, exchanges adopted rules that prohibited their registered specialists and market makers from availing themselves of this exception.[531] In addition, former Rule 10a–1 did not contain a general exception for short selling in connection with bona fide market making activities.[532]

In the Proposal, in connection with one proposed rule, the proposed circuit breaker halt rule, we included a provision that would permit a broker-dealer to mark a short sale order "short exempt" in connection with certain bona fide market making activities. None of the other proposed rules contained a "short exempt" marking provision with respect to bona fide market making activities. In connection with the proposed circuit breaker halt rule, we included an exception for equity and options market makers engaged in bona fide market making activities.[533] We also included in the proposed circuit breaker halt rule an exception related to bona fide market making in derivatives.[534]

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[527] *See* Rule 201(d)(7).

[528] *See* Rule 201(d)(7); 17 CFR 242.100(b) (defining average daily trading volume), 242.101(c)(1), 242.102(d)(1).

[529] *See* Proposal, 74 FR at 18059.

[530] *See* 1974 Release, 39 FR 35570. Former Rule 10a–1(a)(1)(i) referenced the last sale price reported to an effective transaction reporting plan, but former Rule 10a–1(a)(2) also permitted an exchange to make an election to use the last sale price reported in that exchange market. Certain exchanges, such as the NYSE, implemented short sale price test rules consistent with former Rule 10a–1(a)(2). *See, e.g.,* former NYSE Rule 440B.

[531] *See* 1974 Release, 39 FR 35570.

[532] We note, however, that NASD's former bid test contained an exception for short sales executed by qualified market makers in connection with bona fide market making. Although the NASD's former bid test contained an exception for short sales executed by qualified market makers in connection with bona fide market making activity, we understand that market makers relied on the exception a small percentage of the time. For example, a 1997 study indicates that during a sample month in 1997, market maker short sales at or below the inside bid accounted for only 2.41% of their total share volume. *See* D. Timothy McCormick and Bram Zeigler, *The Nasdaq Short Sale Rule: Analysis of Market Quality Effects and The Market Maker Exemption, NASD Economic Research,* (August 7, 1997) at 27; *see also* 2003 Regulation SHO Proposing Release, 68 FR at 62989. In addition, we note that when the Commission approved NASD's former bid test and the market maker exception to the bid test, it noted concerns that the market maker exception could create opportunities for abusive short selling. *See* Exchange Act Release No. 34277 (June 29, 1994), 59 FR 34885 (July 7, 1994). *See also supra* note 43 (discussing NASD Rule 3350).

[533] *See* Proposal, 74 FR at 18110. Proposed Rule 201(d)(1) of the proposed circuit breaker halt rule provided that the short selling halt would not apply to "[a]ny sale of a covered security by a registered market maker, block positioner, or other market maker obligated to quote in the over-the-counter market, in each case that are selling short a covered security as part of bona fide market making in such covered security." *Id.*

[534] *See id.* Proposed Rule 201(d)(4) of the proposed circuit breaker halt rule provided that the short selling halt would not apply to "[a]ny sale of a covered security by any person that is a market maker, including an over-the-counter market maker, if the sale is part of a bona fide market making and hedging activity related directly to bona fide market making in: (i) Derivative securities based on that covered security; or (ii) exchange traded funds and exchange traded notes of which that covered security is a component." *Id.*

In response to our decision not to provide in the Proposal for most of the proposed alternatives that a broker-dealer may mark an order "short exempt" in connection with bona fide market making activity, we received a wide variety of comments both supporting and opposing such a provision. Many commenters stated that any short sale price test restriction adopted by the Commission must include an exception for market makers due to the large amount of liquidity that they provide to the markets; although comments varied with respect to the necessity of such an exception to the various proposed price test restrictions and circuit breaker rules and to whom such an exception should apply.[535] Commenters stated that the lack of a market maker exception to any short sale price test restriction could result in, among other things, reduced liquidity, increased bid-ask spreads, increased volatility, increased barriers to entry for new market makers, reduced competition among market makers, and increased costs to market makers and investors.[536] Some commenters stated that the Commission should consider exceptions that would permit high frequency traders [537] and other market makers to continue to provide the same level of liquidity to the markets.[538]

Some commenters stated that an exception for options market makers, in particular, would be necessary for any short sale price test restriction, citing the important role that short selling plays in an options market maker's ability to hedge risk and the negative impact that a short sale price test restriction would have on options market quality, liquidity, bid-ask spreads, quote size, and investor costs.[539] One commenter noted that although former Rule 10a–1 did not contain an options market maker exception, the NASD's former bid test contained an exception that "allowed options market makers to provide liquidity and depth for listed options by allowing them to hedge," but that also had "limited definitions and scope." [540] Another commenter recognized the risk of a transference effect resulting from an options market maker exception, namely that an exception may facilitate short selling by buying puts from or selling calls to market makers, but stated that there was no empirical evidence showing that the risk is more than theoretical.[541]

Some commenters stated that a market maker exception should include market makers in listed and OTC derivatives.[542] Other commenters stated that a market maker exception should cover block positioners.[543] In addition, some commenters stated that a market maker exception should include market makers in convertibles and warrants.[544] Several commenters stated that an exception for market makers in ETFs should be included in any price test restriction adopted by the Commission.[545]

In addition, some commenters stated that to not include an exception for bona fide market making activities is inconsistent with the Commission's short sale-related emergency orders issued in mid- to late-2008, which included various forms of exceptions for bona fide market making activities.[546] Commenters also noted that since its adoption in 2004, Regulation SHO has included an exception for bona fide market making activities from the "locate" requirement of Rule 203(b)(1).[547] Several commenters also noted that fails to deliver resulting from certain bona fide market making activity are provided additional time to be closed out under Regulation SHO's close-out requirements.[548]

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[535] *See, e.g.,* roundtable statement of Rosenblatt Securities; letter from BATS (May 2009); letter from Matlock Capital (May 2009); letter from Pink OTC; letter from Direct Edge (June 2009); letter from Engmann Options; letter from Prof. Rosenthal; letter from Credit Suisse (June 2009); letter from John Gilmartin, Co-CEO and Ben Londergan, Co-CEO, Group One Trading, L.P., dated June 17, 2009 ("Group One Trading (June 2009)"); letter from Allston Trading (June 2009); letter from Knight Capital (June 2009); letter from STANY (June 2009); letter from AIMA; letter from Barclays (June 2009); letter from Citadel *et al.* (June 2009); letter from EWT (June 2009); letter from GETCO (June 2009); letter from Goldman Sachs (June 2009); letter from ICI (June 2009); letter from NYSE Euronext (June 2009); letter from RBC (June 2009); letter from SIFMA (June 2009); letter from STA (June 2009); letter from T.D. Pro Ex; letter from Vanguard (June 2009); letter from Direct Edge (Sept. 2009); letter from BATS (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from Group One Trading (Sept. 2009); letter from Allston Trading (Sept. 2009); letter from Knight Capital (Sept. 2009); letter from STANY (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from EWT (Sept. 2009); letter from GETCO (Sept. 2009); letter from Goldman Sachs (Sept. 2009); letter from NYSE Euronext (Sept. 2009); letter from RBC (Sept. 2009); letter from SIFMA (Sept. 2009); letter from William J. Brodsky, Chairman and CEO, The Chicago Board Options Exchange, Inc., dated Sept. 21, 2009 ("CBOE (Sept. 2009)"); letter from Edward Jones; letter from Virtu Financial.

[536] *See, e.g.,* letter from SIFMA (June 2009); letter from Knight Capital (June 2009); letter from EWT (June 2009); letter from GETCO (June 2009); letter from Goldman Sachs (June 2009); letter from EWT (Sept. 2009); letter from Virtu Financial; *but cf.* letter from Dr. Jim DeCosta, dated Sept. 14, 2009 ("Dr. Jim DeCosta") (noting that there are currently few barriers to entry for market makers and abuse can arise from small market makers, who are in need of business, being willing to misuse a bona fide market maker exemption in exchange for order flow).

[537] *See* letter from Bingham McCutchen.

[538] *See, e.g.*, roundtable statement of Rosenblatt Securities; letter from MFA (June 2009); *see also* letter from Credit Suisse (Mar. 2009).

[539] *See, e.g.,* roundtable statement of Rosenblatt Securities; letter from BATS (May 2009); letter from Matlock Capital (May 2009); letter from Direct Edge (June 2009); letter from Engmann Options; letter from Prof. Rosenthal; letter from Credit Suisse (June 2009); letter from Group One Trading (June 2009); letter from STANY (June 2009); letter from John Favia, Blue Capital Group LLC, dated June 19, 2009 ("Blue Capital"); letter from Goldman Sachs (June 2009); letter from ISE (June 2009); letter from NYSE Euronext (June 2009); letter from RBC (June 2009); letter from SIFMA (June 2009); letter from STA (June 2009); letter from T.D. Pro Ex; letter from Boston Options Exchange *et al.* (June 2009); letter from Direct Edge (Sept. 2009); letter from BATS (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from Group One Trading (Sept. 2009); letter from Knight Capital (Sept. 2009); letter from STANY (Sept. 2009); letter from Goldman Sachs (Sept. 2009); letter from ISE (Sept. 2009); letter from NYSE Euronext (Sept. 2009); letter from RBC (Sept. 2009); letter from SIFMA (Sept. 2009); letter from Boston Options Exchange, Chicago Board Options Exchange, International Securities Exchange, Nasdaq Options Market, Nasdaq OMX PHLX, NYSE Amex, NYSE Arca and The Options Clearing Corporation, dated Sept. 22, 2009 ("Boston Options Exchange *et al.* (Sept. 2009)"); letter from CBOE (Sept. 2009).

[540] Letter from CBOE (June 2009); *see also* letter from Boston Options Exchange *et al.* (June 2009); letter from ISE (June 2009); letter from Citadel *et al.* (June 2009); letter from STANY (June 2009); letter from GETCO (June 2009).

[541] *See* letter from Blue Capital; *but cf.* letter from John H. Frazer, Jr., dated May 4, 2009 ("Frazer") (stating that if options market makers are not subject to the short sale price test restriction, then "short sellers will simply purchase Puts knowing that Options Market Makers will simply sell the stock short without restriction.").

[542] *See, e.g.,* letter from Direct Edge (June 2009); letter from Credit Suisse (June 2009); letter from STANY (June 2009); letter from Barclays (June 2009); letter from Goldman Sachs (June 2009); letter from ICI (June 2009); letter from NYSE Euronext (June 2009); letter from RBC (June 2009); letter from SIFMA (June 2009); letter from ISDA; letter from Direct Edge (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from STANY (Sept. 2009); letter from Goldman Sachs (Sept. 2009); letter from RBC (Sept. 2009); letter from SIFMA (Sept. 2009).

[543] *See* letter from Credit Suisse (June 2009); letter from RBC (June 2009); letter from SIFMA (June 2009); letter from SIFMA (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from RBC (Sept. 2009).

[544] *See, e.g.,* letter from Credit Suisse (June 2009); letter from SIFMA (June 2009); letter from Credit Suisse (Sept. 2009); letter from Direct Edge (Sept. 2009); letter from SIFMA (Sept. 2009).

[545] *See, e.g.,* letter from Credit Suisse (June 2009); letter from Allston Trading (June 2009); letter from STANY (June 2009); letter from Goldman Sachs (June 2009); letter from ICI (June 2009); letter from SIFMA (June 2009); letter from SIFMA (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from STANY (Sept. 2009); letter from Goldman Sachs (Sept. 2009); letter from Direct Edge (Sept. 2009).

[546] *See, e.g.,* letter from SIFMA (June 2009); letter from RBC (June 2009); letter from CBOE (June 2009); letter from Boston Options Exchange *et al.* (June 2009); letter from ISE (June 2009); letter from Citadel *et al.* (June 2009); letter from Goldman Sachs (June 2009); *see also supra* Section II.C. (discussing the Commission's emergency orders).

[547] *See, e.g.,* letter from SIFMA (June 2009); letter from CBOE (June 2009); letter from Boston Options Exchange *et al.* (June 2009); letter from Goldman Sachs (June 2009); letter from GETCO (June 2009); *see also* 17 CFR 242.203(b)(2)(iii).

[548] *See, e.g.*, letter from Goldman Sachs (June 2009); letter from Wolverine; letter from Boston

Several commenters, however, discussed the importance of limiting a market maker exception to bona fide market making activity and requested that the Commission define the term strictly so as to eliminate the possibility for gaming.[549] Moreover, some commenters stated that a market maker exception may not be necessary. For example, commenters noted that equity market makers will usually sell at their offer quote, which would not be inhibited by any price test restriction.[550] One commenter stated that if we were to adopt a circuit breaker approach with the alternative uptick rule, an equity market making exception may not be as critical because equity market makers generally post their offers one price increment above the national best bid.[551] This commenter stated that "[i]n a market characterized by the kind of decline that would trigger a circuit breaker, remaining above the [national best bid] will tend to be the natural norm."[552]

Other commenters stated that there should not be an exception for market makers in any short sale price test restriction that the Commission adopts.[553] One commenter noted that the activities of market makers "are not unique in contributing to market efficiency; all market participants, regardless of trading frequency or professional expertise, improve market quality by their very participation, whether or not their trading activity is arbitrage or professional market making * * * the Commission's goal should be to implement rules that are sufficiently focused and require few, if any, exceptions to maintain market quality."[554] In addition, as discussed in Section III.B. above, several commenters cautioned against the Commission adopting numerous exceptions and discussed problems that may arise from adopting a short sale price test restriction with many or complex exceptions, such as additional implementation difficulties, greater compliance costs, lack of uniformity that may cause unfair application of the rule, increased opportunities for gaming and abuse, and, overall, a less effective rule that only applies to a limited number of short sales.[555]

At this time, we believe that including a provision to permit broker-dealers to mark as "short exempt" short sale orders in connection with market making activity in the equity or options markets is not necessary and would not advance the goals of our adopting a short sale price test restriction. We recognize that there are distinct differences between options market making and market making in the equity markets and that Rule 201 may impact these markets differently. In addition, we recognize commenters' concerns regarding the potential negative market impact of not including an exception for market making activity in the equity or options markets. Due to the reasons discussed below, however, we believe such impact, if any, would be limited. In addition, we believe that the potential costs of not including exceptions for equity and options market makers are justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from driving down further the price of a security that has already experienced a significant intra-day price decline.

We believe that the potential negative market impact from not including an equity or options market maker exception to Rule 201 will be limited, in large part, because Rule 201 is a narrowly-tailored Rule that will impose a short sale price test restriction only if the price of a covered security declines by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day. In addition, once triggered, the short sale price test restriction will apply for a limited period of time—the remainder of the day on which the circuit breaker has been triggered and the following day. Thus, unlike NASD's former bid test or former Rule 10a–1 (which also did not include an exception for bona fide market making activity), Rule 201 does not impose a short sale price test restriction that will apply all the time to all covered securities. Nor does Rule 201 impose a halt on short selling. Instead, Rule 201 is a targeted Rule that will not impact trading in the majority of covered securities. As discussed in more detail above,[556] in response to our request for comment on an appropriate threshold at which to trigger the proposed circuit breaker short sale price restrictions, commenters submitted estimates of the number of securities that would trigger a circuit breaker rule at a 10% threshold[557] and the estimates reflect that a 10% circuit breaker threshold, on average, should result in a limited percentage of covered securities triggering the threshold.[558] In addition, following its review of trading data, the Staff found that, during the period covering April 9, 2001 to September 30, 2009, the price test restrictions of Rule 201 would have, on an average day, been triggered for approximately 4% of covered securities.[559] The Staff also found that for a low volatility period, covering January 1, 2004 to December 31, 2006, the 10% trigger level of Rule 201 would have, on an average day, been triggered for approximately 1.3% of covered securities.[560]

In addition, we believe that any negative market impact due to the lack of a bona fide market making exception for equity market makers will be limited, if any, because as noted by some commenters, for the most part, equity market makers sell at their offer quote.[561] Thus, the price test restriction of Rule 201, that requires short selling at a price above the national best bid and only if the circuit breaker has been triggered, is consistent with equity market making strategies because these market makers generally post their offer quotes at a price above the national best bid.[562] In addition, because equity market makers typically provide liquidity on the opposite side of the market, if a covered security is experiencing significant downward price pressure such that it is subject to

Options Exchange *et al.* (June 2009); letter from GETCO (Sept. 2009); letter from Virtu Financial; letter from Nasdaq OMX Group (Oct. 2009); *see also* 17 CFR 242.204(a)(3).

[549] *See* letter from Pink OTC; letter from SIFMA (June 2009); letter from STA (June 2009); letter from SIFMA (Sept. 2009); *see also* letter from NYSE Euronext (June 2009); letter from NYSE Euronext (Sept. 2009) (stating that the definition should contain some obligation to the market).

[550] *See* letter from CBOE (June 2009); letter from GETCO (June 2009). Although GETCO stated that a market maker typically should not need an exception because the market maker will be able to sell short on the offer when providing liquidity, this commenter also noted that market makers such as GETCO "often employ market making strategies that sometimes include removing liquidity on the bid as part of the overall strategy, which may include short selling." GETCO stated that such strategies result in tighter spreads, more liquidity and potentially lower costs to investors. *See* letter from GETCO (June 2009).

[551] *See* letter from Direct Edge (Sept. 2009).

[552] Letter from Direct Edge (Sept. 2009).

[553] *See, e.g.*, letter from David G. Furr, dated Apr. 20, 2009; letter from R. Skinner, dated Apr. 21, 2009; letter from Frazer; letter from IBC; letter from Vitus Lask, dated June 20, 2009; letter from Stephen R. Porpora, dated Sept. 10, 2009; letter from Hudson River Trading; letter from David Furr, dated Nov. 3, 2009.

[554] Letter from Hudson River Trading.

[555] *See supra* note 434.

[556] *See supra* Section III.A.5. (discussing the circuit breaker trigger level).

[557] *See, e.g.,* letter from Jordan & Jordan; letter from Citadel *et al.* (June 2009); letter from MFA (June 2009); letter from SIFMA (June 2009); letter from Credit Suisse (Sept. 2009).

[558] *See supra* notes 305 to 308 and accompanying text.

[559] *See supra* note 310 and accompanying text.

[560] *See supra* note 311 and accompanying text.

[561] *See, e.g.,* letter from CBOE (June 2009); letter from GETCO (June 2009).

[562] *See* letter from Direct Edge (Sept. 2009).

Rule 201, market makers will tend to be buying not selling the security. Thus, equity market makers will continue to be able to provide liquidity in that security.

Although a number of commenters expressed concerns regarding the lack of an options market maker exception from a price test restriction, we do not believe that such an exception under Rule 201 is necessary because, unlike with a ban on short selling, options market makers will be able to sell short to hedge their positions even when the restriction is in place.[563] In addition, not all covered securities have options traded on them ("optionable covered securities"). As discussed above, data provided by commenters and Staff analysis indicate that, on an average day, a limited number of all covered securities would trigger a 10% circuit breaker level.[564] Thus, an even more limited number of optionable covered securities would trigger a 10% circuit breaker, thereby further reducing the need for an options market maker exception to the Rule's requirements. To the extent that an optionable covered security is subject to Rule 201, we recognize this may result in a delay in an options market maker's ability to sell short to hedge a position.[565] Such delay, and the resulting uncertainty options market makers may face (including as the price of an optionable covered security approaches the circuit breaker) regarding their ability to obtain immediate execution of their short sale hedging transactions, may have a negative impact on the options markets, such as the widening of options quote spreads.

We believe, however, that this potential negative market impact and any resulting costs to options market makers will be limited and are justified by the benefits of the Rule. As discussed above, we believe these costs will be limited because, among other things, due to the Rule's circuit breaker approach, the Rule's restrictions will not apply to most optionable covered securities most of the time. In addition, even when a security is experiencing excessive downward price pressure such that the short sale price test restriction of Rule 201 has been triggered for a particular security, we expect there will be purchasers in the market willing to buy the security at the offer or at a price between the current national best bid and offer. Thus, for securities that are subject to Rule 201, there will be buying interest in the market that will result in execution of short sale hedging transactions.

We have also determined not to include an options market maker exception because we are concerned about creating an un-level playing field between options market makers and market makers in other derivatives that sell short to hedge their positions in the derivative.[566] For the reasons discussed above and below, we do not believe that any market maker exception is necessary.

We are also concerned that the inclusion of an exception for equity or options market makers may create an opportunity for potential misuse. Whether from misuse or proper use, if a large volume of short selling were excepted from the short sale price test restrictions of the Rule, such an exception could potentially undermine our goals for adopting the Rule.[567] We are also concerned that the inclusion of an exception could result in significant additional surveillance and compliance costs necessary to help to determine whether market participants are validly claiming the applicable exception and to prevent any misuse. In determining not to include such an exception, we also considered these additional costs.

Although some commenters noted that the NASD's former bid test contained exceptions for equity and options market makers, as noted above, former Rule 10a–1, which was in place for almost seventy years, and applied on a permanent, market-wide basis, did not contain any such exceptions. We are not aware of any negative impact on market quality or any significant costs to investors arising from the lack of such exceptions. In addition, we note that although Regulation SHO currently contains a limited exception from its locate requirement [568] and an additional two days to close out fails to deliver under its close-out requirement for certain market making activity,[569] these exceptions relate to the ability to obtain shares in time to make delivery by settlement date rather than to downward price pressure and potential price manipulation resulting from short selling. Thus, although commenters noted these exceptions as support for an exception from a short sale price test restriction, we do not agree that the inclusion of such exceptions to Regulation SHO's locate and close-out requirements necessitates the inclusion of such an exception in Rule 201.

Moreover, we note that we recently eliminated an exception to Regulation SHO's close-out requirement relating to fails to deliver resulting from options market making activity because, as we noted in the Options Market Maker Elimination Release, a substantial level of fails to deliver continued to persist in threshold securities, and it appeared that a significant number of the fails were as a result of the options market maker exception.[570] In addition, in adopting that amendment, we noted that although we acknowledged commenters' concerns regarding the potential impact of the elimination of the options market maker exception on market making risk, quote depths, spread widths, and market liquidity, we believed that these potential effects were justified by the benefits of requiring such fails to deliver to be closed out within specific time-frames

[563] We note that some commenters, in stating that a short sale price test restriction should include an options market maker exception, provided support for their arguments by referencing the impact of the Short Sale Ban Emergency Order that halted short selling in the securities subject to the emergency order, rather than imposing a short sale price test restriction that would continue to allow short selling while the restriction is in effect. *See, e.g.,* letter from CBOE.

[564] *See supra* note 310 and 311 and accompanying text.

[565] We note that one commenter stated that "[options market makers] need immediacy in their hedges, which means selling at lower than the inside offer quote." *See* letter from CBOE (June 2009). Rule 201, if triggered, limits short selling to a price above the current national best bid. Thus, it does not prevent short selling at a price between the current national best bid and offer.

[566] We also note that, as discussed in Section III.A.1. above, we, as well as some commenters, are concerned about the ability to obtain a short position through the use of derivative products and that synthetic short positions may increase as a result of the adoption of a short sale price test restriction. We are concerned that inclusion of an exception in Rule 201 for short sale hedging transactions would make such an increase even more likely. *See supra* Section III.A.1.

[567] *See, e.g.,* Ekkehart Boehmer, Charles M. Jones and Xiaoyan Zhang, 2009, *Shackling Short Sellers: The 2008 Shorting Ban.* This study on the Short Sale Ban Emergency Order found that "[d]uring the shorting ban (19 Sep through 8 Oct), [NYSE-executed] short sales are 7.72% of overall trading volume for stocks on the original ban list, compared to 19.32% of overall trading volume over the same time interval for the matching set of non-banned stocks." The authors of the study attributed the on-going short sales in the banned stocks to market makers selling short as part of their market making and hedging activity, as such activity was excepted from the Short Sale Ban Emergency Order. *See id.* While short sale volume decreased in the banned stocks, based on this study's results and its comparison of ban and non-ban stocks, approximately 40% of the short sale trading volume would be expected to be exempt short selling. This short selling may have occurred as a result of market making exceptions.

[568] *See* 17 CFR 242.203(b)(2)(iii).

[569] *See* 17 CFR 242.204(a)(3).

[570] *See* Options Market Maker Elimination Release, 73 FR at 61696. In addition, as we stated in the Options Market Maker Elimination Release, preliminary analysis by the Staff indicated that there was a significant increase in fails to deliver in threshold securities with options traded on them following elimination of the grandfather exception to Regulation SHO's close-out requirement. *See id.* at 61693.

rather than being allowed to persist indefinitely.[571]

Similarly, although we recognize commenters' concerns about the potential impact of the lack of an options market maker exception or a general equity market maker exception on market liquidity, volatility, spread widths, and investor costs, we believe, for the reasons discussed, that these potential costs are justified by the benefits of requiring that when a covered security's price is undergoing significant downward price pressure, short selling in the security by market makers generally is restricted. Moreover, as discussed above, because the short sale price test restriction of Rule 201(b) will apply to a covered security only after the security has experienced a significant intra-day price decline, will remain in place for a limited period of time, and will continue to permit short selling at a price above the current national best bid (rather than, for example, halt all short selling in that security) even when the restriction is in place, we believe that the negative market impact, if any, when the restriction is in place, will be limited.[572]

For the reasons discussed above, rather than provide an exception for short selling in connection with bona fide market making activity, whether in the equity or options markets, we have determined to limit the extent to which market makers will be permitted to sell short without restriction under Rule 201. We note, however, as discussed above, Rule 201 permits broker-dealers to mark short sale orders as "short exempt" in connection with riskless principal transactions. We also note that under Rule 201, a trading center's policies and procedures will be designed to permit the execution or display of short sale orders at the offer. As discussed above, and as noted by some commenters, equity market makers typically will sell at their offer quote.[573] Thus, Rule 201 generally will not restrict short selling by equity market makers engaged in bona fide market making activity. Moreover, in connection with both equity and options market makers, because most covered securities and, to an even greater extent, most optionable covered securities, will not be subject to the short sale price test restriction of Rule 201, these market makers will be able to continue to provide liquidity and hedge positions, as applicable, by selling short at or below the national best bid in most securities most of the time. For all these reasons, at this time we do not believe it is necessary to provide that a broker-dealer may mark an order "short exempt" where the short sale order is in connection with bona fide market making activity, whether in the equity or options markets.[574]

IV. Order Marking

In the Proposal, we proposed amending Rule 200(g) of Regulation SHO to add a "short exempt" marking requirement.[575] Rule 200(g) of Regulation SHO provides that a broker-dealer must mark all sell orders of any security as "long" or "short."[576] As initially adopted, Regulation SHO included an additional marking requirement of "short exempt" applicable to short sale orders if the seller was "relying on an exception from the tick test of 17 CFR 240.10a–1, or any short sale price test of any exchange or national securities association."[577] We adopted amendments to Rule 200(g) of Regulation SHO to remove the "short exempt" marking requirement in conjunction with our elimination of former Rule 10a–1.[578]

In conjunction with the adoption of Rule 201 of Regulation SHO to add a short sale circuit breaker rule, we are amending Rule 200(g) of Regulation SHO, substantially as proposed, to again impose a "short exempt" marking requirement.[579] Specifically, Rule 200(g), as amended, provides that "[a] broker or dealer must mark all sell orders of any equity security as "long," "short," or "short exempt."[580] In addition, Rule 200(g)(2) provides that a sale order shall be marked "short exempt" only if the provisions of paragraph (c) or (d) of Rule 201 are met.[581]

In response to our requests for comment, several commenters noted that a new "short exempt" marking requirement would require adjustments to front end systems, that many firms have multiple front end systems, and that such costs would be multiplied for firms with correspondent clearing operations because each correspondent firm can have its own front end system.[582] Commenters also stated that market participants would need to make adjustments to reporting systems, including blue sheets, OATS, and OTS reporting systems,[583] in addition to order entry and routing applications.[584]

In contrast, several commenters indicated that requiring broker-dealers to mark all sell orders "long," "short," or "short exempt" would provide valuable information to the Commission[585] and that such information would be worth the costs of requiring such marking.[586] One commenter indicated that the information provided by a "short exempt" marking requirement would provide the Commission with data on the extent to which exceptions are being used to circumvent the requirements of Rule 201.[587] In addition, with respect to implementation periods, one commenter stated that the "short exempt" marking requirement would require coding for new fields in order records, which should be accomplished in approximately three months.[588]

After considering the comments, we have determined to adopt the proposed "short exempt" marking requirement, including the requirement that a sale order shall be marked "short exempt" only if the provisions of paragraph (c) or (d) of Rule 201 are met. The "short exempt" marking requirement will provide a record that a broker-dealer is availing itself of one of the provisions of paragraph (c) or (d) of Rule 201. The records provided pursuant to the "short exempt" marking requirements of Rule 200(g) will also aid surveillance by SROs and the Commission for

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[571] *See id.* at 61696. As discussed above and as noted by several commenters to the Proposal and Re-Opening Release, since the elimination of the options market maker exception to Regulation SHO's close-out requirement, among other Commission actions, data from the Staff indicates there has been a significant reduction in fails to deliver. *See supra* note 119 (discussing the recent reduction in fails to deliver).

[572] *See supra* Sections III.A.3. and III.A.4. (discussing, among other things, the market impact of the alternative uptick rule in combination with a circuit breaker approach); *see also infra* Sections X.B.1.a. and X.B.2.a. (discussing the market impact of the alternative uptick rule and the circuit breaker approach).

[573] *See supra* notes 550, 561, and 562 and accompanying text.

[574] We note, however, as discussed in more detail below, we have instructed the Staff to assess the impact of the Rule on the options markets and to provide a written assessment of the impact. *See infra* Section VIII.

[575] *See* Proposal, 74 FR at 18082–18083.

[576] *See* 17 CFR 242.200(g).

[577] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48030.

[578] *See* 2007 Price Test Adopting Release, 72 FR 36348.

[579] In connection with Rule 200(g), we note that we have made one technical modification to Rule 200(g)(2) from the language in the proposed circuit breaker with modified uptick rule. Specifically, we have specified the subsections of Rule 201—subsections (c) and (d)—that set forth the circumstances under which a short sale order may be marked "short exempt."

[580] Rule 200(g).

[581] *See* Rule 200(g)(2).

[582] *See* letter from RBC (June 2009); letter from NSCP; *see also* letter from FIF (June 2009).

[583] *See* letter from RBC (June 2009); letter from NSCP; letter from FIF (June 2009).

[584] *See* letter from FIF (June 2009).

[585] *See, e.g.,* letter from CFA; letter from STA (June 2009).

[586] *See, e.g.,* letter from STA (June 2009).

[587] *See id.*

[588] *See id.*

compliance with the provisions of Rule 201. In addition, under the policies and procedures approach required by Rule 201, the "short exempt" marking requirement will indicate to a trading center whether it must execute or display a short sale order without regard to whether the short sale order is at a price that is less than or equal to the current national best bid.

We recognize that the "short exempt" marking requirement will increase implementation and compliance costs, including costs related to adjusting front-end systems, reporting systems, and order entry and routing applications.[589] We believe, however, that these costs are justified by the benefit of the information that the "short exempt" marking requirement will provide. In addition, to allow sufficient time to make any necessary systems changes, we are providing for a six month implementation period for the "short exempt" marking requirement of Rule 200(g) such that market participants will have to comply with this requirement six months following the effective date of these amendments. We believe that a six month implementation period will provide market participants with sufficient time in which to modify their systems and procedures in order to comply with the proposed marking requirements. In addition, the six month implementation period is consistent with the implementation period for Rule 201.

V. Exemptive Procedures

Consistent with the provisions proposed, Rule 201(f) as adopted includes provisions establishing procedures for the Commission, upon written request or its own motion, to grant an exemption from the Rule's provisions, either unconditionally or on specified terms and conditions, if the Commission determines that such exemption is necessary or appropriate in the public interest and is consistent with the protection of investors.[590] Pursuant to this provision, we will consider and act upon appropriate requests for relief from the provisions of Rule 201 and will consider the particular facts and circumstances relevant to each such request and any appropriate conditions to be imposed as part of the exemption.

In response to our request for comment, one commenter stated that "it is important for the Commission to have detailed procedures for granting exemptions," but that exemptions can decrease overall compliance with the rule by encouraging other market participants to tailor their situation to qualify for an exemption.[591] The commenter stated that the Commission "must set the bar high for those seeking exemptive relief." [592]

We have determined to include in Rule 201 a provision related to granting exemptions from the Rule's provisions in order to provide clear procedures for requests and grants of exemptions. As stated above, we will consider requests for relief and grant exemptions from Rule 201 if the Commission determines that an exemption is necessary or appropriate in the public interest and is consistent with the protection of investors, taking into account the particular facts and circumstances relevant to each such request and any appropriate conditions to be imposed in connection with the exemption.

VI. Overseas Transactions

In connection with former Rule 10a–1, the Commission consistently took the position that the rule applied to trades in securities subject to that rule where the trade was "agreed to" in the U.S., but booked overseas.[593] In addition, in the 2004 Regulation SHO Adopting Release we stated that any broker-dealer using the United States jurisdictional means to effect short sales in securities traded in the United States would be subject to Regulation SHO, regardless of whether the broker-dealer is registered with the Commission or relying on an exemption from registration.[594] For example, a U.S. money manager decides to sell a block of 500,000 shares in a covered security. The money manager negotiates a price with a U.S. broker-dealer, who sends the order ticket to its foreign trading desk for execution. In our view, this trade was agreed to in the United States and occurred in the United States as much as if the trade had been executed by the broker-dealer at a U.S. trading desk. Consistent with these prior statements, we stated in the Proposal that if a short sale is agreed to in the United States, it must be effected in accordance with the requirements of the proposed rules, unless otherwise excepted.[595]

In response to our request for comment, one commenter stated that "[g]enerally speaking, the Commission has taken the position that the provisions of Regulation SHO apply to transactions in covered securities 'agreed to' in the United States, but sent to a foreign market for execution. Notwithstanding, there has been on-going confusion in this area. The Commission should use this opportunity to clarify the applicability of the restrictions (and Regulation SHO generally) to transactions in covered securities executed on overseas markets." [596] Consistent with our prior statements, we note that Rule 201 applies to any short sale effected using the United States jurisdictional means, regardless of the jurisdiction in which the short sale is executed.

VII. Rule 201 Implementation Period

In the Proposal and Re-Opening Release, we proposed a three-month and two-month implementation period, respectively, and requested comment regarding these implementation periods.[597] We are adopting in Rule 201 a six-month implementation period, such that trading centers will have to comply with Rule 201 six months following the effective date of Rule 201. We believe that this implementation period will provide trading centers,

[589] *See infra* Section X.A.3. and Section X.B.4. (discussing the benefits and costs of the "short exempt" order marking requirement).

[590] *See* Rule 201(f).

[591] Letter from STA (June 2009).

[592] *Id.*

[593] *See* Exchange Act Release No. 27938 (Apr. 23, 1990), 55 FR 17949 (Apr. 30, 1990) (stating that the no-action position exempting certain index arbitrage sales from former Rule 10a–1 would not apply to an index arbitrage position that was established in an offshore transaction unless the holder acquired the securities from a seller that acted in compliance with former Rule 10a–1 or other comparable provision of foreign law). *See also* Exchange Act Release No. 21958 (Apr. 18, 1985), 50 FR 16302, 16306, n.48 (Apr. 25, 1985) (stating that, "Rule 10a–1 does not contain any exemption for short sales effected in international markets."). The question of whether a particular transaction negotiated in the U.S. but nominally executed abroad by a foreign affiliate is a domestic trade for U.S. regulatory purposes was also addressed in the Commission's Order concerning Wunsch Auction Systems, Inc. (WASI). The Commission stated its belief that "trades negotiated in the U.S. on a U.S. exchange are domestic, not foreign trades. The fact that the trade may be time-stamped in London for purposes of avoiding rule 390 does not in our view affect the obligation of WASI and BT Brokerage to maintain a complete record of such trades and report them as U.S. trades to U.S. regulatory and self-regulatory authorities and, where applicable, to U.S. reporting systems." *See* Exchange Act Release No. 28899 (Feb. 20, 1991), 56 FR 8377, 8381 (Feb. 28, 1991). In what is commonly referred to as the "fax market," a U.S. broker-dealer acting as principal for its customer negotiates and agrees to the terms of a trade in the U.S., but transmits or faxes the terms overseas to be "printed" on the books of a foreign office. This practice of "booking" trades overseas was analyzed in depth in the Division of Market Regulation's Market 2000 Report. In the Report, the Division estimated that at that time approximately seven million shares a day in NYSE stocks were faxed overseas, and many of these trades were nominally "executed" in the London over-the-counter market. *See* Division of Market Regulation, SEC, *Market 2000: An Examination of Current Equity Market Developments* (Jan. 1994), Study VII, p. 2.

[594] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48014, n.54.

[595] *See* Proposal, 74 FR at 18083–18084.

[596] Letter from RBC (June 2009).

[597] *See* Proposal, 74 FR at 18042; Re-Opening Release, 74 FR at 42036.

broker-dealers and other market participants with sufficient time in which to modify their systems, policies and procedures in order to comply with the requirements of Rule 201.

In response to our request for comment, commenters indicated that a circuit breaker rule triggering the alternative uptick rule will require an implementation period of between three and twelve months.[598] Several commenters noted that because the alternative uptick rule, unlike the other proposed price tests, would not require sequencing of bids or last sale prices, the alternative uptick rule could be implemented more quickly than the other proposed price tests and could be implemented within three to six months.[599] One commenter noted that implementation concerns with respect to a short sale price test restriction could be minimized, provided that trading centers "could leverage existing architecture developed to comply with the Order Protection Rule in Reg NMS (Rule 611)."[600] Another commenter noted that implementation of a circuit breaker triggering the alternative uptick rule would be easier to implement, "provided that the Commission permits firms to leverage the numerous systems changes made to facilitate compliance with Regulation NMS (including the use of internal market data rather than consolidated data supplied by the industry plans)."[601] Other commenters noted that adopting the alternative uptick rule in conjunction with a circuit breaker, rather than as a permanent, market-wide rule, would not add significantly to the implementation time required.[602]

Several commenters, however, did not agree that the absence of a sequencing requirement would shorten the implementation time required for the alternative uptick rule.[603] In addition, several commenters did not agree that previous implementation of Regulation NMS might allow for quicker implementation of a price test.[604] Other commenters stated that adopting the alternative uptick rule in conjunction with a circuit breaker would add to the implementation time.[605] Some commenters expressed concerns that allowing for certain exceptions could affect the implementation time.[606]

We believe that a six month implementation period is appropriate.[607] This implementation period, which is longer than the implementation periods proposed in the Proposal and the Re-opening Release, takes into consideration commenters' concerns that implementation of a price test could be complex. We do not believe that a longer implementation time is warranted because Rule 201 will not require monitoring of the sequence of bids or last sale prices, unlike other proposed price tests, and because Rule 201 will require the implementation of policies and procedures similar to those required for trading centers under Regulation NMS. In addition, market participants will be able to leverage the numerous systems changes made and current architecture developed to facilitate compliance with Regulation NMS. These factors should reduce implementation time.

In addition, we believe the six month implementation period will allow sufficient time to address any complexities implementing the circuit breaker and the "short exempt" order marking requirement.[608] We note that broker-dealers are already familiar with and have experience implementing a "short exempt" marking requirement as Regulation SHO, as originally adopted, included such a requirement.[609] The "short exempt" marking requirement was eliminated together with the elimination of all short sale price test restrictions in July 2007.[610] In addition, we note that broker-dealers were able to make significant systems changes to de-program the "short exempt" marking requirement from their systems in less than 90 days from the compliance date for elimination of the requirement.[611] Thus, we believe that a six month implementation period should be sufficient.

We also believe that a six month implementation period is appropriate for any systems changes that must be made by listing markets and single plan processors to comply with Rule 201. As discussed above, the single plan processors currently receive information from listing markets regarding trading restrictions (*i.e.* Regulatory Halts as defined in those plans) on individual securities and disseminate such information. Thus, the requirements of Rule 201(b)(3) are similar to existing obligations on plan processors pursuant to the requirements of Regulation NMS, the CTA and CQ Plans and the Nasdaq UTP Plan. Due to this similarity, we believe that a six month implementation period is appropriate.

VIII. Decision Not To Implement Rule 201 on a Pilot Basis

In the Proposal, we requested comment regarding whether, before determining whether to adopt a short sale price test restriction or circuit breaker rule on a permanent basis, we should adopt a rule that would apply on a pilot basis to specified securities.[612] In response to our request for comment, a number of commenters stated that any price test restriction should be adopted on a pilot basis.[613] A number of commenters indicated that a pilot study should be conducted prior to adoption of a price test on a permanent basis in order to gather empirical evidence on the effectiveness and/or market impact

[598] *See, e.g.,* letter from FIF (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from Direct Edge (Sept. 2009); letter from EWT (Sept. 2009); letter from NYSE Euronext (Sept. 2009); letter from RBC (Sept. 2009); letter from SIFMA (Sept. 2009); letter from MFA (Oct. 2009); letter from Amer. Bankers Assoc.; *see also* letter from NSCP; letter from RBC (June 2009); letter from STA (June 2009).

[599] *See, e.g.,* letter from Credit Suisse (June 2009); letter from Credit Suisse (Sept. 2009); letter from STA (Sept. 2009); letter from FIF (Sept. 2009).

[600] Letter from MFA (Oct. 2009).

[601] Letter from Goldman Sachs (Sept. 2009).

[602] *See, e.g.,* letter from Credit Suisse (Sept. 2009); letter from Nasdaq OMX Group (Oct. 2009).

[603] *See, e.g.,* letter from Citadel *et al.* (Sept. 2009); letter from NYSE Euronext (Sept. 2009); letter from RBC (Sept. 2009); letter from SIFMA (Sept. 2009).

[604] *See, e.g.,* letter from NSCP; letter from RBC (June 2009).

[605] *See* letter from Direct Edge (Sept. 2009) (stating that adopting the alternative uptick rule with a circuit breaker would add approximately four to six weeks to the development process); letter from NYSE Euronext (Sept. 2009).

[606] *See* letter from Goldman Sachs (Sept. 2009); letter from FIF (Sept. 2009).

[607] We note that, in effect, market participants will have approximately eight months from publication in the **Federal Register** to implement Rule 201. Rule 201 will not become effective until sixty days following publication in the **Federal Register** and the Compliance Date for Rule 201 is six months following the Rule's Effective Date.

[608] *See supra* Section III.B. (discussing the "short exempt" marking provisions of Rule 201) and *supra* Section IV. (discussing the "short exempt" marking requirement of Rule 200(g)).

[609] *See* 2004 Regulation SHO Adopting Release, 69 FR 48008.

[610] *See* 2007 Price Test Adopting Release, 72 FR 36348.

[611] *See* letter from Josephine J. Tao, Assistant Director, Division of Market Regulation, SEC, to Ira Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association, dated July 2, 2007.

[612] *See, e.g.,* Proposal, 74 FR at 18071.

[613] *See, e.g.,* letter from BATS (May 2009); letter from IAG; letter from BIO; letter from James J. Angel, PhD, CFA, Associate Professor of Finance, McDonough School of Business, Georgetown University, dated June 19, 2009 ("Prof. Angel (June 2009)"); letter from Barclays (June 2009); letter from Citadel *et al.* (June 2009); letter from EWT (June 2009); letter from NSCP; letter from RBC (June 2009); letter from STA (June 2009); letter from NYSE Euronext (June 2009); letter from Knight Capital (June 2009); letter from STANY (June 2009); letter from T. Rowe Price (June 2009); letter from Credit Suisse (June 2009); memorandum regarding meeting with Penson; letter from CFA; letter from Knight Capital (Sept. 2009); letter from Prof. Angel (Sept. 2009); letter from Dialectic Capital (Sept. 2009); letter from Direct Edge (Sept. 2009); letter from EWT (Sept. 2009); letter from NYSE Euronext (Sept. 2009); letter from Qtrade; letter from RBC (Sept. 2009); letter from STANY (Sept. 2009); letter from Virtu Financial.

of a price test.[614] Some commenters stated that adopting a price test on a pilot basis only would limit any negative market impact to the subset of securities subject to the price test.[615] Another commenter stated that a pilot study would allow the Commission to gather data on the effects of a price test as compared to a control group not subject to a price test.[616] One commenter noted that a pilot study would allow the Commission to observe the effects of a price test under current market conditions,[617] while another stated that the Commission should study a price test in the context of severe market conditions.[618] Another commenter stated that a pilot study is particularly important for the alternative uptick rule because it has not been in effect in the market previously and would be more restrictive than other proposed price tests.[619] Other commenters noted that a pilot study could provide data regarding the impact or need for various exceptions to a price test.[620] Several commenters indicated that pilot study data should be made publicly available to permit third parties to analyze the results of the pilot study.[621]

In contrast, several commenters stated that the Commission should not adopt a price test restriction on a pilot basis.[622] Several of these commenters expressed concerns regarding the costs to implement a price test on a pilot basis,[623] with some stating that such costs would outweigh the benefits of a pilot study.[624] One commenter stated that a price test should be implemented as soon as possible, without a pilot study, because a pilot study would produce little or no benefit.[625] Several commenters expressed support for a "sunset" provision allowing the Commission to more easily remove a price test restriction if it was determined that the restriction was not meeting the Commission's goals or was harming the market.[626]

We have determined not to adopt Rule 201 on a pilot basis. We believe that adopting the rule on a temporary pilot basis and/or only for a subset of securities will not advance the goals of our adopting Rule 201. For example, one goal in adopting Rule 201 is to address erosion of investor confidence in our markets. We believe that adopting Rule 201 on a pilot basis, such that the Rule would apply for the duration of the pilot only, could undermine this goal because, among other things, investors would know that the Rule is in place for a limited period of time rather than on a permanent basis and, therefore, may believe that any benefits that result from the Rule could be temporary.

In addition, we note that unlike the Pilot, which removed then-existing short sale price test restrictions for a subset of securities, undertaking a pilot study in connection with Rule 201 would require market participants to undertake as much time, effort and expense as full implementation of the new rule. As noted by one commenter, the implementation cost would be the same whether the Rule is adopted on a pilot or a permanent basis.[627] We also do not believe a "sunset" provision would advance our goal of restoring investor confidence because, as with a pilot, investors would know that the Rule is in place for a limited period of time rather than on a permanent basis and, therefore, may believe that any benefits that result from the Rule could be temporary.

We encourage researchers, however, to provide the Commission with their own empirical analyses regarding the impact of the Rule on the options markets, and on market quality in general. We will, moreover, carefully monitor the operation of the Rule to assess its impact and effectiveness, including the Rule's impact on market quality, to determine whether any modifications to the Rule are warranted. In addition, we have instructed the Staff to assess the impact of the Rule on the options markets and to provide us with a written report of their assessment within the shortest time practicable for completing a meaningful study, which we expect, in any event, will not exceed two years from the Compliance Date.

To the extent that we determine at any time that any of the current parameters of Rule 201, such as the exceptions to the Rule, the 10% trigger level, the duration of the price test restriction if triggered, the basing of the trigger level on the prior day's closing price as determined by the covered security's listing market, or changed market conditions, result in Rule 201 not adequately addressing our concerns or meeting our goals in adopting Rule 201, we will consider whether to amend Rule 201, or grant relief thereunder, as appropriate at that time.

IX. Paperwork Reduction Act

A. Background

Certain provisions of the amendments to Regulation SHO contain new "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[628] We submitted the collection of information to the Office of Management and Budget ("OMB") for review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. 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 title for the collection of information is "Rules 201 and 200(g)" and the OMB control number for the collection of information is 3235–0651.

We are adopting amendments to Rules 201 and 200(g) of Regulation SHO under the Exchange Act. The amendments to Rule 201 impose a short sale-related circuit breaker that, if triggered, will impose a short sale price test restriction on a particular security for a limited

[614] *See, e.g.,* letter from BATS (May 2009); letter from BIO; letter from Prof. Angel (June 2009); letter from Credit Suisse (June 2009); letter from Knight Capital (June 2009); letter from NSCP; letter from RBC (June 2009); letter from STANY (June 2009); memorandum regarding meeting with Penson; letter from CFA; letter from Prof. Angel (Sept. 2009); letter from Dialectic Capital (Sept. 2009); letter from Direct Edge (Sept. 2009); letter from EWT (Sept. 2009); letter from Knight Capital (Sept. 2009); letter from Qtrade; letter from RBC (Sept. 2009); letter from STANY (Sept. 2009); *see also* letter from Park National (stating that a review of a price test based on the national best bid should be conducted six months after implementation to ensure effectiveness). We also note that a number of commenters indicated that the Commission should gather empirical evidence through further study, though not necessarily in the form of a pilot study, prior to adopting a price test. *See, e.g.*, letter from BATS (May 2009); letter from Citadel *et al.* (June 2009); letter from Dialectic Capital (June 2009); letter from Geoffrey F. Foisie, Investments Manager, Shawbrook, dated June 16, 2009; letter from Amer. Bar Assoc. (July 2009); letter from Jeffrey W. Rubin, Chair, Committee on Federal Regulation of Securities, American Bar Association, dated Sept. 30, 2009 ("Amer. Bar Assoc. (Sept. 2009)"); letter from Goldman Sachs (Sept. 2009).

[615] *See, e.g.,* letter from Credit Suisse (June 2009); letter from STA (June 2009).

[616] *See* letter from Citadel *et al.* (June 2009).

[617] *See* letter from NYSE Euronext (June 2009).

[618] *See* letter from Virtu Financial.

[619] *See* letter from STANY (Sept. 2009).

[620] *See, e.g.,* letter from T. Rowe Price (June 2009); letter from Direct Edge (Sept. 2009); *see also* letter from Wells Fargo (June 2009) (noting that additional study regarding an exception for bona fide market making activity would be needed if the Commission adopted a circuit breaker rule).

[621] *See* letter from BATS (May 2009); letter from STA (June 2009).

[622] *See, e.g.,* letter from Amer. Bankers Assoc.; letter from SIFMA (June 2009); letter from IBC.

[623] *See, e.g.,* letter from Amer. Bankers Assoc.; letter from NYSE Euronext (June 2009); letter from SIFMA (June 2009); letter from STA (June 2009).

[624] *See, e.g.,* letter from Amer. Bankers Assoc.; letter from SIFMA (June 2009).

[625] *See* letter from IBC.

[626] *See, e.g.,* letter from SIFMA (June 2009); letter from Dialectic Capital (June 2009). One commenter also cited easier removal of the price test restriction as an argument for a pilot study. *See* letter from STANY (June 2009).

[627] *See* letter from STA (June 2009). We note that a number of commenters expressed concerns regarding the implementation costs of a price test. *See infra* Sections X.B.1.b. and X.B.2.b. (discussing implementation costs).

[628] 44 U.S.C. 3501 *et seq.*

period of time. Specifically, Rule 201 requires that a trading center establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day.[629] In addition, the Rule requires that the trading center establish, maintain, and enforce written policies and procedures reasonably designed to impose this short sale price test restriction for the remainder of the day and the following day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan.[630] In addition, we are adopting amendments to Rule 200(g) of Regulation SHO to provide that a broker-dealer may mark certain qualifying sell orders "short exempt." In particular, if the broker-dealer chooses to rely on its own determination that it is submitting the short sale order to the trading center at a price that is above the current national best bid at the time of submission or to rely on an exception specified in the Rule, it must mark the order as "short exempt."[631]

B. Summary

As detailed below, several provisions under the amendments to Regulation SHO impose a new "collection of information" within the meaning of the PRA.

1. Policies and Procedures Requirement Under Rule 201

Rule 201 imposes a new "collection of information" within the meaning of the PRA. Rule 201 requires that a trading center establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day.[632] In addition, the Rule requires that the trading center establish, maintain, and enforce written policies and procedures reasonably designed to impose this short sale price test restriction for the remainder of the day and the following day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan. Thus, a trading center's policies and procedures must be reasonably designed to permit the trading center to be able to obtain information from the single plan processor regarding whether a covered security is subject to the short sale price test restriction of Rule 201; if the covered security is subject to the short sale price test restriction of Rule 201, to determine whether or not the short sale order is priced in accordance with the provisions of Rule 201(b); and to recognize when an order is marked "short exempt" such that the trading center's policies and procedures do not prevent the execution or display of such orders at a price that is less than or equal to the current national best bid, even if the covered security is subject to the short sale price test restriction of Rule 201.[633]

At a minimum, a trading center's policies and procedures must enable a trading center to monitor, on a real-time basis, the national best bid, so as to determine the price at which the trading center may execute or display a short sale order. As mentioned above, a trading center must have policies and procedures reasonably designed to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a price that is less than or equal to the current national best bid.[634]

A trading center must also take such steps as will be necessary to enable it to enforce its policies and procedures effectively. A trading center must regularly surveil to ascertain the effectiveness of the policies and procedures required under the Rule and must take prompt action to remedy deficiencies in such policies and procedures.[635] The nature and extent of the policies and procedures that a trading center must establish to comply with these requirements will depend upon the type, size, and nature of the trading center.

2. Policies and Procedures Requirement Under the Broker-Dealer and Riskless Principal Provisions

Rule 201 contains a broker-dealer provision that requires a new "collection of information" under the PRA. Rule 201(c) permits a broker-dealer submitting a short sale order for the covered security to a trading center to mark the order "short exempt" if the broker-dealer identifies the order as being at a price above the current national best bid at the time of submission.[636] This provision requires a new collection of information in that a broker-dealer marking an order "short exempt" under Rule 201(c) must identify a short sale order as priced in accordance with the requirements of Rule 201(c); establish, maintain, and enforce written policies and procedures reasonably designed to prevent the incorrect identification of orders as being priced in accordance with the requirements of Rule 201(c); regularly surveil to ascertain the effectiveness of these policies and procedures, and to take prompt action to remedy deficiencies.[637]

Rule 201 also contains a riskless principal provision that requires a new "collection of information" under the PRA. Specifically, Rule 201(d)(6) permits a broker-dealer to mark as "short exempt" short sale orders where broker-dealers are facilitating customer buy orders or sell orders where the customer is net long, and the broker-dealer is net short but is effecting the sale as riskless principal, provided certain conditions are satisfied.[638] This provision requires a new collection of information in that it requires a broker-dealer marking an order "short exempt" under this provision to have written policies and procedures in place to assure that, at a

[629] Rule 201(b). *See also supra* Section III.A.7. (discussing the policies and procedures approach).

[630] *Id.*

[631] *See* Rules 200(g) and 200(g)(2); *see also supra* Section IV. (discussing the amendments to Rule 200(g)).

[632] Rule 201(b). *See also supra* Section III.A.7. (discussing the policies and procedures approach).

[633] *Id.*

[634] Rule 200(g)(2). The broker-dealer marking the order "short exempt" will have responsibility for being able to identify on which provision of Rule 201 it was relying in marking the order "short exempt."

[635] This provision will reinforce the on-going maintenance and enforcement requirements of Rule 201(b)(1) by explicitly assigning an affirmative responsibility to trading centers to surveil to ascertain the effectiveness of their policies and procedures. *See* Rule 201(b)(2). We note that Rule 611(a)(2) of Regulation NMS contains a similar provision for trading centers. *See* 17 CFR 242.611(a)(2).

[636] *See* Rule 201(c). As a result, a trading center's policies and procedures will need to be reasonably designed to permit the execution or display of such orders without regard to whether the order is at a price that is less than or equal to the current national best bid. *See* Rule 201(b)(1)(iii).

[637] *See* Rules 201(c)(1) and 201(c)(2).

[638] *See* Rule 201(d)(6). As a result, a trading center's policies and procedures will need to be reasonably designed to permit the execution or display of such orders without regard to whether the order is at a price that is less than or equal to the current national best bid. *See* Rule 201(b)(1)(iii).

minimum: (i) The customer order was received prior to the offsetting transaction; (ii) the offsetting transaction is allocated to a riskless principal or customer account within 60 seconds of execution; and (iii) that it has supervisory systems in place to produce records that enable the broker-dealer to accurately and readily reconstruct, in a time-sequenced manner, all orders on which the broker-dealer relies pursuant to this provision.[639]

3. Marking Requirements

While the current marking requirements in Rule 200(g) of Regulation SHO, which require broker-dealers to mark all sell orders of any equity security as either "long" or "short,"[640] remain in effect, the amendments to Rule 200(g) add a new marking requirement of "short exempt."[641] In particular, if the broker-dealer chooses to rely on its own determination that it is submitting the short sale order to the trading center at a price that is above the current national best bid at the time of submission or to rely on an exception specified in the Rule, it must mark the order as "short exempt."[642] The new "short exempt" marking requirements impose a new collection of information.

C. Use of Information

1. Policies and Procedures Requirement Under Rule 201

The information collected under Rule 201's written policies and procedure requirement[643] will help ensure that the trading center does not execute or display any impermissibly priced short sale orders, unless an order is marked "short exempt," in accordance with the Rule's requirements. This written policies and procedures requirement will also provide trading centers with flexibility in determining how to comply with the requirements of Rule 201. The information collected also will aid the Commission and SROs that regulate trading centers in monitoring compliance with the Rule's requirements. In addition, it will aid trading centers and broker-dealers in complying with the Rule's requirements.

2. Policies and Procedures Requirement Under the Broker-Dealer and Riskless Principal Provisions

The broker-dealer provision in Rule 201(c) permits a broker-dealer submitting a short sale order for the covered security to a trading center to mark the order "short exempt" if the broker-dealer identifies the order as being at a price above the current national best bid at the time of submission.[644] This provision includes a policies and procedures requirement that is designed to help prevent incorrect identification of orders for purposes of Rule 201(c)'s broker-dealer provision. The information collected will also enable the Commission and SROs to examine for compliance with the requirements of the exception.

Moreover, the information collected under the written policies and procedures requirement in the riskless principal exception in Rule 201(d)(6)[645] will help assure that broker-dealers comply with the requirements of this provision. The information collected will also enable the Commission and SROs to examine for compliance with the requirements of the exception.

3. Marking Requirements

The amendments to Rule 200(g) add a new marking requirement of "short exempt."[646] In particular, if the broker-dealer chooses to rely on its own determination that it is submitting the short sale order to the trading center at a price that is above the current national best bid at the time of submission or to rely on an exception specified in the Rule, it must mark the order as "short exempt."[647] The purpose of the information collected is to enable the Commission and SROs to monitor whether a person entering a sell order covered by Rule 201 is acting in accordance with one of the provisions contained in paragraph (c) or (d) of the Rule. In particular, the "short exempt" marking requirement will provide a record that will aid in surveillance for compliance with the provisions of Rule 201. It also will provide an indication to a trading center regarding whether or not it must execute or display a short sale order in accordance with the Rule's provisions. In addition, it will help a trading center determine whether its policies and procedures are reasonable and whether its surveillance is effective.

D. Respondents

As discussed below, the Commission has considered each of the following respondents for the purposes of calculating the reporting burdens under the amendments to Rules 200(g) and 201 of Regulation SHO.

1. Policies and Procedures Requirement Under Rule 201

Rule 201 requires each trading center to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid during the period when the circuit breaker is in effect, unless an exception applies.[648] A "trading center" is defined as "a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent."[649] Because Rule 201 applies to any trading center that executes or displays a short sale order in a covered security, the Rule applies to 10 registered national securities exchanges that trade covered securities (or "SRO trading centers"),[650] and approximately 407 broker-dealers (including ATSs) registered with the Commission (or "non-SRO trading centers").[651]

[639] *See* Rule 201(d)(6).

[640] 17 CFR 242.200(g).

[641] *See* Rule 200(g); *see also supra* Section IV. (discussing the amendments to Rule 200(g)).

[642] *See* Rule 200(g)(2).

[643] *See* Rule 201(b).

[644] *See* Rule 201(c).

[645] *See* Rule 201(d)(6).

[646] *See* Rule 200(g); *see also supra* Section IV. (discussing the amendments to Rule 200(g)).

[647] *See* Rule 200(g)(2).

[648] *See* Rule 201(b).

[649] *See* Rule 201(a)(9); *see also* 17 CFR 242.600(b)(78).

[650] Currently, there are 10 national securities exchanges (BX, BATS, CBOE, CHX, ISE, Nasdaq, NSX, NYSE, NYSE Amex, and NYSE Arca) that operate an SRO trading facility for covered securities and thus will be subject to the Rule. The Proposal indicated that one national securities association (FINRA) would also be subject to the Rule. *See* Proposal, 74 FR at 18086, n.334. However, FINRA operates an SRO display-only facility for covered securities, rather than an SRO trading facility, and thus is not subject to the Rule.

[651] This number includes the approximately 357 firms that were registered equity market makers or specialists at year-end 2008 (this number was derived from annual FOCUS reports and discussion with SRO staff), as well as the 50 ATSs that operate trading systems that trade covered securities. The Commission believes it is reasonable to estimate that in general, firms that are block positioners—*i.e.,* firms that are in the business of executing orders internally—are the same firms that are registered market makers (for instance, they may be registered as a market maker in one or more Nasdaq stocks and carry on a block positioner business in exchange-listed stocks), especially given the amount of capital necessary to carry on such a business.

2. Policies and Procedures Requirement Under the Broker-Dealer and Riskless Principal Provisions

The collection of information required in connection with the broker-dealer provision in Rule 201(c) and in connection with the riskless principal provision in Rule 201(d)(6) applies to all registered brokers-dealers submitting short sale orders in reliance on these provisions. While not all broker-dealers likely will enter sell orders in securities covered by the amendments to Rules 200(g) and 201 in a manner that will subject them to this collection of information, we estimate, for purposes of the PRA, that all of the approximately 5,178 [652] registered broker-dealers will do so.

3. Marking Requirements

The collection of information that is required pursuant to the "short exempt" marking requirements of Rule 200(g) applies to all registered brokers-dealers submitting short sale orders marked "short exempt" in accordance with the provisions contained in paragraph (c) or (d) of Rule 201. While not all broker-dealers likely will enter sell orders in securities covered by the amendments to Rules 200(g) and 201 in a manner that will subject them to this collection of information, we estimate, for purposes of the PRA, that all of the approximately 5,178 [653] registered broker-dealers will do so.

E. Total Annual Reporting and Recordkeeping Burdens

1. Policies and Procedures Requirement Under Rule 201

Rule 201 requires each trading center to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid during the period when the circuit breaker is in effect.[654] Thus, trading centers must develop written policies and procedures reasonably designed to permit the trading center to be able to obtain information from the single plan processor regarding whether a covered security is subject to the short sale price test restriction of Rule 201; if the covered security is subject to the short sale price test restriction of Rule 201, to determine whether or not the short sale order is priced in accordance with the provisions of Rule 201(b); and to recognize when an order is marked "short exempt" such that the trading center's policies and procedures do not prevent the execution or display of such orders at a price that is less than or equal to the current national best bid, even if the covered security is subject to the short sale price test restriction of Rule 201.

In the Proposal, we provided estimates of the reporting and recordkeeping burdens for trading centers under the proposed short sale price test restrictions, both on a permanent, market-wide basis and in conjunction with a circuit breaker.[655] We also requested comment, in the Proposal and the Re-Opening Release, as to whether the proposed burden estimates were appropriate or whether such estimates should be increased or reduced, and if so, for which entities and by how much.[656]

One commenter provided a cost estimate, including costs for "development man-hours" of $500,000 per firm for implementation of a new short sale price test restriction by trading centers, either on a permanent, market-wide basis, or in conjunction with a circuit breaker.[657] One commenter stated that a new short sale price test restriction would involve "significant implementation costs" and "the generation and retention of voluminous compliance reports" but did not provide a specific estimate of the cost or hours that would be involved.[658] Several commenters expressed general concerns regarding the time and cost that would be imposed for implementation and on-going monitoring and surveillance of a new short sale price test restriction, including a policies and procedures requirement, but did not provide specific estimates of such time and cost.[659]

We considered these comments in reviewing the burden estimates for trading centers that we proposed with respect to the collection of information requirements in Rule 201. We believe that the cost and time required for implementation of Rule 201 will be lower than some commenters' stated estimates [660] because we believe that the implementation and on-going monitoring and surveillance costs of the alternative uptick rule will be lower than the implementation and on-going monitoring and surveillance costs that would be associated with adoption of the proposed modified uptick rule or the proposed uptick rule. Unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price (*i.e.*, whether the current national best bid or last sale price is above or below the previous national best bid or last sale price), the alternative uptick rule references only the current national best bid.

A number of commenters stated that because the alternative uptick rule would not require monitoring of the sequence of bids or last sale prices, implementing the alternative uptick rule would be less costly [661] or easier than implementing the proposed modified uptick rule or the proposed uptick rule.[662] In addition, several commenters stated that the alternative uptick rule would be easier to program into trading and surveillance systems than the proposed modified uptick rule or the proposed uptick rule.[663] Another commenter stated, with respect to the alternative uptick rule, that "actual implementation costs in terms of time and capital expenditure would be

[652] This number is based on a review of 2008 FOCUS Report filings reflecting registered broker-dealers, including introducing broker-dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings.

[653] *Id.*

[654] *See* Rule 201(b)(1).

[655] *See* Proposal, 74 FR at 18087.

[656] *See* Proposal, 74 FR at 18088; Re-Opening Release, 74 FR at 42036.

[657] Letter from Wolverine. Wolverine provided an estimate of $500,000 per firm for implementation costs, which it applied to both non-SRO trading centers and other registered broker-dealers.

[658] Letter from EWT (Sept. 2009).

[659] *See, e.g.,* letter from RBC (June 2009); letter from STANY (June 2009); letter from CPIC (June 2009); letter from EWT (Sept. 2009); letter from RBC (Sept. 2009). We received time estimates only with respect to the Commission's proposed implementation time and did not receive comments regarding estimated PRA burden hours. *See supra* Section VII. (discussing comments on implementation time).

[660] We received comments expressing concerns about the implementation and on-going monitoring and compliance costs of a short sale price test restriction that were not specific to the alternative uptick rule. *See, e.g.*, letter from RBC (June 2009); letter from STANY (June 2009); letter from CPIC (June 2009); letter from Wolverine.

[661] *See, e.g.,* letter from BATS (May 2009); letter from Michael L. Crowl, Managing Director, Global General Counsel, Barclays Global Investors, dated Sept. 21, 2009 ("Barclays (Sept. 2009)"); letter from BATS (Sept. 2009); letter from GETCO (Sept. 2009); letter from ICI (Sept. 2009); letter from Glen Shipway (Sept. 2009); letter from STA (Sept. 2009). In addition, several commenters acknowledged that implementation of the alternative uptick rule will likely be less costly, without referencing the sequencing issue. *See, e.g.,* letter from Atherton Lane; letter from STANY (Sept. 2009).

[662] *See, e.g.,* letter from Credit Suisse (June 2009); letter from Goldman Sachs (June 2009); letter from SIFMA (June 2009); letter from Glen Shipway (Sept. 2009); letter from SIFMA (Sept. 2009). In addition, one commenter acknowledged that implementation of the alternative uptick rule will likely be easier, without referencing the sequencing issue. *See* letter from Allston Trading (Sept. 2009).

[663] *See, e.g.,* letter from BATS (May 2009); letter from Goldman Sachs (June 2009); letter from Glen Shipway (Sept. 2009); letter from ICI (Sept. 2009); *see also* letter from National Stock Exchange *et al.*

negligible when compared to those involved in implementing either the uptick rule or modified uptick rule."[664]

Several commenters indicated that implementation of the alternative uptick rule would not be easier or less costly than implementation of the proposed modified uptick rule or the proposed uptick rule.[665] However, we note that some of these commenters presented concerns that were not directly related to the alternative uptick rule[666] or to implementation costs or difficulties.[667] Additionally, one commenter did not provide the reasoning for its belief that the alternative uptick rule would not be easier or less costly to implement.[668]

Several commenters indicated that their belief that other commenters' estimates regarding the difficulty or costs of implementing and monitoring the proposed modified uptick rule and the proposed uptick rule were exaggerated.[669] We recognize that some commenters' estimates of the costs of the proposed modified uptick rule or the proposed uptick rule may have been conservative. We also believe that because the alternative uptick rule does not include a sequencing requirement, the implementation and on-going monitoring and surveillance costs of the alternative uptick rule will be less than such costs would be with respect to the other proposed short sale price test restrictions.

In addition, as noted in the Proposal, while we have based our burden estimates, in part, on the burden estimates provided in connection with the adoption of Regulation NMS,[670] we believe that these estimates may be on the high end because trading centers have already had to establish policies and procedures in connection with that Regulation's Order Protection Rule, which could help form the basis for the policies and procedures for Rule 201. Several commenters agreed, stating that previous experience with the policies and procedures required under Regulation NMS might reduce the implementation and on-going monitoring and compliance burdens on trading centers.[671] In contrast, some commenters indicated that the Commission overstated the benefit of such previous experience,[672] because, for example, "systems re-written and architected for Reg NMS * * * did not include any short sale restrictions,"[673] or because such systems will require modifications in order to be used in the context of a short sale price test restriction.[674] However, we considered these issues when considering the impact of previous experience with the policies and procedures requirement of Regulation NMS's Order Protection Rule. We continue to believe that because most trading centers already have in place systems and written policies and procedures to comply with Regulation NMS's Order Protection Rule, most trading centers will already be already familiar with establishing, maintaining, and enforcing trading-related policies and procedures, which will mitigate the burden of implementation of the policies and procedures requirement under Rule 201. We realize, however, that the exact nature and extent of the policies and procedures that a trading center is required to establish likely will vary depending upon the type, size, and nature of the trading center. Thus, our estimates take into account different types of trading centers and we realize that these estimates may be on the low-end for some trading centers while they may be on the high-end for other trading centers.

We considered whether our estimates of the burdens associated with the collection of information requirements for trading centers with respect to the proposed modified uptick rule included in the Proposal[675] would change under the circuit breaker approach of Rule 201, but, as discussed below, concluded that these estimates continue to represent reasonable estimates under the circuit breaker approach in combination with the alternative uptick rule.

Despite some commenters' concerns regarding the implementation costs of a circuit breaker rule,[676] we believe that the circuit breaker approach will result in largely the same implementation costs as we estimated would be incurred if we adopted a permanent, market-wide short sale price test restriction.[677] As one commenter stated "[o]nce the price test is in place, there is minimal incremental effort required to add a Circuit Breaker that controls the application of the price test."[678] Similarly, another commenter stated that "[t]he additional coding required to implement a circuit breaker is minimal * * *"[679] We believe that there will be only minimal, if any, implementation costs for a circuit breaker approach in addition to the costs we estimated previously for the implementation of a permanent, market-wide short sale price test rule because trading centers would need to establish written policies and procedures to implement the short sale price test restriction regardless of whether the short sale price test restriction is adopted on a permanent, market-wide basis or, in the case of Rule 201, adopted in conjunction with a circuit breaker. Several other commenters agreed, stating that the costs of the circuit breaker approach would be similar to, or only incrementally higher than, the costs of a permanent, market-wide approach.[680]

In addition, with respect to on-going monitoring and surveillance costs of the circuit breaker approach, we recognize, as noted by one commenter,[681] that trading centers will need to continuously monitor whether a security is subject to the provisions of Rule 201 and that there will be costs associated with such monitoring. However, we believe that these costs will be offset because, under the circuit breaker approach, the alternative uptick rule is time limited and will only apply

[664] Letter from BATS (Sept. 2009).

[665] *See, e.g.,* letter from Matlock Capital (Sept. 2009); letter from NYSE Euronext (Sept. 2009); letter from RBC (Sept. 2009); letter from Knight Capital (Sept. 2009).

[666] *See, e.g.,* letter from NYSE Euronext (Sept. 2009) (stating that implementation of the alternative uptick rule would be more difficult on the basis that the alternative uptick rule would be paired with a circuit breaker and attributing implementation difficulties to the circuit breaker approach, not the alternative uptick rule); letter from RBC (Sept. 2009) (expressing concern about the implementation cost of any short sale price test restriction in general).

[667] *See, e.g.,* letter from Knight Capital (Sept. 2009) (characterizing a potential increase in friction, confusion, or inefficiency in the market as an implementation difficulty that may arise from the alternative uptick rule).

[668] *See* letter from Matlock Capital (Sept. 2009).

[669] *See, e.g.,* letter from Matlock Capital (Sept. 2009); letter from ISE (Sept. 2009); letter from Bingham McCutchen.

[670] *See* Regulation NMS Adopting Release, 70 FR 37496; *see also* Proposal, 74 FR at 18087.

[671] *See, e.g.,* letter from EWT (Sept. 2009); letter from MFA (Oct. 2009).

[672] *See, e.g.,* letter from FIF (June 2009); letter from NSCP; letter from RBC (June 2009).

[673] Letter from FIF (June 2009); *see also* letter from RBC (June 2009).

[674] *See* letter from NSCP; letter from RBC (June 2009).

[675] *See* Proposal, 74 FR at 18087.

[676] *See, e.g.,* letter from T. Rowe Price (June 2009); letter from Glen Shipway (June 2009); *see also* letter from STANY (June 2009) (stating that costs savings of a circuit breaker approach would be reduced if the circuit breaker triggered a short sale price test restriction); letter from NYSE Euronext (Sept. 2009) (stating that "a circuit breaker approach raises significant implementation complexities"); letter from SIFMA (June 2009) (including a survey reflecting implementation costs of a circuit breaker triggering a short sale price test based on the national best bid). We note that one commenter indicated that adoption of a circuit breaker approach would add approximately four to six weeks to the implementation time of the alternative uptick rule. *See* letter from Direct Edge (Sept. 2009); *see also supra* Section VII. (discussing comments on implementation time).

[677] *See* Proposal, 74 FR at 18087.

[678] Letter from Nasdaq OMX Group (Oct. 2009).

[679] Letter from Credit Suisse (Sept. 2009).

[680] *See, e.g.,* letter from STA (June 2009).

[681] *See* letter from Glen Shipway (June 2009).

on a stock-by-stock basis, which will reduce our previously estimated costs for on-going monitoring and surveillance. This is because trading centers only need to monitor and surveil for compliance with the alternative uptick rule during the limited period of time that the circuit breaker is in effect with respect to a specific security. As such, the circuit breaker approach will allow regulatory, supervisory and compliance resources to focus on, and to address, those situations where a specific security is experiencing significant downward price pressure. As noted by one commenter, a circuit breaker "is particularly efficient in stable and rising markets because it avoids imposing continuous monitoring and compliance costs where there is little or no corresponding risk of abusive short selling."[682]

Further, although, under the circuit breaker approach, market participants will need to monitor whether a stock is subject to Rule 201, we believe that familiarity with a circuit breaker approach may help mitigate such compliance costs. As discussed in the Proposal, currently, all stock exchanges and FINRA have rules or policies to implement coordinated circuit breaker halts.[683] Moreover, SROs have rules or policies in place to coordinate individual security trading halts corresponding to significant news events.[684]

On balance, we believe that the estimates of the burdens associated with the collection of information requirements for trading centers included in the Proposal[685] are appropriate with respect to Rule 201. Thus, our estimates have not changed from the Proposal, except to the extent that total burden estimates have changed because we have updated the estimated number of trading centers.[686]

Although the exact nature and extent of the policies and procedures that a trading center must establish likely will vary depending upon the nature of the trading center (*e.g.*, SRO vs. non-SRO, full service broker-dealer vs. market maker), we estimate that it initially will, on average, take an SRO trading center approximately 220 hours[687] of legal, compliance, information technology and business operations personnel time,[688] and a non-SRO trading center approximately 160 hours[689] of legal, compliance, information technology and business operations personnel time,[690] to develop the required policies and procedures.

In addition to these estimates (of 220 hours for SRO respondents and 160 hours for non-SRO respondents), we expect that SRO and non-SRO respondents will incur one-time external costs for outsourced legal services. While we recognize that the amount of legal outsourcing utilized to help establish written policies and procedures may vary widely from entity to entity, we estimate that on average, each trading center will outsource 50 hours of legal time in order to establish policies and procedures in accordance with the amendments.[691]

We estimate that there will be an initial one-time burden of, on average, 220 (not including the outsourced 50 hours of legal time) burden hours per SRO trading center or 2,200 hours,[692] and, on average, 160 (not including the outsourced 50 hours of legal time) burden hours per non-SRO trading center or 65,120 hours,[693] for a total of 67,320 burden hours to establish the required written policies and procedures.[694] We estimate a cost of, on average, approximately $8,340,000 for both SRO and non-SRO trading centers resulting from outsourced legal work.[695]

Once a trading center has established the required written policies and procedures, we estimate that, on average, it will take an SRO and non-SRO trading center each approximately two hours per month of on-going internal legal time and three hours of on-going internal compliance time to ensure that its written policies and procedures are up-to-date and remain in compliance with the amendments to Rule 201, or a total of 60 hours annually per respondent.[696] In addition, we estimate that, on average, it will take an SRO and non-SRO trading center each approximately 16 hours per month of on-going compliance time, 8 hours per month of on-going information technology time, and 4 hours per month of on-going legal time associated with on-going monitoring and surveillance for and enforcement of trading in

[682] Letter from Nasdaq OMX Group (Oct. 2009); *see also* letter from SIFMA (Sept. 2009).

[683] *See supra* note 292.

[684] *See, e.g.,* FINRA Rule 6120; *see also* Proposal, 74 FR at 18065–18066 (discussing the background on circuit breakers).

[685] *See* Proposal, 74 FR at 18087.

[686] The Proposal indicated that there were approximately 372 non-SRO trading centers, including approximately 325 firms that were registered equity market makers or specialists at year-end 2007 (this number was derived from annual FOCUS reports and discussion with SRO staff), as well as 47 ATSs that operate trading systems that trade NMS stocks. *See* Proposal, 74 FR at 18086. We now estimate that there are approximately 407 non-SRO trading centers, including approximately 357 firms that were registered equity market makers or specialists at year-end 2008 (this number was derived from annual FOCUS reports and discussion with SRO staff), as well as 50 ATSs that operate trading systems that trade covered securities. *See supra* note 651. We also note that the number of SRO trading centers has changed from 11 in the Proposal to 10. *See supra* note 650.

[687] For purposes of this adopting release, we are basing our estimates on the burden hour estimates provided in connection with the adoption of Regulation NMS because the policies and procedures developed in connection with that Regulation's Order Protection Rule are in many ways similar to what a trading center will need to do to comply with Rule 201. *See* Regulation NMS Adopting Release, 70 FR 37496; *see also* Proposal, 74 FR at 18087. We note, however, that these estimates may be on the high end because trading centers have already had to establish similar policies and procedures to comply with Regulation NMS.

[688] Based on experience and estimates provided in connection with Regulation NMS, we anticipate that of the 220 hours we estimate will be spent to establish the required policies and procedures, 70 hours will be spent by legal personnel, 105 hours will be spent by compliance personnel, 20 hours will be spent by information technology personnel and 25 hours will be spent by business operations personnel of the SRO trading center.

[689] For purposes of this adopting release, we are basing our estimates on the burden hour estimates provided in connection with the adoption of Regulation NMS because the policies and procedures developed in connection with that Regulation's Order Protection Rule are in many ways similar to what a trading center will need to do to comply with the Rule 201. *See* Regulation NMS Adopting Release, 70 FR 37496; *see also* Proposal, 74 FR at 18087. We note, however, that these estimates may be on the high end because trading centers have already had to establish similar policies and procedures to comply with Regulation NMS.

[690] Based on experience and the estimates provided in connection with Regulation NMS, we anticipate that of the 160 hours we estimate will be spent to establish policies and procedures, 37 hours will be spent by legal personnel, 77 hours will be spent by compliance personnel, 23 hours will be spent by information technology personnel and 23 hours will be spent by business operations personnel of the non-SRO trading center.

[691] As discussed above, we base our burden estimate of 50 hours of outsourced legal time on the burden estimate used for Regulation NMS because the policies and procedures developed in connection with that Regulation's Order Protection Rule are in many ways similar to what a trading center will need to do to comply with Rule 201. *See* Regulation NMS Adopting Release, 70 FR 37496; *see also* Proposal, 74 FR at 18087.

[692] The estimated 2,200 burden hours necessary for SRO trading centers to establish policies and procedures are calculated by multiplying 10 times 220 hours (10×220 hours = 2,200 hours).

[693] The estimated 65,120 burden hours necessary for non-SRO trading centers to establish policies and procedures are calculated by multiplying 407 times 160 hours (407×160 hours = 65,120 hours).

[694] *See* Rule 201(b).

[695] This figure was calculated as follows: (50 legal hours $\times$ $400 $\times$ 10 SRO trading centers) + (50 legal hours $\times$ $400 $\times$ 407 non-SRO trading centers) = $8,340,000. Based on industry sources, we estimate that the average hourly rate for outsourced legal services in the securities industry is $400.

[696] This figure was calculated as follows: (2 legal hours $\times$ 12 months) + (3 compliance hours $\times$ 12 months) = 60 hours annually per respondent. As discussed above, this burden estimate of 60 hours is based on experience and what was estimated for Regulation NMS to ensure that written policies and procedures were up-to-date and remained in compliance. *See* Regulation NMS Adopting Release, 70 FR 37496; *see also* Proposal, 74 FR at 18087.

compliance with Rule 201, or a total of 336 hours annually per respondent.[697]

2. Policies and Procedures Requirement Under the Broker-Dealer and Riskless Principal Provisions

To rely on the broker-dealer provision of Rule 201(c), a broker-dealer marking a short sale order in a covered security "short exempt" under Rule 201(c) must identify the order as being at a price above the current national best bid at the time of submission to the trading center and must establish, maintain, and enforce written policies and procedures that are reasonably designed to prevent the incorrect identification of orders as being submitted to the trading center at a permissible price.[698] At a minimum, the broker-dealer's policies and procedures must be reasonably designed to enable a broker-dealer to monitor, on a real-time basis, the national best bid so as to determine the price at which the broker-dealer may submit a short sale order to a trading center in compliance with the requirements of Rule 201(c). In addition, a broker-dealer must take such steps as necessary to enable it to enforce its policies and procedures effectively.[699]

To rely on the riskless principal provision under Rule 201(d)(6) a broker-dealer must have written policies and procedures in place to assure that, at a minimum: (i) The customer order was received prior to the offsetting transaction; (ii) the offsetting transaction is allocated to a riskless principal or customer account within 60 seconds of execution; and (iii) that it has supervisory systems in place to produce records that enable the broker-dealer to accurately and readily reconstruct, in a time-sequenced manner, all orders on which the broker-dealer relies pursuant to this provision.[700]

In the Proposal, we provided estimates of the reporting and recordkeeping burdens for broker-dealers to implement, monitor and surveil on an on-going basis the policies and procedures required to rely on the broker-dealer provision of Rule 201(c) or the riskless principal provision under Rule 201(d)(6).[701] We also requested comment, in the Proposal and the Re-Opening Release, as to whether the proposed burden estimates were appropriate or whether such estimates should be increased or reduced, and if so, for which entities and by how much.[702] The following discussion of comments on the proposed burden estimates for broker-dealers includes comments that were discussed above with respect to the burden estimates for trading centers[703] because, in some cases, commenters provided comments and estimates on the costs of establishing and monitoring policies and procedures under the proposed short sale price tests without distinguishing between costs that would be applicable to trading centers as opposed to broker-dealers.

One commenter provided a cost estimate, including costs for "development man-hours" of $500,000 per firm for implementation of Rule 201 by broker-dealers.[704] One commenter stated that a new short sale price test restriction would involve "significant implementation costs" and "the generation and retention of voluminous compliance reports" but did not provide a specific estimate of the cost or hours that would be involved.[705] Several commenters expressed general concerns regarding the time and cost that would be imposed on market participants for implementation and on-going monitoring and surveillance of a new short sale price test restriction, including a policies and procedures requirement but did not provide specific estimates of such time and cost.[706]

In addition, several commenters noted that implementation and on-going monitoring and surveillance of the requirements of the broker-dealer provision would impose significant costs on broker-dealers, but did not provide an estimate of such costs.[707] Several commenters stated that the costs of the broker-dealer provision could be particularly burdensome for smaller broker-dealers, but did not provide a time or cost estimate of such burdens.[708]

We considered these comments in reviewing the burden estimates for broker-dealers that we proposed with respect to the collection of information requirements in Rule 201. We believe that the cost and time required for implementation and on-going monitoring and surveillance of the policies and procedures required to rely on the broker-dealer provision of Rule 201(c) will be lower than some commenters' stated estimates[709] because the alternative uptick rule references only the current national best bid, unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price.[710] Because the alternative uptick rule does not require sequencing of the national best bid, we believe that the policies and procedures required in order to rely on the broker-dealer provision under the alternative uptick rule, which are similar to those required for non-SRO trading centers in complying with paragraph (b) of Rule 201, will be easier and less costly to

[697] This figure was calculated as follows: (16 compliance hours × 12 months) + (8 information technology hours × 12 months) + (4 legal hours × 12 months) = 336 hours annually per respondent. As discussed above, this burden estimate of 336 hours is based on experience and what was estimated for Regulation NMS regarding similarly required on-going monitoring and surveillance for and enforcement of trading in compliance with that regulation's policies and procedures requirement.

[698] *See* Rule 201(c).

[699] This will include the requirement that broker-dealers regularly surveil to ascertain the effectiveness of their policies and procedures and take prompt remedial steps. This provision is intended to reinforce the on-going maintenance and enforcement requirements of the provision contained in Rule 201(c)(1) by explicitly assigning an affirmative responsibility to broker-dealers to surveil to ascertain the effectiveness of their policies and procedures. *See* Rule 201(c)(2).

[700] *See* Rule 201(d)(6).

[701] *See* Proposal, 74 FR at 18088–18089.

[702] *See* Proposal, 74 FR at 18089; Re-Opening Release, 74 FR at 42036.

[703] *See supra* Section IX.E.1. (discussing reporting and recordkeeping burdens for trading centers).

[704] Letter from Wolverine. Wolverine provided an estimate of $500,000 per firm for implementation costs, which it applied to both non-SRO trading centers and other registered broker-dealers.

[705] Letter from EWT (Sept. 2009). EWT also did not specify whether this comment on our estimated annual reporting and recordkeeping burdens with respect to provisions of the proposed rules that would require a new "collection of information" was specific to the provisions applicable to trading centers or to the provisions applicable to broker-dealers.

[706] *See, e.g., supra* note 659. These commenters' concerns regarding implementation costs either were expressed with respect to market participants generally or included references to obligations that would be imposed on, or changes that would have to be made by, broker-dealers.

[707] *See, e.g.*, letter from Credit Suisse (June 2009); letter from FIF (June 2009); letter from Lime Brokerage (June 2009); letter from NSCP; letter from STANY (June 2009); letter from EWT (Sept. 2009).

[708] *See, e.g.*, letter from Credit Suisse (June 2009); letter from NSCP; letter from T.D. Pro Ex. We received time estimates on the Commission's proposed implementation time, but did not receive comments with respect to the estimated PRA burden hours. *See supra* Section VII. (discussing comments on implementation time).

[709] We received comments expressing concerns about the implementation and on-going monitoring and compliance costs to broker-dealers of a short sale price test restriction that were not specific to the alternative uptick rule. *See, e.g.*, letter from Credit Suisse (June 2009); letter from RBC (June 2009); letter from STANY (June 2009); letter from CPIC (June 2009); letter from Wolverine; letter from T.D. Pro Ex; letter from FIF (June 2009); letter from Lime Brokerage (June 2009); letter from NSCP.

[710] We also note that it is possible that some smaller broker-dealers that determine to rely on the broker-dealer provision may determine that it is cost-effective for them to outsource certain functions necessary to comply with Rule 201(c) to larger broker-dealers, rather than performing such functions in house, to remain competitive in the market. This may help mitigate costs associated with implementing and complying with Rule 201(c). Additionally, they may decide to purchase order management software from technology firms. Order management software providers may integrate changes imposed by Rules 200(g) and 201 into their products, thereby providing another cost-effective way for smaller broker-dealers to comply with the requirement of Rule 201(c).

implement and monitor than would be the case under the proposed modified uptick rule or the proposed uptick rule.[711] We note that one of the commenters that expressed concerns about the implementation cost of the broker-dealer provision also acknowledged that a rule "that would not require data centralization and sequencing would be significantly less complex and faster to implement."[712]

We disagree with several commenters who stated that, although implementation and on-going monitoring and surveillance of the alternative uptick rule might be easier and/or less costly for trading centers, this would not hold true for broker-dealers.[713] One of these commenters stated that "in order to avoid rejection of short sale orders under an alternative uptick rule, programming would need to be implemented to anticipate changes in the national best bid between the time a short sale order is entered and the time it reaches the relevant market center."[714] However, the broker-dealer provision of Rule 201(c) is designed specifically to help avoid this result. Under the broker-dealer provision, a broker-dealer may, in accordance with the policies and procedures required by the provision, identify the order as being at a price that is above the current national best bid at the time the order is submitted to the trading center and mark the order "short exempt." Trading centers are required to have written policies and procedures in place to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a price that is less than or equal to the current national best bid.[715]

In addition, as noted in the Proposal, while we have based our burden estimates on the burden estimates provided in connection with the adoption of Regulation NMS with respect to non-SRO trading centers (which includes broker-dealers),[716] we note that these estimates may be on the high end for those broker-dealers that have already had to establish policies and procedures in connection with that Regulation's Order Protection Rule, which could help form the basis for the policies and procedures for the broker-dealer provision of Rule 201(c), or the riskless principal provision under Rule 201(d)(6). Several commenters agreed, indicating that broker-dealers' previous experience with the policies and procedures required under Regulation NMS might reduce the implementation and on-going monitoring and compliance burdens on broker-dealers.[717] Some commenters stated that the Commission overstated the benefit of such previous experience[718] because, for example, "systems re-written and architected for Reg NMS * * * did not include any short sale restrictions,"[719] or because such systems will require modifications in order to be used in the context of a short sale price test restriction.[720] However, we considered these issues when considering the impact of previous experience with the policies and procedures requirement of Regulation NMS's Order Protection Rule. We continue to believe that because broker-dealers may already have in place systems and written policies and procedures in connection with Regulation NMS's Order Protection Rule, those broker-dealers will already be familiar with establishing, maintaining, and enforcing trading-related policies and procedures, which will mitigate the burden of implementation of the policies and procedures requirement under the broker-dealer provision of Rule 201(c), or the riskless principal provision under Rule 201(d)(6). We realize, however, that the exact nature and extent of the policies and procedures that a broker-dealer must establish likely will vary depending upon the type, size, and nature of the broker-dealer. Thus, our estimates take into account different types of broker-dealers and we realize that these estimates may be on the low-end for some broker-dealers while they may be on the high-end for other broker-dealers.

We considered whether our estimates of the burdens associated with the collection of information requirements for broker-dealers with respect to the proposed modified uptick rule included in the Proposal[721] would change under the circuit breaker approach of Rule 201, but concluded, as discussed below, that these estimates continue to represent reasonable estimates under the circuit breaker approach.

As discussed previously,[722] despite some commenters' concerns regarding the implementation costs of a circuit breaker rule,[723] we believe that the circuit breaker approach will result in largely the same implementation costs as we estimated would be incurred if we adopted a permanent, market-wide short sale price test restriction.[724] We believe that that there will be only minimal, if any, implementation costs for a circuit breaker approach in addition to the costs we estimated previously for the implementation of a permanent, market-wide short sale price test rule because broker-dealers relying on Rule 201(c) or Rule 201(d)(6) must establish written policies and procedures required to comply with those provisions regardless of whether the short sale price test restriction is adopted on a permanent, market-wide basis or, in the case of Rule 201, adopted in conjunction with a circuit breaker. Several other commenters agreed, stating that the costs of the circuit breaker approach would be similar to, or only incrementally higher than, the costs of a permanent, market-wide approach.[725]

In addition, with respect to on-going monitoring and surveillance costs of the circuit breaker approach, we recognize, as noted by one commenter,[726] that broker-dealers relying on Rule 201(c) or Rule 201(d)(6) must continuously monitor whether a security is subject to the provisions of Rule 201 and that there will be costs associated with such monitoring. However, we believe that these costs will be offset because, under the circuit breaker approach, the alternative uptick rule is time limited and will only apply on a stock by stock basis, which will reduce our previously estimated costs for on-going monitoring and surveillance. This is because broker-dealers relying on Rule 201(c) will only need to monitor and surveil for compliance with the alternative uptick rule, and broker-dealers relying on Rule 201(d)(6) will only need to monitor for compliance with the requirements of that provision, during the limited period of time that the circuit breaker is in effect with respect to a specific security. As such, the circuit breaker approach will allow

[711] *See supra* notes 660 to 669 and accompanying text (discussing comments on the impact of the alternative uptick rule on implementation and on-going monitoring and compliance costs).

[712] Letter from Credit Suisse (June 2009).

[713] *See, e.g.,* letter from Citadel *et al.* (Sept. 2009); letter from EWT (Sept. 2009); letter from Lime Brokerage (Sept. 2009).

[714] Letter from Citadel *et al.* (Sept. 2009).

[715] *See* Rule 201(b)(1)(iii).

[716] *See supra* note 670.

[717] *See, e.g.,* letter from EWT (Sept. 2009); letter from MFA (Oct. 2009).

[718] *See, e.g.,* letter from FIF (June 2009); letter from NSCP; letter from RBC (June 2009).

[719] Letter from FIF (June 2009); *see also* letter from RBC (June 2009).

[720] *See* letter from NSCP; letter from RBC (June 2009).

[721] *See* Proposal, 74 FR at 18088–18089.

[722] *See supra* Section IX.E.1. (discussing estimated burdens of the collection of information requirements applicable to trading centers under Rule 201).

[723] *See supra* note 676.

[724] *See* Proposal, 74 FR at 18088.

[725] *See, e.g.,* letter from Nasdaq OMX Group (Oct. 2009); letter from Credit Suisse (Sept. 2009); letter from STA (June 2009).

[726] *See* letter from Glen Shipway (June 2009).

regulatory, supervisory and compliance resources to focus on, and to address, those situations where a specific security is experiencing significant downward price pressure.[727]

On balance, we believe that the estimates of the burdens associated with the collection of information requirements for broker-dealers included in the Proposal[728] are appropriate with respect to Rule 201. Thus, our estimates have not changed from the Proposal, except to the extent that total burden estimates have changed because we have updated the estimated number of broker-dealers.[729]

Although the exact nature and extent of the required policies and procedures that a broker-dealer must establish under the broker-dealer or the riskless principal provisions likely will vary depending upon the nature of the broker-dealer (*e.g.,* full service broker-dealer vs. market maker), we estimate that it initially will, on average, take a broker-dealer approximately 160 hours[730] of legal, compliance, information technology and business operations personnel time,[731] to develop the required policies and procedures. In addition to this estimate of 160 hours, we expect that broker-dealers will incur one-time external costs for outsourced legal services. While we recognize that the amount of legal outsourcing utilized to help establish written policies and procedures will vary widely from entity to entity, we estimate that on average, each broker-dealer will outsource 50 hours[732] of legal time in order to establish policies and procedures in accordance with the broker-dealer provision in Rule 201(c) and the riskless principal provision in Rule 201(d)(6).

We estimate that, on average, there will be an initial one-time burden of 160 burden hours per broker-dealer or 828,480 hours[733] to establish policies and procedures required under the broker-dealer provision in Rule 201(c) and the riskless principal provision in Rule 201(d)(6). We estimate an average cost of approximately $103,560,000 for broker-dealers resulting from outsourced legal work.[734]

Once a broker-dealer has established written policies and procedures that are required under Rule 201(c) or Rule 201(d)(6), we estimate that it will take, on average, a broker-dealer approximately two hours per month of internal legal time and three hours of internal compliance time to ensure that its written policies and procedures are up-to-date and remain in compliance with Rule 201(c) or 201(d)(6), or a total of 60 hours annually per respondent.[735] In addition, we estimate that, on average, it will take a broker-dealer approximately 16 hours per month of on-going compliance time, 8 hours per month of on-going information technology time, and 4 hours per month of on-going legal time associated with on-going monitoring and surveillance for and enforcement of trading in compliance with Rule 201, or a total of 336 hours annually per respondent.[736]

3. Marking Requirements

The amendments to Rule 200(g) add a new marking requirement of "short exempt."[737] In particular, if the broker-dealer chooses to rely on its own determination that it is submitting the short sale order to the trading center at a price that is above the current national best bid at the time of submission or to rely on an exception specified in the Rule, it must mark the order as "short exempt."[738]

In the Proposal, we provided estimates of the reporting and recordkeeping burdens for the "short exempt" marking requirement. We also requested comment, in the Proposal and Re-Opening Release, on the accuracy of such estimates.[739]

Several commenters noted that the "short exempt" marking requirement would impose significant implementation costs, but did not provide a specific estimate of such costs.[740] One commenter stated that costs of the "short exempt" marking requirement would be worth the benefits gained.[741] We considered these comments in reviewing the burden estimates of the "short exempt" marking requirement of Rule 200(g).

We also considered whether our estimates of the burdens associated with the collection of information requirements for broker-dealers with respect to the amendments to Rule 200(g) in conjunction with the proposed modified uptick rule included in the Proposal[742] would change under the circuit breaker approach of Rule 201, but concluded, as discussed below, that these estimates continue to represent reasonable estimates under the circuit breaker approach.

We believe that the "short exempt" marking requirements of Rule 200(g), in conjunction with a circuit breaker approach, will result in largely the same implementation costs as would be incurred if the "short exempt" marking requirements were combined with a market-wide short sale price test restriction. This is because broker-dealers relying on the provisions of Rule 201(c) or Rule 201(d) would need to make systems changes to implement the "short exempt" marking requirements

[727] *See, e.g.,* letter from Nasdaq OMX Group (Oct. 2009); letter from SIFMA (Sept. 2009).

[728] *See* Proposal, 74 FR at 18088–18089.

[729] The Proposal indicated that there were approximately 5,561 broker-dealers. This number was based on a review of 2007 FOCUS Report filings reflecting registered broker-dealers, including introducing broker-dealers. This number did not include broker-dealers that were delinquent on FOCUS Report filings. *See* Proposal, 74 FR at 18086. We now estimate that there are approximately 5,178 broker-dealers. *See supra* note 652 and accompanying text.

[730] We base this estimate of 160 hours on the estimated burden hours we believe it will take a non-SRO trading center (which includes broker-dealers) to develop similarly required policies and procedures, since the policies and procedures required under the broker-dealer provision or the riskless principal exception will be similar to those required for non-SRO trading centers in complying with paragraph (b) of Rule 201. *See* Regulation NMS Adopting Release, 70 FR 37496; *see also* Proposal, 74 FR at 18087.

[731] Based on experience and the estimates provided in connection with Regulation NMS, we anticipate that of the 160 hours we estimate will be spent to establish policies and procedures, 37 hours will be spent by legal personnel, 77 hours will be spent by compliance personnel, 23 hours will be spent by information technology personnel and 23 hours will be spent by business operations personnel of the broker-dealer.

[732] As discussed above, we base our burden estimate of 50 hours of outsourced legal time on the burden estimate used for Regulation NMS because the policies and procedures developed in connection with that Regulation's Order Protection Rule are in many ways similar to what a broker-dealer will need to do to comply with the policies and procedures required under the broker-dealer provision and the riskless principal exception of Rule 201. *See* Regulation NMS Adopting Release, 70 FR 37496; *see also* Proposal, 74 FR at 18087.

[733] The estimated 828,480 burden hours necessary for a broker-dealer to establish policies and procedures are calculated by multiplying 5,178 times 160 hours (5,178 × 160 hours = 828,480 hours). *See supra* note 730.

[734] This figure was calculated as follows: (50 legal hours × $400 × 5,178 broker-dealers) = $103,560,000. Based on industry sources, we estimate that the average hourly rate for outsourced legal services in the securities industry is $400.

[735] This figure was calculated as follows: (2 legal hours × 12 months) + (3 compliance hours × 12 months). As discussed above, this burden estimate of 60 hours is based on experience and what was estimated for a Regulation NMS respondent to ensure that its written policies and procedures were up-to-date and remained in compliance.

[736] This figure was calculated as follows: (16 compliance hours × 12 months) + (8 information technology hours × 12 months) + (4 legal hours × 12 months) = 336 hours annually per respondent. As discussed above, this burden estimate of 336 hours is based on experience and what was estimated for Regulation NMS for similarly required on-going monitoring and surveillance for and enforcement of trading in compliance with that regulation's policies and procedures requirement.

[737] *See* Rule 200(g); *see also supra* Section IV. (discussing the amendments to Rule 200(g)).

[738] *See* Rule 200(g)(2).

[739] *See* Proposal, 74 FR at 18089; Re-Opening Release, 74 FR at 42036.

[740] *See, e.g.,* letter from FIF (June 2009); letter from NSCP; letter from RBC (June 2009).

[741] *See* letter from STA (June 2009).

[742] *See* Proposal, 74 FR at 18089.

regardless of whether the short sale price test restriction is adopted on a permanent, market-wide basis or, in the case of Rule 201, adopted in conjunction with a circuit breaker.

In addition, with respect to on-going monitoring and surveillance costs of the "short exempt" marking requirements in conjunction with a circuit breaker approach, we recognize, as noted by one commenter,[743] that market participants will need to continuously monitor whether a security is subject to the provisions of Rule 201 and that there will be costs associated with such monitoring. However, we believe that these costs will be offset because, under the circuit breaker approach, use of the "short exempt" provisions of Rule 201(c) and Rule 201(d) and the related marking requirements are time limited and will only apply on a stock by stock basis, which will reduce our previously estimated costs for on-going monitoring and surveillance. This is because broker-dealers who choose to rely on Rule 201(c) or Rule 201(d) will only need to monitor and surveil for compliance with the requirements of those provisions and will only need to mark qualifying orders "short exempt" during the limited period of time that the circuit breaker is in effect with respect to a specific security. As such, the circuit breaker approach will allow regulatory, supervisory and compliance resources to focus on, and to address, those situations where a specific security is experiencing significant downward price pressure.[744]

On balance, we believe our proposed estimates of the burdens associated with the collection of information requirements of the "short exempt" marking requirement[745] are appropriate with respect to Rule 200(g) as adopted. Thus, our estimates have not changed from the Proposal, except to the extent that total burden estimates have changed because we have updated the estimated number of broker-dealers.[746]

We believe that the implementation cost of the "short exempt" marking requirement will likely be similar to the implementation cost of the order marking requirements of Rule 200(g) of Regulation SHO, which had originally included the category of "short exempt." Industry sources at that time estimated initial implementation costs for the former "short exempt" marking requirement to be approximately $100,000 to $125,000.[747] Based on these estimates, as adjusted for inflation, we estimate that the initial implementation cost of the "short exempt" marking requirement will be approximately $115,000 to $145,000 per broker-dealer[748] for a total initial implementation cost of approximately $595,470,000 to $750,810,000 for all broker-dealers.[749]

While not all broker-dealers likely will enter sell orders in securities covered by the amendments to Rules 200(g) and 201 in a manner that will subject them to this collection of information, we estimate, for purposes of the PRA, that all of the approximately 5,178 registered broker-dealers will do so. For purposes of the PRA, the Staff has estimated that a total of approximately 12.9 billion "short exempt" orders are entered annually.[750]

This is an average of approximately 2,491,309 annual responses by each respondent.[751] As we discussed in the Proposal, each response of marking sell orders "short exempt" will take approximately .000139 hours (.5 seconds) to complete. This estimate is based on the same time estimate for marking sell orders "long" or "short" used upon adoption of Rule 200(g) under Regulation SHO.[752] We believe this estimate is appropriate because, in accordance with the current marking requirements of Rule 200(g) of Regulation SHO, broker-dealers are already required to mark a sell order either "long" or "short." Thus, most broker-dealers already have the necessary mechanisms and procedures in place and are already familiar with processes and procedures to comply with the marking requirements of Rule 200(g) of Regulation SHO and broker-dealers will be able to continue to use the same mechanisms, processes and procedures to comply with the amendments to Rules 200(g) and 200(g)(2). We note, however, that this estimate may be too high given technological advances, such as automation of sell order marking, since the adoption of Rule 200(g) in 2004.

Thus, the total approximate estimated annual hour burden per year is 1,793,100 burden hours (12,900,000,000 orders marked "short exempt" multiplied by 0.000139 hours/order marked "short exempt"). Our estimate for the paperwork compliance for the marking requirement of Rule 200(g) for each broker-dealer is approximately 346 burden hours (2,491,309 responses multiplied by 0.000139 hours/responses) or (a total of 1,793,100 burden hours divided by 5,178 respondents).

F. Collection of Information Is Mandatory

1. Policies and Procedures Requirements

The collection of information required under Rule 201's policies and procedures requirement is mandatory for trading centers executing and displaying short sale orders in covered securities. The collection of information required under Rule 201's policies and procedures requirements in connection with the broker-dealer provision in Rule 201(c) and the riskless principal exception in Rule 201(d)(6) is mandatory for broker-dealers relying on these provisions.

2. Marking Requirements

The collection of information is mandatory for all broker-dealers submitting sale orders marked "short exempt" in reliance on one of the provisions contained in paragraph (c) or (d) of Rule 201.

G. Confidentiality

1. Policies and Procedures Requirements

We expect that the information collected pursuant to Rule 201's required policies and procedures for trading centers will be communicated to

[743] *See* letter from Glen Shipway (June 2009).

[744] *See, e.g.,* letter from Nasdaq OMX Group (Oct. 2009); letter from SIFMA (Sept. 2009).

[745] *See* Proposal, 74 FR at 18089.

[746] *See supra* note 729.

[747] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48023.

[748] The adjustment for inflation was calculated using information in the Consumer Price Index, U.S. Department of Labor, Bureau of Labor Statistics.

[749] These figures were calculated as follows: ($115,000 × 5,178) = $595,470,000 and ($145,000 × 5,178) = $750,810,000.

[750] As we stated in the Proposal, our estimate of 12.9 billion "short exempt" orders was calculated based on a review of short sale trades and short sale orders during August 2008. We believe that August 2008 data is representative of a normal month of trading. Specifically, we calculated that there were about 263 million short sale trades during August 2008 for Amex, FINRA, Nasdaq, NYSE Arca, and NYSE market centers. Based on a review of Rule 605 reports from the three largest market centers during August 2008, we estimate a ratio of 14.4 orders to trades. We gross up 263 million short sale trades by 14.4, which yields 3.8 billion short sale orders during August 2008 or an annualized figure of 45.4 billion. We estimate that approximately 28.5% of short sale orders are short exempt using Nasdaq short sale data from January to April 2005. We multiply 45.4 billion times 0.285 to obtain our estimate of 12.9 billion short exempt orders. *See* Proposal, 74 FR at 18089. We also note that, because the circuit breaker rule will not be in place at all times or for all securities, the frequency and, therefore, the estimated burden of marking "short exempt" is expected to be lower. We did not receive any comments on the estimated number of annual "short exempt" orders.

[751] This figure was calculated as follows: 12.9 billion "short exempt" orders divided by 5,178 broker-dealers.

[752] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48023, n.140; *see also* 2003 Regulation SHO Proposing Release, 68 FR at 63000, n.232.

the members, subscribers, and employees (as applicable) of all trading centers. In addition, the information collected pursuant to Rule 201's required policies and procedures for trading centers will be retained by the trading centers and will be available to the Commission and SRO examiners upon request, but not subject to public availability. The information collected pursuant to Rule 201's broker-dealer provision and the riskless principal exception will be retained by the broker-dealers and will be available to the Commission and SRO examiners upon request, but not subject to public availability.

2. Marking Requirements

The information collected pursuant to the "short exempt" marking requirements in Rule 200(g) and Rule 200(g)(2) will be submitted to trading centers and will be available to the Commission and SRO examiners upon request. The information collected pursuant to the "short exempt" marking requirement may be publicly available because it may be published, in a form that would not identify individual broker-dealers, by SROs that publish on their Internet Web sites aggregate short selling volume data in each individual equity security for that day and, on a one-month delayed basis, information regarding individual short sale transactions in all exchange-listed equity securities.

H. Record Retention Period

1. Policies and Procedures Requirements

Any records generated in connection with Rule 201's requirements that trading centers and broker-dealers (with respect to the broker-dealer and riskless principal provisions) establish written policies and procedures must be preserved in accordance with, and for the periods specified in, Exchange Act Rules 17a–1 [753] for SRO trading centers and 17a–4(e)(7) [754] for non-SRO trading centers and registered broker-dealers.

2. Marking Requirements

The amendments to Rule 200(g) and Rule 200(g)(2) do not contain any new record retention requirements. All registered broker-dealers that are subject to the amendments are currently required to retain records in accordance with Rule 17a–4(e)(7) under the Exchange Act.[755]

[753] 17 CFR 240.17a–1.

[754] 17 CFR 240.17a–4(e)(7).

[755] *Id.*

X. Cost-Benefit Analysis

We are sensitive to the costs and benefits of our rules. To assist us in evaluating the costs and benefits of the amendments to Regulation SHO, in the Proposal and the Re-Opening Release, we encouraged commenters to discuss any costs or benefits that the proposed rules might impose.[756] In particular, we requested comment on the potential costs for any modification to both computer systems and surveillance mechanisms and for information gathering, management, and recordkeeping systems or procedures, as well as any potential benefits resulting from the proposed amendments for registrants, issuers, investors, broker-dealers, other securities industry professionals, regulators, and others.[757] We also requested comment as to the extent to which placing price restrictions on short selling could impact or lessen some of the benefits of legitimate short selling or could lead to a decrease in market efficiency, price discovery, or liquidity.[758] Commenters were requested to provide analysis and data to support their views on the costs and benefits associated with the proposed amendments to Rule 201 and Rule 200(g).[759] We discuss below the benefits and costs, including cost mitigation features, of Rule 201.

A. Benefits

We believe it is appropriate at this time to adopt in Rule 201 a circuit breaker approach combined with the alternative uptick rule. Specifically, Rule 201(b) requires that a trading center establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day.[760] In addition, the Rule requires that the trading center establish, maintain, and enforce written policies and procedures reasonably designed to impose this short sale price test restriction for the remainder of the day and the following day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan.[761]

In conjunction with the amendments to Rule 201, we are amending Rule 200(g) of Regulation SHO to provide that a broker-dealer may mark certain qualifying sell orders "short exempt." In particular, if the broker-dealer chooses to rely on its own determination that it is submitting the short sale order to the trading center at a price that is above the current national best bid at the time of submission or to rely on an exception specified in the Rule, it must mark the order as "short exempt."[762]

We discuss below the benefits of Rule 201 with respect to two inter-related aspects of the Rule: the short sale price test restriction, specifically the alternative uptick rule, and the circuit breaker approach that triggers application of that restriction. We have separated the discussion into two parts in order to more clearly address the comments that we received with respect to the various aspects of Rule 201. However, the circuit breaker approach and the alternative uptick rule under Rule 201 operate in conjunction with one another and should not be considered isolated provisions.

1. Alternative Uptick Rule

The alternative uptick rule is designed to prevent the execution or display of short sale orders at a price that is less than or equal to the current national best bid. By not allowing short sellers to sell at or below the current national best bid, the alternative uptick rule will allow long sellers, by selling at the bid, to sell first in a declining market for a particular security. As the Commission has noted previously in connection with short sale price test restrictions, a goal of such restrictions is to allow long sellers to sell first in a declining market.[763] A short seller that is seeking to profit quickly from accelerated, downward market moves may find it advantageous to be able to short sell at the current national best bid. By placing long sellers ahead of short sellers in the execution queue under certain circumstances, Rule 201 will help promote capital formation, since investors may be more willing to hold long positions if they know they may have a preferred position over short sellers when they wish to sell.[764]

[756] *See* Proposal, 74 FR at 18090; Re-Opening Release, 74 FR at 42037.

[757] *See* Proposal, 74 FR at 18090.

[758] *See id.*

[759] *See id.;* Re-Opening Release, 74 FR at 42037.

[760] Rule 201(b).

[761] Rule 201(b).

[762] *See* Rules 200(g) and 200(g)(2).

[763] *See supra* note 17.

[764] *But see infra* notes 821 to 827 and accompanying text (discussing the potential negative impact of Rule 201 on various trading strategies that include short selling).

In addition, because the alternative uptick rule, when triggered, will generally permit short selling only at a price above the current national best bid, the alternative uptick rule will not allow short sales to get immediate execution at the bid.[765] In other words, short sellers will not be permitted to act as liquidity takers when the alternative uptick rule applies, but will participate, if at all, as liquidity providers (unless an exception applies), adding depth to the market. Put another way, unless an exception applies, short sales will execute only when purchasers arrive willing to buy at prices above the national best bid. In discussing the alternative uptick rule, one commenter stated that "[n]ot only does it faithfully replicate the old uptick rule it improves upon it by making each and every short sale a liquidity providing transaction."[766]

Further, the alternative uptick rule is designed to help restore investor confidence in the securities markets.[767] It will also help restore investor confidence during times of substantial uncertainty because, once the circuit breaker has been triggered for a particular security, long sellers will have preferred access to bids for the security, and the security's continued price decline will more likely be due to long selling and the underlying fundamentals of the issuer, rather than to other factors. Bolstering investor confidence in the markets should help to encourage investors to be more willing to invest in the markets, thus adding depth and liquidity to the markets. In addition, we note that a number of commenters stated that they believe that a short sale price test restriction will aid small investors.[768]

As we stated in the Proposal, short sale price test restrictions, whether a permanent market-wide restriction or in combination with a circuit breaker, might help prevent short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.[769] Because the alternative uptick rule only permits short selling at a price above the current national best bid, unless an exception applies, we believe it will be more effective than the proposed uptick rule or the proposed modified uptick rule at achieving our goals in helping to prevent short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security. Several commenters stated that the alternative uptick rule would dramatically decrease price pressure on a security[770] and, thereby, the ability of market participants to use short selling as a market manipulation tool.[771] Another commenter, in supporting the alternative uptick rule, stated that it would "likely be more restrictive on short selling than the original Rule 10a–1 'uptick rule'."[772]

In addition, we believe that the alternative uptick rule is preferable to the proposed modified uptick rule or the proposed uptick rule, in part, because it will be easier and less costly to implement and monitor. Unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price, the alternative uptick rule references only the current national best bid. Several commenters expressed support for the alternative uptick rule, stating that the alternative uptick rule was preferable to the proposed modified uptick rule or the proposed uptick rule because it would eliminate sequencing issues[773] and would be easier and less costly to implement.[774] One commenter noted that the alternative uptick rule would simplify on-going surveillance and enforcement, as compared to the other proposed short sale price test restrictions.[775] In addition, we believe that the implementation and on-going monitoring and compliance costs of the alternative uptick rule are justified by the benefits provided in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

2. Circuit Breaker Approach

Under the circuit breaker approach, the alterative uptick rule will apply only if the price of a covered security has declined by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day.[776] In addition, the short sale price test restriction will only remain in place for the remainder of the day and for the following day.[777] The listing market for each covered security must determine whether that covered security is subject to Rule 201[778] and must immediately notify the single plan processor responsible for consolidation of information for the covered security in accordance with Rule 603(b) of Regulation NMS[779] of the fact that a covered security has become subject to the short sale price test restriction of Rule 201. The plan processor must then disseminate this information.[780]

We believe that a circuit breaker approach strikes the appropriate balance between our goal of preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security and the need to allow for the continued smooth functioning of the markets, including the provision of liquidity and price efficiency in the markets.[781] The circuit breaker approach of Rule 201 will help benefit the market for a particular security by allowing participants, when a security is undergoing a significant intra-day price decline, an opportunity to re-evaluate circumstances and respond to volatility in that security. We also believe that a circuit breaker will better target short selling that may be related to potential bear raids[782] and other forms of manipulation that may be

[765] As noted by some commenters, there may be situations in which a short seller could get immediate execution, such as where an order is executed in a facility that provides executions at the mid-point of the national best bid and offer. *See, e.g.,* letter from ISE (Sept. 2009); *see also* letter from BATS (Sept. 2009).

[766] Letter from Glen Shipway (Sept. 2009).

[767] *See, e.g., supra* note 94 (citing comment letters suggesting that reinstatement of short price test restrictions in some form will help restore investor confidence in the markets).

[768] *See supra* note 97 (citing commenters who stated that a short sale price test restriction would aid small investors).

[769] *See* Proposal, 74 FR at 18050, 18053, 18059, 18061, 18065, 18069; *see also* Securities and Exchange Commission, Special Study of Securities Markets, H.R. Doc. No. 95, 88th Cong., 1st Sess., at 251 (1963).

[770] *See, e.g.,* letter from BATS (Sept. 2009); letter from Wells Fargo (Sept. 2009); *see also* letter from SIFMA (Sept. 2009) (stating that a circuit breaker coupled with the alternative uptick rule "would limit instances where a security is the subject of severe downward pressure").

[771] *See* letter from BATS (Sept. 2009); letter from Wells Fargo (Sept. 2009); letter from STA (Sept. 2009); letter from Glen Shipway (Sept. 2009).

[772] Letter from Virtu Financial.

[773] *See, e.g.,* letter from Direct Edge (June 2009); letter from BATS (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from STA (Sept. 2009); letter from Wells Fargo (Sept. 2009); *see also* letter from Hudson River Trading (expressing a preference for the alternative uptick rule, as opposed to the proposed modified uptick rule or the proposed uptick rule, if in conjunction with a circuit breaker); *see also supra* notes 661 to 664 and accompanying text.

[774] *See, e.g.,* letter from BATS (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from European Investors (Sept. 2009); letter from Goldman Sachs (Sept. 2009); letter from STA (Sept. 2009); letter from Glen Shipway (Sept. 2009); letter from T. Rowe Price (Sept. 2009); letter from Wells Fargo (Sept. 2009); *see also* letter from Hudson River Trading; *see also supra* notes 661 to 664 and accompanying text.

[775] *See* letter from SIFMA (Sept. 2009).

[776] *See* Rule 201(b).

[777] *See id.*

[778] *See* Rule 201(b)(3).

[779] 17 CFR 242.603(b); *see supra* note 368.

[780] *See* Rule 201(b)(3); 17 CFR 242.603(b).

[781] *See supra* Section III.A.4.

[782] *See supra* note 36 and accompanying text.

used to exacerbate a price decline in a covered security.

In response to our requests for comment, some commenters expressed support for a circuit breaker approach because it would be more narrowly-tailored to address our concerns about the effects of short selling in a market subject to a significant downturn than a permanent, market-wide short sale price test restriction.[783] For example, one commenter noted that "by implementing the alternative uptick rule only after a circuit breaker threshold has been reached, [the commenter] believes the Commission would strike the appropriate balance between the desirable goals of maximizing efficiency when the market is operating within normal trading ranges and prohibiting potentially abusive short selling when it is not, while refraining from imposing excessive implementation costs on the industry."[784] Another commenter stated that a circuit breaker is preferable because it "will restrict short selling when prices begin to decline substantially and short selling becomes more likely to be abusive and potentially harmful."[785]

As discussed above, short selling is an important tool in price discovery and the provision of liquidity to the market, and we recognize that imposition of a short selling circuit breaker that when triggered imposes the alternative uptick rule could restrict otherwise legitimate short selling activity during periods of significant volatility. Under the circuit breaker approach, the alternative uptick rule will only be imposed when a covered security has experienced an intra-day price decline of 10% or more and will only apply for the remainder of the day and the following day. As discussed previously,[786] commenters' estimates and the Staff's analysis show that a 10% circuit breaker threshold generally should affect only a limited percentage of covered securities. In addition, when triggered, the short sale price test restriction will apply for a limited period of time, *i.e.,* the remainder of the day and the following day, rather than all the time. Thus, Rule 201 is structured so that it will not be triggered for the majority of covered securities most of the time and, thereby, will not interfere with the smooth functioning of the markets for those securities, including when prices in such securities are undergoing minimal downward price pressure or are stable or rising. To the extent that Rule 201 results in a disruption to the smooth functioning of the markets, including the provision of liquidity and price efficiency in the markets, we believe that such costs are justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

Several commenters stated their belief that implementing short sale price test restrictions on a permanent, market-wide basis, rather than in combination with a circuit breaker, would substantially diminish the benefits that short sellers bring to the markets.[787] Another commenter stated that a circuit breaker is preferable to a permanent, market-wide short sale price test restriction because it "permits normal market activity while a stock is trading in a natural range and short selling is more likely to benefit the market (by, for example, increasing price discovery and liquidity)."[788]

The Commission has long held the view that circuit breakers may help restore investor confidence during times of substantial uncertainty.[789] We believe that the requirements of Rule 201 will produce such benefits. By imposing the alternative uptick rule once a security's price is experiencing a significant intra-day price decline, the short selling circuit breaker rule in Rule 201(b) is designed to target only those securities that experience such declines and, therefore, will help to prevent short selling from being used as a tool to exacerbate the decline in the price of those securities. This approach establishes a narrowly-tailored Rule that targets only those securities experiencing such a decline and which only applies a short sale price test restriction for a limited period of time. We believe that addressing short selling in connection with such declines will help restore investor confidence in the markets generally. One commenter noted that "preventing rapid declines in stock prices strengthens investor confidence."[790] Another commenter stated that a circuit breaker triggering a short sale price test restriction would provide "investors with confidence that short sellers will be restricted from conducting any perceived market manipulation strategies such as 'bear raids.'"[791]

A circuit breaker approach will also allow regulatory, supervisory and compliance resources to focus on, and to address, those situations where a specific security is experiencing significant downward price pressure. As noted by one commenter, a circuit breaker "is particularly efficient in stable and rising markets because it avoids imposing continuous monitoring and compliance costs where there is little or no corresponding risk of abusive short selling."[792]

Requiring the listing market for a covered security to determine whether the security has become subject to the short sale price test restrictions of Rule 201 will help ensure consistency for each covered security with respect to such determinations as only the listing market for that covered security will be making the determination. In addition, we believe that listing markets will be in the best position to respond to anomalous or unforeseeable events that may impact a covered security's price, such as an erroneous trade, because the listing markets generally have in place specific procedures designed to address such events.[793] Further, because the single plan processors currently receive information from listing markets regarding trading restrictions (*i.e.* Regulatory Halts as defined in those plans) on individual securities and disseminate such information, the requirements of Rule 201(b)(3) are similar to existing obligations on plan processors pursuant to the requirements of Regulation NMS, the CTA and CQ Plans and the Nasdaq UTP Plan.

3. Marking Requirements

The "short exempt" marking requirements under Rule 200(g) will provide a record that a broker-dealer is availing itself of the provisions of

[783] *See, e.g.,* letter from Direct Edge (June 2009); letter from Citadel *et al.* (Sept. 2009); letter from Direct Edge (Sept. 2009); letter from BATS (Sept. 2009); letter from Goldman Sachs (Sept. 2009); letter from Hudson River Trading (Sept. 2009); letter from Qtrade; letter from SIFMA (Sept. 2009); letter from Virtu Financial; *see also* letter from Goldman Sachs (June 2009); letter from SIFMA (June 2009); letter from Nasdaq OMX Group (Oct. 2009).

[784] Letter from BATS (Sept. 2009).

[785] Letter from Nasdaq OMX Group (Oct. 2009); *see also* letter from Goldman Sachs (June 2009); letter from BATS (Sept. 2009); letter from SIFMA (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from Virtu Financial.

[786] *See supra* Section III.A.5. (discussing the circuit breaker trigger level).

[787] *See, e.g.,* letter from Direct Edge (Sept. 2009); letter from Credit Suisse (Sept. 2009).

[788] Letter from Nasdaq OMX Group (Oct. 2009); *see also* letter from Goldman Sachs (June 2009); letter from BATS (Sept. 2009); letter from SIFMA (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from Virtu Financial.

[789] *See, e.g.,* 1998 Release, 63 FR 18477; *see also* Proposal, 74 FR at 18067.

[790] Letter from BIO.

[791] Letter from Brian M. Collie, Esq., Associate, Taurus Compliance Consulting, LLC, dated June 19, 2009 ("Taurus Compliance").

[792] Letter from Nasdaq OMX Group (Oct. 2009); *see also* letter from SIFMA (Sept. 2009).

[793] *See supra* note 327 (discussing NYSE's procedures to ensure the accuracy and reliability of its closing price).

paragraph (c) or (d) of Rule 201. Thus, the records created pursuant to the "short exempt" marking requirements of Rule 200(g) will aid surveillance by SROs and the Commission for compliance with the provisions of Rule 201. In addition, the "short exempt" marking requirement will provide an indication to a trading center regarding when it must execute or display a short sale order without regard to whether the order is at a price that is less than or equal to the current national best bid and will aid broker-dealers in complying with their legal requirements.

In response to our requests for comment, several commenters indicated that requiring broker-dealers to mark all sell orders "long," "short," or "short exempt" would provide valuable information to the Commission[794] and that such information would be worth the costs of requiring such marking.[795] One commenter stated that the information provided by a "short exempt" marking requirement would provide the Commission with data on the extent to which exceptions are being used to circumvent the requirements of Rule 201.[796]

B. Costs

In the Proposal, we discussed the anticipated costs of the proposed short sale price test restrictions, both on a permanent, market-wide basis and in conjunction with a circuit breaker.[797] We requested comment, in the Proposal and Re-Opening Release, on the costs associated with the proposed amendments.[798] In particular, we requested comment on the potential costs for any modification to both computer systems and surveillance mechanisms and for information gathering, management, and recordkeeping systems or procedures.[799] We also requested comment as to the extent to which placing price restrictions on short selling could impact or lessen some of the benefits of legitimate short selling or could lead to a decrease in market efficiency, price discovery, or liquidity.[800] We discuss the comments that we received with respect to the costs of Rule 201 in detail in Sections X.B.1., X.B.2., X.B.3 and X.B.4., below.

We recognize that Rule 201 will impose costs on market participants to implement and assure compliance with the requirements of the Rule. After considering empirical evidence regarding former Rule 10a–1 and the comments that we received in response to the Proposal and the Re-Opening Release, as discussed below, we believe that Rule 201 will have a minimal, if any, negative effect on market liquidity, price efficiency, and quote depths.[801] In addition, we recognize that there will be market costs associated with Rule 201 in terms of the potential impact of such a short sale-related circuit breaker on execution speed and probability. By requiring for a limited time-period that short sales may only be executed or displayed above the current national best bid once a covered security has experienced an intra-day price decline of 10% or more, Rule 201 may slow the speed of executions and impose additional costs on market participants, including buyers.[802] Such costs may increase the costs of legitimate short selling.

To the extent that Rule 201 results in increased costs for short selling in covered securities that trigger the alternative uptick rule, it may increase the trading costs of legitimate short selling for these securities and may result in a reduction in short selling generally. Restricting short selling may also reduce "long" activity where the short selling is part of a larger trading strategy.

We believe, however, that such costs will be mitigated by the circuit breaker approach of Rule 201. Under the circuit breaker approach, the alternative uptick rule will only be imposed when a covered security has experienced an intra-day price decline of 10% or more and will only apply for the remainder of the day and the following day. As discussed previously,[803] commenters' estimates and the Staff's analysis show that a 10% circuit breaker threshold generally should affect only a limited percentage of covered securities. In addition, when triggered, the short sale price test restriction will apply for a limited period of time, *i.e.,* the remainder of the day and the following day, rather than all the time. Thus, Rule 201 is structured so that it will not be triggered for the majority of covered securities most of the time and, thereby, will not interfere with the smooth functioning of the markets for those securities, including when prices in such securities are undergoing minimal downward price pressure or are stable or rising. To the extent that Rule 201 results in increased costs for short selling in covered securities that trigger the alternative uptick rule, a reduction in short selling generally, and a reduction in "long" activity where the short selling is part of a larger trading strategy, we believe that such costs are justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

In addition, we recognize that Rule 201, when triggered, will impose a short sale price test restriction, when, currently, there is an absence of any short sale price test restrictions. This will result in costs in terms of modifications to systems and surveillance mechanisms, as well as changes to processes and procedures. We anticipate that these changes will likely result in immediate implementation costs for trading centers and SROs and other market participants associated with reprogramming trading and surveillance systems to account for short sale price test restrictions based on best bid information, as discussed in more detail below. We also believe Rule 201 will impose costs on trading centers and SROs and other market participants related to systems changes to computer software, reprogramming costs, and surveillance and compliance costs, as well as staff time and technology resources, associated with monitoring compliance with Rule 201, as discussed below.

Moreover, imposing a short sale-related circuit breaker that, if triggered, will impose a short sale price test restriction, when there are currently no short sale price test restrictions in place also may mean that staff (compliance personnel, associated persons, *etc.*) may need to be trained or re-trained regarding rules related to short sale price test restrictions. As such, we believe Rule 201 may impose training and compliance costs for trading

[794] *See, e.g.,* letter from STA (June 2009); letter from CFA.

[795] *See, e.g.,* letter from STA (June 2009).

[796] *See* letter from STA (June 2009).

[797] *See* Proposal, 74 FR at 18092–18100.

[798] *See* Proposal, 74 FR at 18100; Re-Opening Release, 74 FR at 42037.

[799] *See* Proposal, 74 FR at 18090.

[800] *See id.*

[801] *See infra* note 878 (citing empirical evidence showing that former Rule 10a–1 did not have an effect on market liquidity and price efficiency and that price test restrictions resulted in an increase in quote depths). We note that, although the alternative uptick rule is by definition more restrictive than the proposed modified uptick rule, differences between the operation of the proposed uptick rule and the alternative uptick rule mean that one approach or the other would be more restrictive in particular circumstances. *See, e g., supra* note 242 and accompanying text (discussing automated trade matching systems).

[802] As discussed above, on the day the Pilot went into effect, listed Pilot securities underperformed listed control group securities by approximately 24 basis points. The Pilot and control group securities, however, had similar returns over the first six months of the Pilot. *See supra* note 52 (referencing Staff's Summary Pilot Report at 8).

[803] *See supra* Section III.A.5. (discussing the circuit breaker trigger level).

centers, SROs, and other market participants.

However, as discussed below, because the alternative uptick rule references only the current national best bid, unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price, we believe that the alternative uptick rule will be easier and less costly to implement and monitor than the proposed modified uptick rule or the proposed uptick rule.[804]

Further, we note that the policies and procedures that are required to be implemented under Rule 201 are similar to those that are required under the Order Protection Rule of Regulation NMS.[805] Thus, we believe trading centers and broker-dealers may already be familiar with establishing, maintaining, and enforcing trading-related policies and procedures, including programming their trading systems in accordance with such policies and procedures. We believe this familiarity may reduce the implementation costs of Rule 201 and may make Rule 201 less burdensome to implement.

In addition, we believe that the implementation, and on-going monitoring and compliance costs of Rule 201 are justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

We discuss below the costs of Rule 201 with respect to two inter-related aspects of the Rule: The short sale price test restriction, specifically the alternative uptick rule, and the circuit breaker approach that triggers application of that restriction. We have separated the discussion into two parts in order to more clearly address the comments that we received with respect to the various aspects of Rule 201. However, the circuit breaker approach and the alternative uptick rule under Rule 201 operate in conjunction with one another and should not be considered isolated provisions.

1. Alternative Uptick Rule

Rule 201 requires a trading center to have written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day.[806]

a. Impact on Market Quality

As stated above, in the Proposal and Re-Opening Release, we requested comment on the costs of a short sale price test restriction,[807] and specifically as to the extent to which placing price restrictions on short selling could impact or lessen some of the benefits of legitimate short selling or could lead to a decrease in market efficiency, price discovery, or liquidity.[808]

The Commission received comments stating that the alternative uptick rule, or any short sale price restriction for that matter, would reduce the benefits that short selling provides to the markets.[809] For example, commenters stated that a short sale price test restriction would negatively impact liquidity,[810] market volume,[811] bid-ask spreads and price discovery.[812] Several commenters also stated that a short sale price test restriction might increase volatility.[813]

We believe, however, that the short sale price test restriction of Rule 201 will have a limited negative effect on liquidity, market volume, bid-ask spreads, price discovery and volatility. The Pilot Results found that the former tick test of Rule 10a–1 and former bid test of NASD, which were permanent, market-wide short sale price tests, did not have a significant impact on daily volatility, and also found some evidence that the short sale price tests dampened intra-day volatility for smaller stocks.[814] In addition, the Pilot Results found that the Pilot data provided limited evidence that then-current short sale price test restrictions distort a security's price. The Pilot Results also found that the short sale price test restrictions resulted in an increase in quote depths.[815] Realized liquidity levels, however, were unaffected by the removal of such short sale price test restrictions.[816] In addition, one study concluded that former Rule 10a–1 had little or no effect on price efficiency.[817] Another study found no evidence that former Rule 10a–1 negatively impacted price discovery.[818] Due to differences in the operation of former Rule 10a–1 and Rule 201, when it applies, the alternative uptick rule under Rule 201 will be more restrictive than former Rule 10a–1 in some circumstances and less restrictive in others.[819] As discussed above, however, due to the circuit breaker approach in Rule 201, the alternative uptick rule of Rule 201 generally will apply to a limited number of covered securities [820] and will apply only when

[804] *See infra* Section X.B.1.b.i. and Section X.B.1.b.ii. (discussing the implementation and on-going monitoring and surveillance costs of the alternative uptick rule on trading centers and broker-dealers).

[805] *See* Regulation NMS Adopting Release, 70 FR 37496; *see also* Proposal, 74 FR at 18087; 17 CFR 242.611.

[806] *See* Rule 201(b)(1).

[807] *See* Proposal, 74 FR at 18090, 18100; Re-Opening Release, 74 FR at 42037.

[808] *See* Proposal, 74 FR at 18090.

[809] *See, e.g.,* letter from Prof. Lipkin; letter from Citadel *et al.* (June 2009); letter from GETCO (June 2009); letter from Goldman Sachs (June 2009); letter from ICI (June 2009); letter from ISDA; letter from Lime Brokerage (June 2009); letter from RBC (June 2009); letter from Vanguard (June 2009); letter from Allston Trading (Sept. 2009); letter from TD Asset Management; letter from EWT (Sept. 2009); letter from BATS (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from CPIC (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from EWT (Sept. 2009); letter from Dialectic Capital (Sept. 2009); letter from GETCO (Sept. 2009); letter from Hudson River Trading; letter from Lime Brokerage (Sept. 2009); letter from RBC (Sept. 2009); letter from STA (Sept. 2009); letter from STANY (Sept. 2009); letter from Vanguard (Sept. 2009); letter from Bingham McCutchen; letter from MFA (Oct. 2009); letter from Nasdaq OMX Group (Oct. 2009); *see also* letter from Credit Suisse (Mar. 2009).

[810] *See, e.g.,* letter from Chad Stogel, Trillium Trading, LLC, dated May 26, 2009 ("Chad Stogel"); letter from Citadel *et al.* (June 2009); letter from Credit Suisse (June 2009); letter from Lime Brokerage (June 2009); letter from MFA (June 2009); letter from STA (June 2009); letter from EWT (Sept. 2009); letter from BATS (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from Lime Brokerage (Sept. 2009); letter from RBC (Sept. 2009); letter from STA (Sept. 2009); letter from Bingham McCutchen; *see also* letter from Credit Suisse (Mar. 2009).

[811] *See, e.g.,* letter from Chad Stogel; letter from Citadel *et al.* (June 2009); letter from Credit Suisse (June 2009); letter from MFA (June 2009); letter from STA (June 2009); letter from EWT (Sept. 2009); letter from BATS (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from RBC (Sept. 2009); letter from Bingham McCutchen; *see also* letter from Credit Suisse (Mar. 2009).

[812] *See, e.g.,* letter from Credit Suisse (June 2009); letter from MFA (June 2009); letter from Lime Brokerage (June 2009); letter from STA (June 2009); letter from RBC (Sept. 2009); *see also* letter from Credit Suisse (Mar. 2009).

[813] *See, e.g.,* letter from Prof. Lipkin; letter from AIMA; letter from Citadel *et al.* (June 2009); letter from Credit Suisse (June 2009); letter from RBC (June 2009); letter from SIFMA (June 2009); letter from Citadel *et al.* (Sept. 2009); letter from TD Asset Management; letter from Barclays (Sept. 2009); *see also* letter from NSCP.

[814] *See* Staff's Summary Pilot Report at 55–56.

[815] *See* Staff's Summary Pilot Report at 55; *see also* Karl B. Diether, Kuan Hui Lee and Ingrid M. Werner, 2009, *It's SHO Time! Short-Sale Price-Tests and Market Quality,* Journal of Finance 64:37.

[816] *See supra* note 54.

[817] *See* J. Julie Wu, *Uptick Rule, short selling and price efficiency,* Aug. 14, 2006.

[818] *See* Lynn Bai, 2008, *The Uptick Rule of Short Sale Regulation—Can it Alleviate Downward Price Pressure from Negative Earnings Shocks?* Rutgers Business Law Journal 5:1–63.

[819] *See, e g., supra* note 242 and accompanying text (discussing automated trade matching systems).

[820] *See supra* Section III.A.5. (discussing the circuit breaker trigger level and duration).

the circuit breaker has been triggered for a covered security. As such, it will not be triggered for the majority of covered securities at any given time and, when triggered, will remain in effect for a short duration—that day and the following day. Considering the empirical studies and the comments, and because of the limited scope and duration of Rule 201, we believe that the impact of Rule 201, if any, on liquidity, market volume, bid-ask spreads, price discovery and volatility will be limited. To the extent that Rule 201 negatively impacts liquidity, market volume, bid-ask spreads, price discovery and volatility, we believe that such costs are justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

The Commission received a number of comments addressing the extent to which a short sale price test restriction might cause a reduction in short selling.[821] For example, commenters stated that a reduction in short selling might result from: The implementation costs and on-going compliance costs of a short sale price test restriction; [822] uncertainty about whether a short sale order can be executed; [823] and reduced use of trading strategies that are market neutral or that rely on the ability to hedge through short sales.[824] Several commenters stated that the alternative uptick rule would restrict short sales more than the other proposed short sale price test restrictions, specifically because it would not allow immediate execution, and fewer short sales might be executed as a result.[825] A number of commenters stated that a reduction in short selling would result in decreased liquidity, wider price spreads, and more costly trading for investors overall.[826] Some commenters stated that such an increase in costs to investors would have a negative effect on investor confidence.[827]

The short sale price test restriction of Rule 201 may cause a limited reduction in short selling as a result of the implementation costs and on-going compliance costs of a short sale price test restriction; uncertainty about whether a short sale order can be executed; and reduced use of trading strategies that are market neutral or that rely on the ability to hedge through short sales. However, the alternative uptick rule will only be imposed when a covered security has experienced an intra-day price decline of 10% or more and will only apply for the remainder of the day and the following day. Due to the limited scope and applicability of Rule 201, we believe that any reduction in short selling will be limited.[828] In addition, we believe that any such reduction in short selling will have a minimal, if any, resulting negative impact on liquidity and price efficiency. As noted above, the Pilot Results found that the Pilot data provided limited evidence that then-current short sale price test restrictions, which were permanent and market-wide, distort a security's price. The Pilot Results also found that the short sale price test restrictions resulted in an increase in quote depths.[829] Realized liquidity levels, however, were unaffected by the removal of such short sale price test restrictions.[830] In addition, one study concluded that former Rule 10a–1 had little or no negative effect on price efficiency.[831] Another study found no evidence that former Rule 10a–1 negatively impacted price discovery.[832] Due to differences in the operation of former Rule 10a–1 and Rule 201, when it applies, the alternative uptick rule under Rule 201 will be more restrictive than former Rule 10a–1 in some circumstances and less restrictive in others.[833] As discussed above, however, due to the circuit breaker approach in Rule 201, the alternative uptick rule of Rule 201 generally will apply to a limited number of covered securities [834] and will apply only when the circuit breaker has been triggered for a covered security. As such, it will not be triggered for the majority of covered securities at any given time and, when triggered, will remain in effect for a short duration—that day and the following day. Considering the empirical studies and the comments, and due to the limited scope and duration of Rule 201, we believe that any reduction in short selling as a result of Rule 201 will have a minimal, if any, negative impact on liquidity and price efficiency. To the extent that Rule 201 has a negative impact on liquidity and price efficiency, we believe that such costs are justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

In addition, commenters stated that a short sale price test restriction in general, or the alternative uptick rule specifically, might negatively impact various trading strategies that include short selling,[835] such as high frequency

[821] *See, e.g.,* letter from Peter J. Driscoll, Chairman, John C. Giesea, President and CEO, Security Traders Association, dated May 4, 2009 ("STA (May 2009)"); letter from Citadel *et al.* (June 2009); letter from CPIC (June 2009); letter from MFA (June 2009); letter from Allston Trading (Sept. 2009); letter from Barclays (Sept. 2009); letter from CBOE (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from CPIC (Sept. 2009); letter from EWT (Sept. 2009); letter from GETCO (Sept. 2009); letter from ICI (Sept. 2009); letter from ISE (Sept. 2009); letter from RBC (Sept. 2009); letter from MFA (Oct. 2009).

[822] *See, e.g.,* letter from CPIC (June 2009); letter from Barclays (Sept. 2009).

[823] *See, e.g.,* letter from STA (May 2009); letter from Citadel *et al.* (June 2009); letter from STA (June 2009); letter from Barclays (Sept. 2009); letter from STA (Sept. 2009); *see also* letter from Lime Brokerage (June 2009) (explaining specifically the increased risk that would be associated with virtual market making strategies).

[824] *See, e.g.,* letter from STA (May 2009); letter from Credit Suisse (June 2009); letter from STA (June 2009); letter from Barclays (Sept. 2009); letter from STA (Sept. 2009); letter from MFA (Oct. 2009); *see also* letter from Lime Brokerage (June 2009) (explaining specifically the increased risk that would be associated with virtual market making strategies).

[825] *See, e.g.,* letter from Allston Trading (Sept. 2009); letter from Barclays (Sept. 2009); letter from CBOE (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from CPIC (Sept. 2009); letter from EWT (Sept. 2009); letter from GETCO (Sept. 2009); letter from ICI (Sept. 2009); letter from ISE (Sept. 2009); letter from RBC (Sept. 2009); letter from MFA (Oct. 2009).

[826] *See, e.g.,* letter from STA (May 2009); letter from Chad Stogel; letter from Allston Trading (June 2009); letter from Credit Suisse (June 2009); letter from STA (June 2009); letter from STA (Sept. 2009); letter from MFA (June 2009).

[827] *See, e.g.,* letter from Citadel *et al.* (June 2009); letter from Vanguard (June 2009); letter from Allston Trading (Sept. 2009); letter from EWT (Sept. 2009); letter from GETCO (Sept. 2009); *see also* letter from NSCP (stating that, without empirical evidence of inefficiency or failure in the equity markets that both caused deterioration of investor confidence and that would be remedied by a short sale price test restriction, a loss in confidence in the Commission as a fair and impartial regulator could do more harm in the long-run to damage the confidence of investors); letter from STA (June 2009) (stating that "[p]romulgating a rule that would not have any impact on the execution of abusive short sales may, in fact, foster further deterioration of investor confidence").

[828] *See supra* Section III.A.5. (discussing the circuit breaker trigger level and duration).

[829] *See* Staff's Summary Pilot Report at 55 and supporting text; *see also* Karl B. Diether, Kuan Hui Lee and Ingrid M. Werner, 2009, *It's SHO Time! Short-Sale Price-Tests and Market Quality,* Journal of Finance 64:37.

[830] *See supra* note 54.

[831] *See* J. Julie Wu, *Uptick Rule, short selling and price efficiency,* Aug. 14, 2006.

[832] *See* Lynn Bai, 2008, *The Uptick Rule of Short Sale Regulation—Can it Alleviate Downward Price Pressure from Negative Earnings Shocks?* Rutgers Business Law Journal 5:1–63.

[833] *See, e g., supra* note 242 and accompanying text (discussing automated trade matching systems).

[834] *See supra* Section III.A.5. (discussing the circuit breaker trigger level and duration).

[835] *See, e.g.,* letter from Citadel *et al.* (June 2009); letter from Credit Suisse (June 2009); letter from ISDA; letter from RBC (June 2009); letter from STA (June 2009); letter from Vanguard (June 2009); letter from EWT (Sept. 2009); letter from TD Asset Management; letter from Lime Brokerage (Sept. 2009); letter from Bingham McCutchen; letter from MFA (Oct. 2009); *see also* letter from Credit Suisse (Mar. 2009).

trading,[836] options valuation models that are used to value and hedge equity derivatives transactions,[837] market neutral trading strategies or those that rely on hedging,[838] convertible arbitrage,[839] statistical arbitrage,[840] program or portfolio trading baskets,[841] and hedging strategies that significantly contribute to market liquidity, such as computerized liquidity providers or "virtual market makers."[842] Commenters noted what they believe would be the negative consequences of such an impact, including increasing bid-ask spreads, reducing market volume,[843] reducing market liquidity,[844] reducing market efficiency,[845] complicating the raising of capital by corporate issuers,[846] and causing investors to exit the market.[847] Other commenters expressed the belief that restrictions on short selling might encourage the use of other trading strategies that largely mirror the benefits of short selling (such as sales of calls, purchase of puts, synthetic short sales of OTC derivatives, and sales of security futures), but that impose additional costs, such as reduced efficiency or inaccessibility to small investors.[848]

To the extent that Rule 201 may have a negative effect on various trading strategies that include short selling, we believe any such negative effect will be limited. Under Rule 201, although short selling will be restricted for a limited time by the alternative uptick rule if the price of a covered security decreases by 10% or more, unlike with securities subject to the Short Sale Ban Emergency Order, Rule 201 will permit short selling at a price above the current national best bid in the covered security even when the restriction is in place. Thus, short sellers engaged in various trading strategies that include short selling will generally continue to be able to sell short for the limited period of time when the short sale price test restriction is in effect. In addition, we note that many of the above comments on potential market-wide impacts of a short sale price test restriction on various trading strategies that include short selling were not specific to a short sale price test applied in conjunction with a circuit breaker.[849] Under the circuit breaker approach, the alternative uptick rule will only be imposed when a covered security has experienced an intra-day price decline of 10% or more and will only apply for the remainder of the day and the following day.[850] We believe that the negative impact of Rule 201, if any, on various trading strategies that include short selling will be limited because of the limited scope and duration of Rule 201. To the extent that Rule 201 has a negative impact on various trading strategies that include short selling, we believe that such costs are justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

We recognize that imposing a short sale price test restriction with respect to NMS stocks, without a similar restriction on derivative securities, could increase the use of derivative securities to create a short position and that such "synthetic" short positions could increase as a result of Rule 201. As discussed in Section III.A.1., above, however, short sales in the equity markets to hedge derivatives transactions are subject to Rule 201. In addition, we remain concerned that the ability to create a short position through the use of derivative securities may undermine the goals of short sale price test restrictions. At a later time, we may reconsider whether additional regulation of derivative securities and the use of "synthetic" short positions may be appropriate.

Several commenters discussed how constraints on short selling might harm price discovery and pricing efficiency.[851] Commenters stated that, under the alternative uptick rule, only long sellers could hit bids displayed as part of the national market system, which would result in long sellers exclusively dictating the market price of purchases, which would harm price discovery.[852] Additionally, commenters stated that the alternative uptick rule would restrict the informational content that short sale orders contain to only passive orders, meaning that the information would not be fully communicated in the price discovery process and pricing inefficiency would arise.[853] Other commenters stated that the alternative uptick rule might result in an inflated transaction price[854] or upward stock price manipulation.[855]

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[836] *See, e.g.,* letter from Bingham McCutchen.

[837] *See, e.g.,* letter from ISDA.

[838] *See, e.g.,* letter from Citadel *et al.* (June 2009); letter from Credit Suisse (June 2009); letter from EWT (Sept. 2009); letter from TD Asset Management; letter from MFA (Oct. 2009). This category includes such trading methods as long short equity strategies, convertible securities investors, and hedged strategies such as 130/30 portfolios. *See id.*

[839] *See, e.g.,* letter from Citadel *et al.* (June 2009); letter from Credit Suisse (June 2009); letter from Goldman Sachs (June 2009); letter from SIFMA (June 2009).

[840] *See, e.g.,* letter from Citadel *et al.* (June 2009).

[841] *See* letter from TD Asset Management.

[842] *See, e.g.,* letter from Lime Brokerage (June 2009); letter from Lime Brokerage (Sept. 2009).

[843] *See, e.g.,* letter from Citadel *et al.* (June 2009); letter from Lime Brokerage (Sept. 2009); letter from Bingham McCutchen; letter from Credit Suisse (June 2009).

[844] *See, e.g.,* letter from Chad Stogel; letter from Citadel *et al.* (June 2009); letter from Lime Brokerage (June 2009); letter from STA (June 2009); letter from EWT (Sept. 2009); letter from BATS (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from Lime Brokerage (Sept. 2009); letter from STA (Sept. 2009); letter from Bingham McCutchen.

[845] *See e.g.,* letter from Citadel *et al.* (June 2009); letter from Citadel *et al.* (Sept. 2009).

[846] *See, e.g.,* letter from Citadel *et al.* (June 2009); letter from Credit Suisse (June 2009); letter from Goldman Sachs (June 2009); letter from SIFMA (June 2009).

[847] *See, e.g.,* letter from Credit Suisse (June 2009).

[848] *See, e.g.,* letter from Prof. Rosenthal; letter from Barclays (June 2009) (warning that a mere transfer of short selling activity to other types of markets would impair the price discovery, efficiency, safety, and soundness of the public equity markets); letter from STA (June 2009) (discussing a possible shift to the derivative markets); letter from RBC (June 2009) (discussing sales of calls, purchases of puts, and short selling of security futures as methods to bypass the price restrictions); letter from Vanguard (June 2009) (discussing the use of synthetic short sales through OTC derivatives); *see also supra* Section III.A.1. (discussing the creation of "synthetic" short positions that are the economic equivalent of a short sale through the use of derivative securities).

[849] *See, e.g.,* letter from Bingham McCutchen; letter from ISDA; letter from TD Asset Management; letter from EWT (Sept. 2009); letter from Lime Brokerage (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from STA (Sept. 2009); letter from BATS (Sept. 2009); letter from MFA (Oct. 2009).

[850] *See supra* Section III.A.5. (discussing the circuit breaker trigger level and duration).

[851] *See, e.g.,* letter from Matlock Capital (May 2009); letter from Prof. Rosenthal; letter from Goldman Sachs (June 2009); Autore, Billingsley, and Kovacs, *Short Sale Constraints, Dispersion of Opinion, and Market Quality: Evidence from the Short Sale Ban on U.S. Financial Stocks* (June 19, 2009); letter from GETCO (June 2009); letter from STA (June 2009); letter from Allston Trading (Sept. 2009); letter from Bingham McCutchen; letter from Citadel *et al.* (Sept. 2009); letter from CPIC (Sept. 2009); letter from Dialectic Capital (Sept. 2009); letter from EWT (Sept. 2009); letter from Hudson River Trading; letter from STA (Sept. 2009); letter from TD Asset Management.

[852] *See, e.g.,* letter from Citadel *et al.* (Sept. 2009); letter from Dialectic Capital (Sept. 2009); letter from Bingham McCutchen; *see also* letter from GETCO (June 2009); letter from Charles A. Trzcinka, Professor of Finance and Chairman of the Finance Department, Kelly School of Business, Indiana University, dated May 10, 2009; letter from Prof. Rosenthal; Autore, Billingsley, and Kovacs, *Short Sale Constraints, Dispersion of Opinion, and Market Quality: Evidence from the Short Sale Ban on U.S. Financial Stocks* (June 19, 2009).

[853] *See, e.g.,* letter from TD Asset Management; letter from CPIC (Sept. 2009); *see also* letter from GETCO (June 2009); letter from Goldman Sachs (June 2009).

[854] *See, e.g.,* letter from Allston Trading (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from CPIC (Sept. 2009); letter from Dialectic Capital (Sept. 2009); letter from EWT (Sept. 2009); letter from Hudson River Trading; letter from STA (Sept. 2009).

[855] *See, e.g.,* letter from Allston Trading (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from RBC (Sept. 2009); *see also* letter from AIMA; letter from Citadel *et al.* (June 2009); letter from Goldman Sachs (June 2009); letter from RBC (June 2009).

We believe that Rule 201 will have a limited negative effect on price discovery and price efficiency. As discussed above, the Pilot Results[856] found that the Pilot data provided limited evidence that the former tick test of Rule 10a–1(a) and former bid test of NASD, which were permanent, market-wide short sale price tests, distorted a security's price. In addition, one study concluded that former Rule 10a–1 had little or no effect on price efficiency.[857] Another study found no evidence that former Rule 10a–1 negatively impacted price discovery.[858] Due to differences in the operation of former Rule 10a–1 and Rule 201, when it applies, the alternative uptick rule under Rule 201 will be more restrictive than former Rule 10a–1 in some circumstances and less restrictive in others.[859] As discussed above, however, due to the circuit breaker approach in Rule 201, the alternative uptick rule of Rule 201 generally will apply to a limited number of covered securities[860] and will apply only when the circuit breaker has been triggered for a covered security. As such, it will not be triggered for the majority of covered securities at any given time and, when triggered, will remain in effect for a short duration—that day and the following day. Considering the empirical studies and the comments and because of the limited scope and duration of Rule 201, we believe that Rule 201 will have little, if any, negative effect on price discovery and price efficiency. To the extent that Rule 201 negatively affects price discovery and price efficiency, we believe that such costs are justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

A number of commenters discussed the impact that the alternative uptick rule might have on execution.[861] Several commenters stated that, under the alternative uptick rule, short sales would be ineligible for immediate execution, causing increased trading costs and opportunity costs, decreased liquidity, and widened spreads.[862] Commenters also stated that the alternative uptick rule would increase the risk of non-execution of a short sale, which would reduce the speed of price discovery and increase execution prices.[863] Commenters also noted that the alternative uptick rule could cause missed execution opportunities, thereby causing retail investors to pay artificially high prices to obtain execution.[864]

As we stated in the Re-Opening Release, because the alternative uptick rule will only permit short selling at a price above the current national best bid, the alternative uptick rule will generally not allow short sales to get immediate execution, even in an advancing market,[865] which may slow the speed of executions and impose additional costs on market participants, including buyers.[866] We note, however, that the above comments on the potential impacts of the alternative uptick rule on execution were not specific to a short sale price test in conjunction with a circuit breaker.[867] Under the circuit breaker approach, the alternative uptick rule will only be imposed when a covered security has experienced an intra-day price decline of 10% or more and will only apply for the remainder of the day and the following day.[868] We believe that the negative impact of Rule 201, if any, on execution speed and probability will be limited because of the limited scope and duration of Rule 201. To the extent that Rule 201 negatively impacts execution speed and probability, we believe that such costs are justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

Several commenters suggested that short sellers who remain in the markets, as well as other market participants, might change their trading behavior in response to a short sale price test restriction.[869] For example, commenters expressed the belief that other traders might use computer algorithms to identify the presence of short sellers who have sell orders exactly one increment above the bid and quickly adjust their bid price downward in anticipation of the stock price dropping, which would result in the price of the security declining even further overall.[870] Similarly, several commenters stated that short sale limit orders might be perceived by other market participants as a negative view on a covered security, which might have negative implications on market efficiency, market liquidity, and bid-ask spreads and might cause buyers to withdraw their bids.[871] One commenter noted that displayed short sale limit orders could be "subject to the risk that long sellers would use the information in the orders to their advantage and front-run or pick off the orders."[872] Additionally, commenters stated that short sellers who seek to execute above the best bid without displaying the offer would be driven to transact in market centers that do not display their better-priced bids as part of the national

[856] *See* Staff's Summary Pilot Report at 55; Karl B. Diether, Kuan Hui Lee and Ingrid M. Werner, 2009, *It's SHO Time! Short-Sale Price-Tests and Market Quality,* Journal of Finance 64:37–73; Gordon J. Alexander and Mark A. Peterson, 2008, *The Effect of Price Tests on Trader Behavior and Market Quality: An Analysis of Reg. SHO,* Journal of Financial Markets 11:84–111; J. Julie Wu, *Uptick Rule, short selling and price efficiency,* Aug. 14, 2006; Lynn Bai, 2008, *The Uptick Rule of Short Sale Regulation—Can it Alleviate Downward Price Pressure from Negative Earnings Shocks?* Rutgers Business Law Journal 5:1–63.

[857] *See* J. Julie Wu, *Uptick Rule, short selling and price efficiency,* Aug. 14, 2006.

[858] *See* Lynn Bai, 2008, *The Uptick Rule of Short Sale Regulation—Can it Alleviate Downward Price Pressure from Negative Earnings Shocks?* Rutgers Business Law Journal 5:1–63.

[859] *See, e g., supra* note 242 and accompanying text (discussing automated trade matching systems).

[860] *See supra* notes 305 to 311 and accompanying text (discussing data reflecting that, on average, a limited number of covered securities would hit a 10% trigger level each day).

[861] *See, e.g.,* letter from Citadel *et al.* (Sept. 2009); letter from Group One Trading (Sept. 2009); letter from TD Asset Management; letter from CPIC (Sept. 2009); letter from Lime Brokerage (Sept. 2009); letter from RBC (Sept. 2009); letter from SIFMA (Sept. 2009); letter from STA (Sept. 2009); letter from Barclays (Sept. 2009).

[862] *See, e.g.,* letter from Citadel *et al.* (Sept. 2009); letter from TD Asset Management; letter from CPIC (Sept. 2009); letter from STA (Sept. 2009). As noted by some commenters, however, there may be situations in which a short seller could get immediate execution, such as where an order is executed in a facility that provides executions at the mid-point of the national best bid and offer. *See, e.g.,* letter from ISE (Sept. 2009); *see also* letter from BATS (Sept. 2009).

[863] *See, e.g.,* letter from Barclays (Sept. 2009); letter from STA (Sept. 2009).

[864] *See, e.g.,* letter from Allston Trading (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from Dialectic Capital (Sept. 2009); *see also* letter from Chad Stogel.

[865] *See* Re-Opening Release, 74 FR at 42034; *see also supra* note 227 (noting that under some circumstances a short seller may be able to get immediate execution).

[866] *See supra* note 52 (discussing returns for listed Pilot securities and listed control group securities during the first six months of the Pilot and referencing Staff's Summary Pilot Report at 8).

[867] *See, e.g.,* letter from Allston Trading (Sept. 2009); letter from Barclays (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from Dialectic Capital (Sept. 2009); letter from TD Asset Management; letter from CPIC (Sept. 2009); letter from STA (Sept. 2009).

[868] *See supra* Section III.A.5. (discussing the circuit breaker trigger level and duration).

[869] *See, e.g.,* letter from STA (May 2009); letter from Group One Trading (Sept. 2009); letter from Lime Brokerage (Sept. 2009).

[870] *See* letter from Group One Trading (Sept. 2009); letter from STANY (Sept. 2009).

[871] *See, e.g.,* letter from Barclays (Sept. 2009); letter from MFA (Oct. 2009); *see also* letter from STA (Sept. 2009) (stating that because short sale orders would have to be priced one increment above the national best bid, and would drop in price as bids were exhausted, the alternative uptick rule "would also prolong and deepen downward moves by forcing there to be overhanging, passive supply").

[872] Letter from Citadel *et al.* (Sept. 2009).

market system, such as dark pools, or through broker-dealers that offer internalization.[873] Commenters noted that such an increase in volume directed to non-public markets would decrease overall market transparency, liquidity, and pricing efficiency.[874]

Although we recognize that short sellers who remain in the markets, as well as other market participants, might change their trading behavior in response to a short sale price test restriction, we believe any such effect will be limited by the circuit breaker approach of Rule 201. Under the circuit breaker approach, the alternative uptick rule will only be imposed when a covered security has experienced an intra-day price decline of 10% or more and will only apply for the remainder of the day and the following day.[875] To the extent that Rule 201 results in changes in trading behavior, we believe that such an impact is justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

In addition, we note that, as discussed in Section II.D., above, we reviewed the empirical analyses that commenters submitted to us or discussed in their comments. Consistent with the Pilot Results, a study of the effect that rescission of former Rule 10a–1 had on market quality found that the elimination had no measurable effect on market volatility,[876] while the results of other studies on the effect of the lack of a short sale price test restriction on volatility were mixed.[877] However, we note that the study showing no measurable effect on market volatility only analyzed daily volatility during a six-week period following the elimination of former Rule 10a–1 and, thus, may have limited statistical significance. In addition, the studies evidencing an increase in volatility do not address the extent to which other factors may have contributed to or caused the increased volatility.

Studies of other aspects of market quality suggest little measurable impact of a short sale price test restriction on price discovery, market efficiency, liquidity or market quality in general.[878] Several commenters cited empirical evidence showing that restrictions on short selling, particularly bans on short selling, may impede liquidity, price discovery, and market efficiency,[879] but the cited studies do not address the effects of a short sale price test restriction in general or Rule 201 in particular. The empirical analyses that commenters submitted on whether a short sale price test restriction dampens price pressure from short sellers are mixed, but generally focus on long time horizons, such as weeks or months, as opposed to short time horizons, such as seconds or minutes, which are more relevant to the impact of a short sale price test restriction on price pressure.[880]

In summary, after considering the empirical evidence and the comments that we received in response to the Proposal and the Re-Opening Release, we believe that Rule 201 will have a minimal, if any, negative effect on market liquidity, price efficiency, and quote depths.[881] In addition, we recognize that there will be market costs associated with Rule 201 in terms of the potential impact of such a short sale-related circuit breaker on execution speed and probability. Such costs may increase the costs of legitimate short selling. To the extent that Rule 201 results in increased costs for short selling in covered securities, it may increase the trading costs of legitimate short selling for these securities and may result in a reduction in short selling generally. Restricting short selling may also reduce "long" activity where the short selling is part of a larger trading strategy. As discussed above, we believe that these costs will be limited because of the circuit breaker approach of Rule 201.

We believe that the potential costs of Rule 201 are justified by its design, such that, when Rule 201 is triggered, it will allow long sellers, by selling at the bid, to sell first, ahead of short sellers, in a declining market for a particular security. As the Commission has noted previously in connection with short sale price test restrictions, a goal of such restrictions is to allow long sellers to sell first in a declining market.[882] A short seller that is seeking to profit quickly from accelerated, downward market moves may find it advantageous to be able to short sell at the current national best bid. In addition, by making bids accessible only by long sellers when a security's price is undergoing significant downward price pressure, Rule 201 will help to facilitate and maintain stability in the markets and help ensure that they function efficiently. It will also help restore investor confidence during times of substantial uncertainty because, once the circuit breaker has been triggered for a particular security, long sellers will have preferred access to bids for the security, and the security's continued price decline will more likely be due to long selling and the underlying fundamentals of the issuer, rather than to other factors. In addition, combining the alternative uptick rule with a circuit breaker strikes the appropriate balance between our goal of preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security and the need to allow for the continued smooth functioning of the markets, including the provision of liquidity and price efficiency in the markets.

In addition, we believe several of the provisions contained in paragraph (d) of Rule 201 will help to mitigate any potential price distortions or costs associated with Rule 201. These provisions are designed to help promote the workability of Rule 201, while at the same time furthering our goals for adopting short sale price test regulation.

As discussed above,[883] we are adopting the seller's delay in delivery exception under Rule 201(d)(1) to allow sale orders of owned but restricted

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[873] *See, e.g.,* letter from EWT (Sept. 2009); letter from Group One Trading (Sept. 2009); letter from STANY (Sept. 2009).

[874] *See id.; see also* letter from STA (May 2009).

[875] *See supra* Section III.A.5. (discussing the circuit breaker trigger level and duration).

[876] *See* Ekkehart Boehmer, Charles M. Jones, and Xiaoyan Zhang, *Unshackling Short Sellers: The Repeal of the Uptick Rule* (Nov. 2008).

[877] *See, e.g.,* letter from NAREIT; letter from High Street Advisors; letter from European Investors (Sept. 2009).

[878] *See, e.g.,* the Pilot Results; *see also supra* note 856 and accompanying text. Numerous commenters also sent analyses on short selling restrictions in general or on the short selling ban. *See, e.g.,* letter from AIMA; letter Allston Trading (June 2009); Autore, Billingsley, and Kovacs, *Short Sale Constraints, Dispersion of Opinion, and Market Quality: Evidence from the Short Sale Ban on U.S. Financial Stocks* (June 19, 2009); letter from BATS (May 2009); letter from CBOE (June 2009); letter from Citadel *et al.* (June 2009); letter from Credit Suisse (June 2009), letter from CPIC (June 2009); letter from GETCO (June 2009); letter from Goldman Sachs (Sept. 2009); letter from Hudson River Trading; letter from ICI (June 2009); letter from NSCP; letter from NYSE Euronext (June 2009); letter from TD Asset Management; letter from STANY (June 2009); letter from Wolverine.

[879] *See supra* note 128.

[880] *See, e.g.,* J. Julie Wu, *Uptick Rule, short selling and price efficiency,* Aug. 14, 2006.

[881] *See supra* note 878 (citing empirical evidence showing that former Rule 10a–1 did not have an effect on market liquidity and price efficiency and that price test restrictions resulted in an increase in quote depths). We note that, although the alternative uptick rule is by definition more restrictive than the proposed modified uptick rule, differences between the operation of the proposed uptick rule and the alternative uptick rule mean that one approach or the other would be more restrictive in particular circumstances. *See, e. g., supra* note 242 and accompanying text (discussing automated trade matching systems).

[882] *See supra* note 17.

[883] *See supra* Section III.B.2. (discussing the "short exempt" provision for seller's delay in delivery).

securities to be displayed or executed at a price that is less than or equal to the current national best bid, thereby mitigating the negative impact of Rule 201, if any, on execution speed and probability and helping to promote the workability of Rule 201.

Rule 201(d)(2) allows a broker-dealer to mark a short sale order as "short exempt" if the broker-dealer has a reasonable basis to believe that the short sale order is by a market maker to off-set a customer odd-lot order or liquidate an odd-lot position which changes such broker-dealer's position by no more than a unit of trading.[884] We believe that the odd-lot exception will promote the workability of Rule 201 and help mitigate potential price distortions or costs associated with the Rule, if any, because it will allow those acting in the capacity of a "market maker" to off-set customer odd-lot orders without regard to whether the sale order is at a price that is less than or equal to the current national best bid, thereby facilitating the liquidity providing function of market makers.

Rule 201(d)(3) permits a broker-dealer to mark as "short exempt" short sale orders associated with certain bona fide domestic arbitrage transactions.[885] Moreover, to facilitate arbitrage transactions in which a short position is taken in a security in the U.S. markets, and which is to be immediately covered on a foreign market, Rule 201(d)(4) permits a broker-dealer to mark as "short exempt" short sale orders associated with certain international arbitrage transactions.[886] Because domestic arbitrage and international arbitrage transactions promote market efficiency by equalizing prices at an instant in time in different markets or between relatively equivalent securities,[887] we believe these provisions will help mitigate the negative effect of Rule 201, if any, on market and pricing efficiency and help to promote the workability of Rule 201.

Rule 201(d)(5) permits a broker-dealer to mark as "short exempt" short sale orders by underwriters or syndicate members participating in a distribution in connection with an over-allotment, and any short sale orders for purposes of lay-off sales by such persons in connection with a distribution of securities through a rights or standby underwriting commitment.[888] We are including a "short exempt" marking provision for syndicate and lay-off sales because, as discussed above, we have historically excepted such activity from short sale rules.[889] In addition, we note that the public offering process is key to capital formation. By facilitating price support during the offering process, Rule 201(d)(5) will mitigate the negative effects of Rule 201, if any, on capital formation.

Rule 201(d)(6) allows a broker-dealer to mark as "short exempt" short sale orders where broker-dealers are facilitating customer buy orders or sell orders where the customer is net long, and the broker-dealer is net short but is effecting the sale as riskless principal.[890] We believe that the riskless principal exception of Rule 201(d)(6) will facilitate broker-dealers' ability to provide best execution to certain customer orders, thus mitigating the negative impact of Rule 201, if any, on execution speed and probability and helping to promote the workability of Rule 201.

Rule 201(d)(7) permits a broker-dealer to mark as "short exempt" certain short sale orders executed on a VWAP basis.[891] We believe that the exception for VWAP short sale transactions will provide an additional source of liquidity for investors' VWAP orders and will help enable investors to achieve their objective of obtaining an execution at the VWAP, thus mitigating the negative impact of Rule 201, if any, on liquidity and execution speed and probability and helping to promote the workability of Rule 201.

b. Implementation and On-Going Monitoring and Surveillance Costs

i. Policies and Procedures Requirement Under Rule 201

Rule 201 requires a trading center to have written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day.[892] In addition, the Rule requires that the trading center establish, maintain, and enforce written policies and procedures reasonably designed to impose this short sale price test restriction for the remainder of the day and the following day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan.[893] In addition, trading centers are required to regularly surveil to ascertain the effectiveness of the policies and procedures required under the Rule and to take prompt action to remedy deficiencies in such policies and procedures.[894]

As stated previously, we discussed in the Proposal the anticipated costs of the proposed short sale price test restrictions and, in the Proposal and Re-Opening Release, we requested comment on the costs associated with the proposed amendments.[895] In particular, we requested comment on the potential costs for any modification to both computer systems and surveillance mechanisms and for information gathering, management, and recordkeeping systems or procedures.[896]

A number of commenters expressed concerns that the costs of implementing a short sale price test restriction would be significant.[897] However, many of these comments were not specific to the alternative uptick rule.[898] While some commenters discussed the potential implementation costs of the alternative uptick rule, they did not provide specific estimates of such costs.[899] Most commenters compared estimated implementation costs of the alternative uptick rule to the other proposed rules.[900]

[884] *See supra* Section III.B.3. (discussing the "short exempt" provision for odd lot transactions).

[885] *See supra* Section III.B.4. (discussing the "short exempt" provision for domestic arbitrage transactions).

[886] *See supra* Section III.B.5. (discussing the "short exempt" provision for international arbitrage transactions).

[887] *See supra* Sections III.B.4. and III.B.5. (discussing the benefits of bona fide arbitrage activities to market efficiency because they tend to reduce pricing disparities between related securities).

[888] *See supra* Section III.B.6. (discussing the "short exempt" provision for over-allotments and lay-off sales).

[889] *See id.*

[890] *See supra* Section III.B.7. (discussing the "short exempt" provision for riskless principal transactions).

[891] *See supra* Section III.B.8. (discussing the "short exempt" provision for transactions on a volume weighted average price basis).

[892] *See* Rule 201(b)(1)(i).

[893] *See* Rule 201(b)(1)(ii).

[894] *See* Rule 201(b)(2).

[895] *See* Proposal, 74 FR at 18090, 18092–18103; Re-Opening Release, 74 FR at 42037.

[896] *See* Proposal, 74 FR at 18090.

[897] *See, e.g.,* letter from NSCP; letter from STANY (June 2009); letter from RBC (June 2009); letter from Wolverine; letter from CPIC (Sept. 2009); letter from EWT (Sept. 2009); letter from RBC (Sept. 2009); letter from STA (Sept. 2009).

[898] *See, e.g.,* letter from NSCP; letter from STANY (June 2009); letter from RBC (June 2009); letter from Wolverine.

[899] *See, e.g.,* letter from CPIC (Sept. 2009); letter from EWT (Sept. 2009); letter from RBC (Sept. 2009); letter from STA (Sept. 2009).

[900] *See, e.g.,* letter from EWT (Sept. 2009) (stating that the net savings of the alternative uptick rule to the broader industry compared to the other proposals would at best be minimal); letter from

Continued

As discussed in the PRA section above, we believe that the implementation and on-going monitoring and surveillance costs of the alternative uptick rule will be lower than the implementation and on-going monitoring and surveillance costs that would be associated with adoption of the proposed modified uptick rule or the proposed uptick rule.[901] Unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price (*i.e.,* whether the current national best bid or last sale price is above or below the previous national best bid or last sale price), the alternative uptick rule references only the current national best bid. In addition, we believe that the implementation and on-going monitoring and surveillance costs of the alternative uptick rule are justified by the benefits provided by preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

A number of commenters stated that because the alternative uptick rule would not require monitoring of the sequence of bids or last sale prices, implementing the alternative uptick rule would be less costly[902] or easier than implementing the proposed modified uptick rule or the proposed uptick rule.[903] In addition, several commenters stated that the alternative uptick rule would be easier to program into trading and surveillance systems than the proposed modified uptick rule or the proposed uptick rule.[904] Another commenter stated, with respect to the alternative uptick rule, that "actual implementation costs in terms of time and capital expenditure would be negligible when compared to those involved in implementing either the uptick rule or modified uptick rule."[905]

Several commenters indicated that implementation of the alternative uptick rule would not be easier or less costly than implementation of the proposed modified uptick rule or the proposed uptick rule.[906] However, we note that some of these commenters presented concerns that were not directly related to the alternative uptick rule[907] or to implementation costs or difficulties.[908] Additionally, one commenter did not provide the reasoning for its belief that the alternative uptick rule would not be easier or less costly to implement.[909]

Several commenters indicated their belief that other commenters' estimates regarding the difficulty or costs of implementing and monitoring the proposed modified uptick rule and the proposed uptick rule were exaggerated.[910] We recognize that some commenters' estimates of the costs of the proposed modified uptick rule or the proposed uptick rule may have been conservative. We also believe that because the alternative uptick rule does not include a sequencing requirement, the implementation and on-going monitoring and surveillance costs of the alternative uptick rule will be less than such costs would be with respect to the other proposed short sale price test restrictions.

One commenter stated that the Commission "underestimate[s] the time and expense that will be required for market participants to comply with the [alternative uptick] rule (or any other of the proposed alternatives)" and that such costs "will include expenses * * * for the initial implementation of any restriction."[911] However, this commenter did not specify why or how the implementation cost of the alternative uptick rule may be greater than we estimated.[912]

One commenter indicated that implementation costs would be approximately $500,000 per firm, for a total of $191,000,000 for all non-SRO trading centers subject to Rule 201,[913] including costs for "the purchase of additional costly data feeds" but not including "costs associated with developing appropriate internal supervisory procedures and compliance programs."[914] The implementation cost estimates provided by this commenter, which are significantly higher than our estimate of, on average, $68,381 per non-SRO trading center,[915] were not specific to the alternative uptick rule. Because the alternative uptick rule references only the current national best bid, unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price, we believe that the alternative uptick rule will be easier and less costly to implement and monitor than the proposed modified uptick rule or the proposed uptick rule.[916] In addition, we note that implementation of Rule 201 will not require modifications to how data feeds are currently received. As discussed above, Rule 201 does not mandate that the receipt of the current national best bid must be from any one particular data feed; thus, trading centers will be able to continue using the data feed they currently use, and for which they

STA (Sept. 2009); letter from BATS (Sept. 2009); letter from Goldman Sachs (Sept. 2009); letter from Wells Fargo (Sept. 2009); letter from SIFMA (Sept. 2009); letter from ICI (Sept. 2009); letter from Credit Suisse (Sept. 2009).

[901] *See supra* Section IX.E.1. (discussing estimated burdens on trading centers of the collection of information requirements in connection with Rule 201).

[902] *See, e.g.,* letter from BATS (May 2009); letter from BATS (Sept. 2009); letter from GETCO (Sept. 2009); letter from ICI (Sept. 2009); letter from Glen Shipway (Sept. 2009). In addition, several commenters acknowledged that implementation of the alternative uptick rule will likely be less costly, without referencing the sequencing issue. *See, e.g.,* letter from STANY (Sept. 2009).

[903] *See, e.g.,* letter from Glen Shipway (Sept. 2009); letter from SIFMA (Sept. 2009); letter from STA (Sept. 2009); *see also* letter from Credit Suisse (June 2009). In addition, one commenter acknowledged that implementation of the alternative uptick rule will likely be easier, without referencing the sequencing issue. *See* letter from Allston Trading (Sept. 2009).

[904] *See, e.g.,* letter from BATS (May 2009); letter from Glen Shipway (Sept. 2009); letter from ICI (Sept. 2009); *see also* letter from National Stock Exchange *et al.*

[905] Letter from BATS (Sept. 2009).

[906] *See, e.g.,* letter from Matlock Capital (Sept. 2009); letter from NYSE Euronext (Sept. 2009); letter from Knight Capital (Sept. 2009).

[907] *See, e.g.,* letter from NYSE Euronext (Sept. 2009) (stating that implementation of the alternative uptick rule would be more difficult on the basis that the alternative uptick rule would be paired with a circuit breaker and attributing implementation difficulties to the circuit breaker approach, not the alternative uptick rule).

[908] *See, e.g.,* letter from Knight Capital (Sept. 2009) (characterizing a potential increase in friction, confusion, or inefficiency in the market as an implementation difficulty that may arise from the alternative uptick rule).

[909] *See* letter from Matlock Capital (Sept. 2009).

[910] *See, e.g.,* letter from Matlock Capital (Sept. 2009); letter from ISE (Sept. 2009); letter from Bingham McCutchen.

[911] Letter from RBC (Sept. 2009).

[912] In addition, with respect to the commenter's concern that we underestimated the time required for implementation, we note that, as discussed in Section VII., above, we believe that a six month implementation period is appropriate. This implementation period, which is longer than the implementation periods proposed in the Proposal and the Re-Opening Release, takes into consideration commenters' concerns that implementation of a price test could be complex. We do not believe that a longer implementation time is warranted because, for example, Rule 201 does not require monitoring of the sequence of bids or last sale prices, unlike other proposed price tests, and because Rule 201 requires the implementation of policies and procedures similar to those required for trading centers under Regulation NMS.

[913] *See* letter from Wolverine. In its letter, Wolverine multiplied its implementation cost estimate of $500,000 by 382 non-SRO trading centers for a total of $191,000,000. *See id.* As indicated above, however, we now estimate that there are 407 non-SRO trading centers. *See supra* note 686.

[914] *Id.*

[915] *See infra* note 960 and accompanying text (discussing our estimated implementation costs for trading centers).

[916] *See supra* notes 661 to 669 and accompanying text (discussing comments on the impact of the alternative uptick rule on implementation and on-going monitoring and compliance costs).

currently pay.[917] As a result, we believe this commenter's estimates of the implementation costs are higher than our estimated implementation costs for Rule 201.

Another commenter conducted a survey of firms with respect to implementation cost estimates. Cost estimates in response to the survey indicated that a circuit breaker triggering a short sale price test based on the national best bid would have implementation costs that averaged between $235,000 and $2,000,000 per firm.[918] This estimated implementation cost range is significantly higher than our estimated range of, on average, $68,381 per non-SRO trading center to $86,880 per SRO trading center for implementation.[919] We note that the commenter's survey results covered fifty firms, categorized as large firms, regional firms, and clearing firms, rather than SRO trading centers, non-SRO trading centers and broker-dealers. Thus, it is difficult to determine the implementation costs to trading centers, including non-SRO trading centers, from these survey results. In addition, these cost estimates were based on a circuit breaker triggering the proposed modified uptick rule and, as such, were not specific to the alternative uptick rule. Because the alternative uptick rule references only the current national best bid, unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price, we believe that the alternative uptick rule will be easier and less costly to implement and monitor than the proposed modified uptick rule or the proposed uptick rule.[920]

Commenters indicated that implementation costs would include costs for modifications to multiple systems, including blue sheet, OATS, and OTS reporting systems, trading system interfaces, execution management systems, and order management systems; modifications to data feeds;[921] adjustments to data retention capabilities; revisions to written policies and procedures; and personnel training regarding the new requirements.[922] We recognize that implementation of Rule 201 will impose surveillance and reprogramming costs for enforcing, monitoring, and updating trading, order management, execution management, surveillance, and reporting systems under Rule 201, systems changes to computer software, adjustments to data retention capabilities, as well as staff time and technology resources. These costs are included in our estimates of the costs of implementing Rule 201.[923]

In addition, commenters expressed concerns that the costs of on-going monitoring and surveillance of a short sale price test restriction would be significant.[924] Only one commenter specifically discussed concerns about the on-going monitoring and surveillance costs of the alternative uptick rule, and this commenter did not provide specific cost estimates.[925] One commenter stated that the alternative uptick rule would be easier to surveil and monitor than the proposed modified uptick rule or the proposed uptick rule, and thus would present lower on-going costs to the industry.[926] The alternative uptick rule references only the current national best bid, unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price. Thus, we believe that the alternative uptick rule will be easier and less costly to implement and monitor than the proposed modified uptick rule or the proposed uptick rule.[927]

Another commenter estimated that on-going system maintenance would cost $20,000 annually per firm.[928] This estimate is lower than our estimated total cost of, on average, $121,356 annually per trading center for on-going monitoring and surveillance.[929] This commenter stated that this estimate covers the cost "annually to maintain the system." It is not clear what specific on-going monitoring and surveillance functions are included in the commenter's estimate but we believe that our estimate is more inclusive, in that it specifically takes into account costs for the commitment of resources associated with compliance administration and oversight, response to regulatory inquiries and examinations, response to internal inquiries, market surveillance, data retention, testing, training, and enforcement, with attendant opportunity costs.[930]

One commenter conducted a survey of fifty firms with respect to on-going monitoring cost estimates. Cost estimates in response to the survey indicated that a circuit breaker triggering a short sale price test based on the national best bid would have on-going monitoring costs that averaged between $45,000 and $175,000 per firm.[931] Although our estimated cost of, on average, $121,356 per trading center for on-going monitoring and surveillance,[932] falls within this commenter's estimated range of on-going monitoring cost, we note that the survey results covered fifty firms,

[917] *See supra* notes 404 to 411 and accompanying text (discussing the use of various data feeds in determining the current national best bid).

[918] *See* letter from SIFMA (June 2009). SIFMA did not categorize estimates of the implementation costs of a circuit breaker triggering a short sale price test based on the national best bid by SRO trading centers, non-SRO trading centers, and other broker-dealers, but categorized responses by larger firms, with implementation cost estimates that averaged $2,000,000 per firm, with the highest estimate at $9,000,000 per firm, regional firms, with estimates that averaged $235,000 per firm, with the highest estimate at $500,000 per firm, and clearing firms, with estimates that averaged $1,200,000 per firm, with the highest estimate at $1,900,000 per firm. SIFMA only provided the average and highest cost estimates per category. *See id.*

[919] *See infra* note 960 and accompanying text (discussing our estimated implementation costs for trading centers).

[920] *See supra* notes 661 to 669 and accompanying text (discussing comments on the impact of the alternative uptick rule on implementation and on-going monitoring and compliance costs).

[921] As discussed above, implementation of Rule 201 will not require modifications to how data feeds are currently received. *See supra* notes 404 to 411 and accompanying text (discussing the use of various data feeds in determining the current national best bid).

[922] *See, e.g.,* letter from NSCP; letter from STANY (June 2009); letter from RBC (June 2009); letter from Wolverine; letter from EWT (Sept. 2009).

[923] *See infra* note 960 and accompanying text (discussing our estimates of the implementation costs of Rule 201 by trading centers).

[924] *See, e.g.,* letter from NSCP; letter from RBC (June 2009); letter from SIFMA (June 2009); letter from Wolverine; letter from RBC (Sept. 2009).

[925] *See* letter from RBC (Sept. 2009).

[926] *See* letter from STA (Sept. 2009).

[927] *See supra* notes 661 to 669 and accompanying text (discussing comments on the impact of the alternative uptick rule on implementation and on-going monitoring and compliance costs).

[928] *See* letter from Wolverine. Wolverine does not apply this estimate to exchanges and ATSs, but only to other non-SRO trading centers (such as market makers), noting that on-going costs for exchanges and ATSs "should be minimal because they would be limited to system testing and maintenance, not the regulation of hundreds of members' systems, procedures and trading activity." *Id.*

[929] *See infra* notes 961 to 962 and accompanying text (discussing our estimates of the on-going monitoring and surveillance costs of Rule 201 by trading centers).

[930] *See infra* notes 934 and 935 and accompanying text (discussing the scope of our on-going monitoring and compliance cost estimates).

[931] *See* letter from SIFMA (June 2009). SIFMA did not categorize estimates of the on-going monitoring costs of a circuit breaker triggering a short sale price test based on the national best bid by SRO trading centers, non-SRO trading centers, and other broker-dealers, but categorized responses by larger firms, with on-going monitoring cost estimates that averaged $130,000 per firm, with the highest estimate at $1,500,000 per firm, regional firms, with estimates that averaged $45,000 per firm, with the highest estimate at $350,000 per firm, and clearing firms, with estimates that averaged $175,000 per firm, with the highest estimate at $250,000 per firm. SIFMA only provided the average and highest cost estimates per category. *See id.*

[932] *See infra* notes 961 to 962 and accompanying text (discussing our estimated on-going monitoring and surveillance costs for trading centers).

categorized as large firms, regional firms, and clearing firms, rather than SRO trading centers, non-SRO trading centers and broker-dealers. Thus, it is difficult to determine the implementation costs to trading centers, including non-SRO trading centers, from these survey results. In addition, these cost estimates were not specific to the alternative uptick rule. Because the alternative uptick rule references only the current national best bid, unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price, we believe that the alternative uptick rule will be easier and less costly to implement and monitor than the proposed modified uptick rule or the proposed uptick rule.[933]

Commenters indicated that the on-going costs to trading centers of a short sale price test restriction would include surveillance, testing, training, administration and supervision, data retention, response to regulatory inquiries and examinations, and response to internal inquiries.[934] We agree with these comments and believe that Rule 201 will require the commitment of resources associated with compliance administration and oversight, response to regulatory inquiries and examinations, response to internal inquiries, market surveillance, data retention, testing, training, and enforcement, with attendant opportunity costs. These costs are included in our estimates of the costs of on-going monitoring and surveillance of Rule 201.[935]

In estimating the costs to trading centers of implementing Rule 201, we considered that the policies and procedures required to be implemented for purposes of Rule 201 are similar to those that are required under Regulation NMS.[936] In accordance with Regulation NMS, trading centers must have in place written policies and procedures in connection with that Regulation's Order Protection Rule, which could help form the basis for implementing the policies and procedures for Rule 201.[937] Thus, we believe trading centers may already be familiar with establishing, maintaining, and enforcing trading-related policies and procedures, including programming their trading systems in accordance with such policies and procedures. We believe this familiarity will reduce the implementation costs of Rule 201 on trading centers and will make Rule 201 less burdensome to implement. Moreover, because trading centers have already developed or modified their surveillance mechanisms in order to comply with Regulation NMS's policies and procedures requirement, trading centers may already have retained and trained the necessary personnel to ensure compliance with that Regulation's policies and procedures requirements and, therefore, may already have in place most of the infrastructure and potential policies and procedures necessary to comply with Rule 201.[938] Further, we believe that the implementation and on-going monitoring and surveillance costs of the alternative uptick rule are justified by the benefits provided in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

Several commenters indicated that the Commission overstated the benefit of previous implementation of Regulation NMS in mitigating the costs of implementing a short sale price test restriction,[939] because, for example, "systems re-written and architected for Reg NMS * * * did not include any short sale restrictions," [940] or because such systems will require modifications in order to be used in the context of a short sale price test restriction.[941] However, we took into account that Regulation NMS was implemented after elimination of the prior short sale price tests when considering the impact of previous experience with the policies and procedures requirement of Regulation NMS's Order Protection Rule. And, although we recognize that systems and processes will have to be modified for implementation of Rule 201, we continue to believe that because most trading centers already have in place systems and written policies and procedures in order to comply with Regulation NMS's Order Protection Rule, most trading centers will already be familiar with establishing, maintaining, and enforcing trading-related policies and procedures, which will mitigate the burden of implementation of the policies and procedures requirement under Rule 201.

Several commenters agreed, stating that previous experience with the policies and procedures required under Regulation NMS might reduce the implementation and on-going monitoring and compliance burdens on trading centers.[942] One commenter stated that implementation of a circuit breaker approach combined with the alternative uptick rule would be easier to implement than the other proposed short sale price tests or proposed circuit breaker rules, "provided that the Commission permits firms to leverage the numerous systems changes made to facilitate compliance with Regulation NMS (including the use of internal market data rather than consolidated data supplied by the industry plans)." [943] And one commenter stated that prior implementation of Regulation NMS could ease implementation of a short sale price test restriction, "provided that broker-dealers' implementations of Regulation NMS was sufficiently modular and extensible." [944] We believe that Rule 201 is structured so that trading centers will be able to leverage their existing systems and experience with implementing the policies and procedures required by Regulation NMS's Order Protection Rule. For example, Rule 201 does not mandate that the receipt of the current national best bid must be from any one particular data feed; thus, trading centers will be able to use internal market data if they choose.[945] Thus, as stated above, we believe that familiarity with trading-related policies and procedures under Regulation NMS will mitigate the burden of implementation of the policies and procedures requirement under Rule 201.

Moreover, the written policies and procedures requirement of Rule 201 is designed to provide trading centers with significant flexibility in determining how to comply with the requirements of

[933] *See supra* notes 661 to 669 and accompanying text (discussing comments on the impact of the alternative uptick rule on implementation and on-going monitoring and compliance costs).

[934] *See, e.g.,* letter from NSCP; letter from RBC (June 2009); letter from SIFMA (June 2009); letter from Wolverine; letter from RBC (Sept. 2009).

[935] *See infra* notes 961 to 962 and accompanying text (discussing our estimates of the on-going monitoring and surveillance costs of Rule 201 to trading centers).

[936] *See* Regulation NMS Adopting Release, 70 FR 37496; *see also* Proposal, 74 FR at 18087; 17 CFR 242.611.

[937] *See* Regulation NMS Adopting Release, 70 FR 37496; *see also* 17 CFR 242.611.

[938] We also believe some trading centers may have retained personnel familiar with the former SRO bid tests, which may make Rule 201 even less burdensome to implement. *See,* Proposal, 74 FR at 18095, n.393 and 18053, n.125.

[939] *See, e.g.,* letter from FIF (June 2009); letter from NSCP; letter from RBC (June 2009).

[940] Letter from FIF (June 2009); *see also* letter from RBC (June 2009).

[941] *See* letter from NSCP; letter from RBC (June 2009).

[942] *See, e.g.,* letter from EWT (Sept. 2009); letter from Goldman Sachs (Sept. 2009); letter from MFA (Oct. 2009).

[943] Letter from Goldman Sachs (Sept. 2009); *see also* letter from MFA (Oct. 2009).

[944] Letter from EWT (Sept. 2009).

[945] *See supra* notes 404 to 411 and accompanying text (discussing the use of various data feeds in determining the current national best bid).

the Rule. For example, Rule 201 is designed to provide trading centers and their customers with flexibility in determining how to handle orders that are not immediately executable or displayable by the trading center because the order is impermissibly priced. Thus, if an order were impermissibly priced, the trading center could, in accordance with policies and procedures reasonably designed to prevent the execution or display of a short sale at a price that is less than or equal to the current national best bid, re-price the order upwards to the lowest permissible price and hold it for later execution at its new price or better.[946] As quoted prices change, Rule 201 allows a trading center to repeatedly re-price and display an order at the lowest permissible price down to the order's original limit order price (or, if a market order, until the order is filled). Because a trading center could re-price and display a previously impermissibly priced short sale order, Rule 201 may allow for the more efficient functioning of the markets because trading centers do not have to reject or cancel impermissibly priced orders unless instructed to do so by the trading center's customer submitting the short sale order. We note that a number of commenters expressed support for a policies and procedures approach to any short sale price test restriction, in part, because it would add flexibility to the Rule's requirements.[947]

Moreover, while latencies in obtaining data regarding the national best bid from consolidated market data feeds, as discussed in detail above, may impact implementation costs associated with Rule 201, a trading center could have policies and procedures that would provide for a snapshot of the applicable national best bid of the security. We note that some commenters expressed concerns regarding latencies in obtaining data regarding the national best bid disseminated by proprietary data feeds and/or by SIPs.[948] We believe that a policies and procedures approach that provides for a snapshot of the applicable current national best bid will aid trading centers in dealing with time lags in receiving data regarding the national best bid from different data sources, as well as lead to reduced initial and on-going costs associated with Rule 201 for trading centers by facilitating verification of whether a short sale order was executed or displayed at a permissible price.

We considered whether our estimates of the costs to trading centers for implementation and on-going monitoring and surveillance of the proposed modified uptick rule included in the Proposal[949] would change under the circuit breaker approach of Rule 201, but concluded, as discussed below, that these estimates continue to represent reasonable estimates under the circuit breaker approach.

Despite some commenters' concerns regarding the implementation costs of a circuit breaker rule,[950] we believe that the circuit breaker approach will result in largely the same implementation costs as we estimated would be incurred if we adopted a permanent, market-wide short sale price test restriction.[951] As one commenter stated, "[o]nce the price test is in place, there is minimal incremental effort required to add a Circuit Breaker that controls the application of the price test."[952] Similarly, another commenter stated that "[t]he additional coding required to implement a circuit breaker is minimal * * *"[953] We believe that there will be only minimal, if any, implementation costs for a circuit breaker approach in addition to the costs that we estimated previously for the implementation of a permanent, market-wide short sale price test rule because trading centers will need to establish written policies and procedures to implement the short sale price test restriction regardless of whether the short sale price test restriction is adopted on a permanent, market-wide basis or, in the case of Rule 201, adopted in conjunction with a circuit breaker. Several other commenters agreed, stating that the costs of the circuit breaker approach would be similar to, or only incrementally higher than, the costs of a permanent, market-wide approach.[954]

In addition, with respect to on-going monitoring and surveillance costs of the circuit breaker approach, we recognize, as noted by one commenter,[955] that trading centers will need to continuously monitor whether a security is subject to the provisions of Rule 201 and that there will be costs associated with such monitoring. However, we believe that these costs will be offset because, under the circuit breaker approach, the alternative uptick rule will be time limited and will only apply on a stock-by-stock basis, which will reduce our previously estimated costs for on-going monitoring and surveillance. This is because trading centers will only need to monitor and surveil for compliance with the alternative uptick rule during the limited period of time that the circuit breaker is in effect with respect to a specific security. As such, the circuit breaker approach will allow regulatory, supervisory and compliance resources to focus on, and to address, those situations where a specific security is experiencing significant downward price pressure.[956] Further, although, under the circuit breaker approach, market participants will need to monitor whether a stock is subject to Rule 201 or not, we believe that familiarity with a circuit breaker approach may help mitigate such compliance costs.[957]

On balance, we believe that the estimates of the costs to trading centers for implementation and on-going monitoring and surveillance of the proposed modified uptick rule included in the Proposal[958] are appropriate with respect to Rule 201. Thus, our estimates have not changed from the Proposal, except to the extent that total burden estimates have changed because we have updated the estimated number of trading centers.[959] As detailed in PRA Section IX.E.1., above, we realize that the exact nature and extent of the policies and procedures that a trading center is required to establish likely will vary depending upon the type, size, and nature of the trading center (*e.g.,* SRO vs. non-SRO, full service broker-dealer vs. market maker). Thus, our estimates take into account different types of trading centers and we realize that these estimates may be on the low-end for some trading centers while they may be on the high-end for other trading centers.

[946] For example, if a trading center receives a short sale order priced at $47.00 when the current national best bid in the security is $47.00, the trading center could re-price the order at the permissible offer price of $47.01, and display the order for execution at this new limit price.

[947] *See, e.g.,* letter from T. Rowe Price (June 2009); letter from AIMA; letter from RBC (June 2009); letter from Citadel *et al.* (Sept. 2009).

[948] *See, e.g.,* letter from Glen Shipway (Sept. 2009); *see also* letter from Credit Suisse (June 2009); letter from FIF (June 2009); letter from Lime Brokerage (June 2009); letter from RBC (June 2009); letter from SIFMA (June 2009); letter from Direct Edge (June 2009); letter from BATS (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from Lime Brokerage (Sept. 2009).

[949] *See* Proposal, 74 FR at 18093.

[950] *See supra* note 676.

[951] *See* Proposal, 74 FR at 18093.

[952] Letter from Nasdaq OMX Group (Oct. 2009).

[953] Letter from Credit Suisse (Sept. 2009).

[954] *See, e.g.,* letter from STA (June 2009).

[955] *See* letter from Glen Shipway (June 2009).

[956] *See, e.g.,* letter from Nasdaq OMX Group (Oct. 2009); letter from SIFMA (Sept. 2009).

[957] *See supra* notes 292 and 684 and accompanying text (discussing stock exchanges' and FINRA's rules or policies to implement coordinated circuit breaker halts and SRO rules or polices to coordinate individual security trading halts corresponding to significant news events).

[958] *See* Proposal, 74 FR at 18093.

[959] *See supra* note 686 (discussing the change in the estimated number of trading centers).

As detailed in PRA Section IX.E.1., above, we estimate a total one-time initial cost of $28,699,867 [960] for all trading centers subject to Rule 201 to establish the written policies and procedures reasonably designed to prevent the execution or display of short sale orders at a price that is less than or equal to the current national best bid.

Once a trading center has established written policies and procedures reasonably designed to prevent the execution or display of a short sale order at a price that is less than or equal to the current national best bid, we estimate a total annual on-going cost of $7,751,196 [961] for all trading centers subject to Rule 201 to ensure that their written policies and procedures are up-to-date and remain in compliance with Rule 201. In addition, with regard to on-going monitoring for and enforcement of trading in compliance with Rule 201, as detailed in PRA Section IX.E.1., above, we believe that, once the tools necessary to carry out on-going monitoring have been put in place, a trading center will be able to incorporate on-going monitoring and enforcement within the scope of its existing surveillance and enforcement policies and procedures without a substantial additional burden. We recognize, however, that this on-going compliance will not be cost-free, and that trading centers will incur some additional annual costs associated with on-going compliance, including compliance costs of reviewing transactions. We estimate that each trading center will incur an average annual on-going compliance cost of $102,768, for a total annual cost of $42,854,256 for all trading centers.[962]

To summarize, we estimate an average one-time initial cost of $86,880 per SRO trading center and $68,381 per non-SRO trading center for a total one-time initial cost of $28,699,867 [963] for all trading centers subject to Rule 201 to establish the written policies and procedures reasonably designed to prevent the execution or display of short sale orders at a price that is less than or equal to the current national best bid. We estimate an average annual on-going cost of $18,588 per trading center for a total annual on-going cost of $7,751,196 [964] for all trading centers subject to Rule 201 to ensure that their written policies and procedures are up-to-date and remain in compliance with Rule 201. In addition, we estimate an average annual cost of $102,768 per trading center for a total annual cost of $42,854,256 for all trading centers for on-going monitoring for and enforcement of trading in compliance with Rule 201.[965]

ii. Policies and Procedures Requirement Under the Broker-Dealer and Riskless Principal Provisions

A broker-dealer marking an order "short exempt" under Rule 201(c) must identify the order as being at a price above the current national best bid at the time of submission to the trading center [966] and must establish, maintain, and enforce written policies and procedures reasonably designed to prevent the incorrect identification of orders as being priced in accordance with the requirements of Rule 201(c).[967]

Rule 201(d)(6) allows a broker-dealer to mark short sale orders of a covered security "short exempt" where a broker-dealer is facilitating customer buy orders or sell orders where the customer is net long, and the broker-dealer is net short but is effecting the sale as riskless principal, provided certain conditions are satisfied.[968] A broker-dealer marking an order "short exempt" under this provision is required to have written policies and procedures in place to assure that, at a minimum: (i) The customer order was received prior to the offsetting transaction; (ii) the offsetting transaction is allocated to a riskless principal or customer account within 60 seconds of execution; and (iii) that it has supervisory systems in place to produce records that enable the broker-dealer to accurately and readily reconstruct, in a time-sequenced manner, all orders on which the broker-dealer relies pursuant to this provision.[969]

As stated previously, we discussed in the Proposal the anticipated costs of the proposed short sale price test restrictions and we requested comment, in the Proposal and Re-Opening Release, on the costs associated with the proposed amendments.[970] In particular, we requested comment on the potential costs for any modification to both computer systems and surveillance mechanisms and for information gathering, management, and recordkeeping systems or procedures.[971]

[960] This figure was calculated by adding $20,359,867 and $8,340,000 (for outsourced legal work). The $20,359,867 figure was calculated as follows: (70 legal hours × $305) + (105 compliance hours × $313) + (20 information technology hours × $292) + (25 business operation hours × $273) = $66,880 per SRO × 10 SROs = $668,800 total cost for SROs; (37 legal hours × $305) + (77 compliance hours × $313) + (23 information technology hours × $292) + (23 business operation hours × $273) = $48,381 per broker-dealer × 407 broker-dealers = $19,691,067 total cost for broker-dealers; $668,800 + $19,691,067 = $20,359,867. The $8,340,000 figure for outsourced legal work was calculated as follows: (50 legal hours × $400 × 10 SROs) + (50 legal hours × $400 × 407 broker-dealers) = $8,340,000.

Based on industry sources, we estimate that the average hourly rate for outsourced legal services in the securities industry is $400. For in-house legal services, we estimate that the average hourly rate for an attorney in the securities industry is approximately $305 per hour. The $305/hour figure for an attorney is from SIFMA's *Management & Professional Earnings in the Securities Industry 2008,* modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. In addition, we estimate that the average hourly rate for an assistant compliance director, a senior computer programmer, and a senior operations manager in the securities industry is approximately $313, $292, and $273 per hour, respectively. These figures are from SIFMA's *Management & Professional Earnings in the Securities Industry 2008,* modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[961] This figure was calculated as follows: (2 legal hours × 12 months × $305) × (10 + 407) + (3 compliance hours × 12 months × $313) × (10 + 407) = $7,751,196.

[962] We estimate that each trading center will incur an average annual on-going compliance cost of $102,768 for a total annual cost of $42,854,256 for all trading centers. This figure was calculated as follows: (16 compliance hours × $313) + (8 information technology hours × $292) + (4 legal hours × $305) × 12 months = $102,768 per trading center × 417 trading centers = $42,854,256. As discussed above, we base our burden hour estimates on the estimates used for Regulation NMS because it requires similar on-going monitoring and surveillance for and enforcement of trading in compliance with that regulation's policies and procedures requirement.

For in-house legal services, we estimate that the average hourly rate for an attorney in the securities industry is approximately $305 per hour. The $305/hour figure for an attorney is from SIFMA's *Management & Professional Earnings in the Securities Industry 2008,* modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead. In addition, we estimate that the average hourly rate for an assistant compliance director, a senior computer programmer, and a senior operations manager in the securities industry is approximately $313, $292, and $273 per hour, respectively. These figures are from SIFMA's *Management & Professional Earnings in the Securities Industry 2008,* modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[963] *See supra* note 960.

[964] *See supra* note 961.

[965] *See supra* note 962.

[966] *See* Rule 201(c). As a result, a trading center's policies and procedures will need to be reasonably designed to permit the execution or display of such orders without regard to whether the order is at a price that is less than or equal to the current national best bid. *See* Rule 201(b)(1)(iii).

[967] *See* Rule 201(c)(1). As part of its written policies and procedures, a broker-dealer also is required to regularly surveil to ascertain the effectiveness of its policies and procedures and take prompt remedial steps. *See* Rule 201(c)(2). This provision is intended to reinforce the on-going maintenance and enforcement requirements of the provision contained in Rule 201(c)(1) by explicitly assigning an affirmative responsibility to broker-dealers to surveil to ascertain the effectiveness of their policies and procedures. *See id.*

[968] *See* Rule 201(d)(6). As a result, a trading center's policies and procedures must be reasonably designed to permit the execution or display of such orders without regard to whether the order is at a price that is less than or equal to the current national best bid. *See* Rule 201(b)(1)(iii).

[969] *See* Rule 201(d)(6).

[970] *See* Proposal, 74 FR at 18090, 18092–18103; Re-Opening Release, 74 FR at 42037.

[971] *See* Proposal, 74 FR at 18090.

In response to our request for comment, commenters that specifically addressed the riskless principal provision of Rule 201(d)(6) supported its inclusion.[972]

Several commenters expressed concerns with respect to the costs of the broker-dealer provision of Rule 201(c), but did not provide a specific estimate of such costs.[973] Several commenters stated that the broker-dealer provision would place responsibility for ensuring order compliance with Rule 201 on broker-dealers, rather than exchanges, and noted that this is a significant difference from former Rule 10a–1 and NASD's former bid test.[974] Similarly, one commenter stated that the broker-dealer provision would significantly expand the implementation cost of Rule 201, without providing a specific estimate of such cost.[975] Although we agree that implementation of the broker-dealer provision of Rule 201(c) will impose costs on broker-dealers who choose to rely on this provision, we note that Rule 201(c) is not a requirement of the Rule, but rather provides that a broker-dealer may mark a sell order for a security that has triggered the circuit breaker as "short exempt," provided that the broker-dealer identifies the order as being at a price above the current national best bid at the time of submission to the trading center and otherwise complies with the requirements of the provision.

In addition, as discussed throughout this adopting release, the alternative uptick rule references only the current national best bid, unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price. In order to rely on the broker-dealer provision, a broker-dealer must establish, maintain, and enforce written policies and procedures reasonably designed to prevent the incorrect identification of orders as being at a price above the current national best bid at the time of submission of the order to the trading center. Because the alternative uptick rule does not require sequencing of the national best bid, we believe that the policies and procedures required in order to rely on the broker-dealer provision under the alternative uptick rule will be easier and less costly to implement and monitor than would be the case under the proposed modified uptick rule or the proposed uptick rule.[976] We note that one of the commenters that expressed concerns about the implementation cost of the broker-dealer provision also acknowledged that a rule "that would not require data centralization and sequencing would be significantly less complex and faster to implement."[977]

We disagree with several commenters who stated that, although implementation and on-going monitoring and surveillance of the alternative uptick rule might be easier and/or less costly for trading centers, this would not hold true for broker-dealers.[978] One of these commenters stated that "in order to avoid rejection of short sale orders under an alternative uptick rule, programming would need to be implemented to anticipate changes in the national best bid between the time a short sale order is entered and the time it reaches the relevant market center."[979] However, the broker-dealer provision of Rule 201(c) is designed specifically to help avoid this result. Under the broker-dealer provision, a broker-dealer may, in accordance with the policies and procedures required by the provision, identify the order as not being at a price that is less than or equal to the current national best bid at the time the order is submitted to the trading center and mark the order "short exempt." Trading centers are required to have written policies and procedures in place to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a price that is less than or equal to the current national best bid.[980]

Commenters also expressed concerns about the competitive pressure of the broker-dealer provision, stating either that broker-dealers would feel compelled to undertake implementation of the provision, despite the high cost,[981] which would be particularly burdensome for smaller firms,[982] or that smaller firms would find the costs prohibitive, placing them at a competitive disadvantage.[983] We recognize that broker-dealers are faced with competitive concerns and that such concerns may influence their decision whether or not to rely on the broker-dealer provision of Rule 201(c). With respect to the cost, as stated above, although we recognize that the broker-dealer provision will impose implementation costs on broker-dealers who choose to rely on this provision, we believe that this cost will not be as great as stated by some commenters because the alternative uptick rule does not require sequencing of the national best bid, unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price.[984] We believe that, without a sequencing requirement, the policies and procedures required in order to rely on the broker-dealer provision under the alternative uptick rule will be easier and less costly to implement and monitor, for all broker-dealers including smaller broker-dealers, than would be the case under the proposed modified uptick rule or the proposed uptick rule.[985]

Further, we believe that the implementation and on-going monitoring and compliance costs for broker-dealers who choose to rely on the broker-dealer provision are justified by the benefits of providing broker-dealers with the option to manage their order flow, rather than having to always rely on their trading centers to manage their order flow on their behalf.

One commenter stated that the broker-dealer provision would impose significant on-going costs in the form of data storage, surveillance, and review, but did not provide a specific estimate

[972] *See, e.g.,* letter from BATS (May 2009); letter from SIFMA (June 2009); letter from Credit Suisse (June 2009); letter from NYSE Euronext (Sept. 2009).

[973] *See, e.g.,* letter from Credit Suisse (June 2009); letter from STANY (June 2009); letter from FIF (June 2009); letter from Lime Brokerage (June 2009); letter from NSCP; letter from Direct Edge (June 2009).

[974] *See, e.g.,* letter from Credit Suisse (June 2009); letter from STANY (June 2009).

[975] *See* letter from Lime Brokerage (June 2009).

[976] *See supra* notes 709 to 715 and accompanying text (discussing comments on the impact of the alternative uptick rule on implementation and on-going monitoring and compliance costs).

[977] Letter from Credit Suisse (June 2009).

[978] *See, e.g.,* letter from Citadel *et al.* (Sept. 2009); letter from EWT (Sept. 2009); letter Lime Brokerage (Sept. 2009).

[979] Letter from Citadel *et al.* (Sept. 2009).

[980] *See* Rule 201(b)(1)(iii).

[981] *See, e.g.,* letter from STANY (June 2009); letter from FIF (June 2009); letter from Lime Brokerage (June 2009).

[982] *See, e.g.,* letter from T.D. Pro Ex; letter from Taurus Compliance; letter from Credit Suisse (June 2009).

[983] *See, e.g.,* letter from Credit Suisse (June 2009); letter from NSCP.

[984] We also note that it is possible that some smaller broker-dealers that determine to rely on the broker-dealer provision may determine that it is cost-effective for them to outsource certain functions necessary to comply with Rule 201(c) to larger broker-dealers, rather than performing such functions in house, to remain competitive in the market. This may help mitigate costs associated with implementing and complying with Rule 201(c). Additionally, they may decide to purchase order management software from technology firms. Order management software providers may integrate changes imposed by Rules 200(g) and 201 into their products, thereby providing another cost-effective way for smaller broker-dealers to comply with the requirement of Rule 201(c).

[985] *See supra* notes 709 to 715 and accompanying text (discussing comments on the impact of the alternative uptick rule on implementation and on-going monitoring and compliance costs to broker-dealers).

of such cost.[986] We agree that broker-dealers who choose to rely on the broker-dealer provision of Rule 201(c) will face on-going costs for data storage, surveillance and review. However, we believe that broker-dealers' on-going monitoring and surveillance costs under Rule 201(c) will be mitigated by the alternative uptick rule, as compared to the proposed modified uptick rule or the proposed uptick rule, because the alternative uptick rule will reference only the current national best bid in determining permissible short sales.[987] In order to rely on the broker-dealer provision, a broker-dealer must establish, maintain, and enforce written policies and procedures reasonably designed to prevent the incorrect identification of orders as being at a price above the current national best bid at the time of submission of the order to the trading center. Under the alternative uptick rule, broker-dealers who choose to rely on Rule 201(c) will need to monitor the current national best bid, but will not be required to monitor the sequence of bids or last sale prices, as would have been required under the proposed modified uptick rule or the proposed uptick rule, respectively. Several commenters noted that the lack of a sequencing requirement would make the alternative uptick rule, in comparison to the other proposed short sale price tests, less costly [988] or easier to monitor on an on-going basis.[989] One commenter stated that the alternative uptick rule would reduce the data retention requirements of a new short sale price test restriction.[990]

Another commenter stated that the "Commission's cost estimates seem to underestimate the cost to large, full service broker-dealers, since the volume of orders handled by these firms are likely to lead to significantly greater technology and storage costs alone as well as more frequent reviews" but did not provide a specific cost estimate.[991] As we stated in the Proposal,[992] we recognize that the exact nature and extent of the required policies and procedures, and thus the costs associated with such policies and procedures, that a broker-dealer is required to establish under the broker-dealer provision in Rule 201(c) likely will vary depending upon the nature of the broker-dealer, and we have taken this into account in our cost estimates.[993]

The following discussion of comments on the costs to broker-dealers includes comments that were discussed above with respect to the costs to trading centers [994] because, in some cases, commenters provided comments and estimates on the costs of establishing and monitoring policies and procedures under the proposed short sale price tests without distinguishing between costs that would be applicable to trading centers as opposed to broker-dealers. One commenter provided a dollar estimate of broker-dealer implementation costs at approximately $500,000 per broker-dealer, for a total of $2,780,500,000 for all broker-dealers subject to Rule 201,[995] including costs for "the purchase of additional costly data feeds" but not including "costs associated with developing appropriate internal supervisory procedures and compliance programs." [996] However, we note that this implementation cost estimate for the broker-dealer provision, which is significantly higher than our estimate of, on average, $68,381 per broker-dealer,[997] was not specific to the alternative uptick rule. As discussed above, we believe that the alternative uptick rule will be easier and less costly to monitor than the proposed modified uptick rule or the proposed uptick rule because under the alternative uptick rule, broker-dealers who choose to rely on Rule 201(c) will need to monitor the current national best bid, but will not be required to monitor the sequence of bids or last sale prices, as would have been required under the proposed modified uptick rule or the proposed uptick rule, respectively.[998] In addition, we note that implementation of Rule 201 will not require modifications to how data feeds are currently received. As discussed above, Rule 201 does not mandate that the receipt of the current national best bid must be from any one particular data feed; thus, broker-dealers will be able to continue using the data feed they currently use and for which they currently pay.[999]

Another commenter conducted a survey of fifty firms with respect to implementation and on-going monitoring cost estimates. Cost estimates in response to the survey indicated that a circuit breaker triggering a short sale price test based on the national best bid would have implementation costs that averaged between $235,000 and $2,000,000 per firm.[1000] This estimated implementation cost range is significantly higher than our cost estimate of, on average, $68,381 per broker-dealer for implementation.[1001] In addition, cost estimates in response to the survey indicated that a circuit breaker triggering a short sale price test based on the national best bid would have on-going monitoring costs that averaged between $45,000 and $175,000 per firm.[1002] Our estimated cost of $121,356 per broker-dealer for on-going monitoring and surveillance [1003] falls within this commenter's estimated range of on-going monitoring cost. We note that the estimated costs were categorized by large firms, regional firms, and clearing firms, rather than by SRO trading centers, non-SRO trading centers and broker-dealers. As a result, it is difficult to determine the applicability of these cost estimates to the expected implementation and on-

[986] *See* letter from NSCP; *see also* letter from Credit Suisse (June 2009).

[987] *See supra* notes 709 to 715 and accompanying text (discussing comments on the impact of the alternative uptick rule on implementation and on-going monitoring and compliance costs to broker-dealers).

[988] *See supra* note 661.

[989] *See, e.g.,* letter from Glen Shipway (Sept. 2009); letter from SIFMA (Sept. 2009); letter from STA (Sept. 2009); *see also* letter from Credit Suisse (June 2009). In addition, one commenter acknowledged that monitoring of the alternative uptick rule will likely be easier, without referencing the sequencing issue. *See* letter from Allston Trading (Sept. 2009).

[990] *See* letter from STA (Sept. 2009).

[991] Letter from NSCP.

[992] *See* Proposal, 74 FR at 18093.

[993] *See infra* notes 1022 to 1024 and accompanying text (discussing our estimates of implementation and on-going monitoring and surveillance costs to broker-dealers).

[994] *See supra* Section X.B.1.b.i. (discussing costs to trading centers).

[995] *See* letter from Wolverine. Wolverine provided an estimate of $500,000 per firm for implementation costs, which it applied to both non-SRO trading centers and other registered broker-dealers. In its letter, Wolverine multiplied its implementation cost estimate of $500,000 by 5,561 for a total of $2,780,500,000. *See id.* As indicated above, the Commission now estimates the number of broker-dealers at 5,178 based on a review of 2008 FOCUS Report filings reflecting registered broker-dealers, including introducing broker-dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings. *See supra* note 652.

[996] Letter from Wolverine.

[997] *See infra* note 1022 and accompanying text (discussing our estimated implementation costs for broker-dealers).

[998] *See supra* notes 709 to 715 and accompanying text and notes 978 to 980 and accompanying text (discussing comments on the impact of the alternative uptick rule on implementation and on-going monitoring and compliance costs).

[999] *See supra* notes 404 to 411 and accompanying text (discussing the use of various data feeds in determining the current national best bid).

[1000] *See supra* note 918 (discussing the results of SIFMA's cost estimate survey with respect to the costs of implementing a circuit breaker triggering a short sale price test based on the national best bid); *see also* letter from Wolverine.

[1001] *See infra* note 1022 and accompanying text (discussing our estimated implementation costs for broker-dealers).

[1002] *See supra* note 931 (discussing the results of SIFMA's cost estimate survey with respect to the on-going monitoring costs of a circuit breaker triggering a short sale price test based on the national best bid).

[1003] *See infra* note 1022 and accompanying text (discussing our estimated implementation costs for broker-dealers).

going monitoring and compliance costs of Rule 201 to broker-dealers. In addition, this commenter's cost estimates were not specific to the alternative uptick rule. As discussed above, because the alternative uptick rule references only the current national best bid, unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price, we believe that the alternative uptick rule will be easier and less costly to implement and monitor than the proposed modified uptick rule or the proposed uptick rule.[1004]

We considered these comments in evaluating the costs of implementation and on-going monitoring and surveillance of the broker-dealer provision of Rule 201(c) and the riskless principal provision of Rule 201(d)(6). We note that the policies and procedures that must be implemented under the broker-dealer provision are similar to those that are required under the Order Protection Rule of Regulation NMS.[1005] Thus, we believe broker-dealers will already be familiar with establishing, maintaining, and enforcing trading-related policies and procedures, including programming their trading systems in accordance with such policies and procedures.

Although, as discussed above with respect to trading centers, several commenters stated that previous implementation of Regulation NMS would not mitigate the costs to broker-dealers of implementing a short sale price test restriction,[1006] we considered these comments, as well as comments stating that previous implementation of Regulation NMS could ease implementation provided that broker-dealers could leverage existing systems in implementing Rule 201,[1007] and continue to believe that familiarity with Regulation NMS policies and procedures will reduce the implementation costs of the broker-dealer provision under Rule 201(c) on broker-dealers. Moreover, because broker-dealers may have already developed or modified their surveillance mechanisms in order to comply with the policies and procedures requirement of the Order Protection Rule under Regulation NMS, broker-dealers may already have retained and trained the necessary personnel to ensure compliance with that Regulation's policies and procedures requirements and, therefore, may already have in place most of the infrastructure and potential policies and procedures necessary to comply with the broker-dealer provision of Rule 201(c). In addition, one commenter supported using a policies and procedures approach to any short sale price test restriction because it would ease implementation for broker-dealers.[1008]

Moreover, while latencies in obtaining data regarding the national best bid from consolidated market data feeds, as discussed in detail above, may impact implementation costs associated with Rule 201, a broker-dealer could have policies and procedures that would provide for a snapshot of the applicable national best bid of the security. Several commenters expressed concerns that implementing "snapshot" capability to preserve an auditable record of the current national best bid would be difficult and costly for broker-dealers,[1009] particularly because this is not a capability currently supported by many broker-dealers.[1010] Commenters also noted that "snapshot" capability would require increased data storage.[1011]

Although we recognize commenters' concerns that implementing "snapshot" capability could be costly for some broker-dealers, we note that most broker-dealers may already have developed "snapshot" capability in connection with Regulation NMS's Order Protection Rule. We also agree that "snapshot" capability will require data storage by broker-dealers; however, as noted by one commenter,[1012] because the alternative uptick rule does not require sequencing of the national best bid, the data storage requirements under the alternative uptick rule are lower than they would be under the proposed modified uptick rule or the proposed uptick rule. In addition, we believe that the costs of a policies and procedures approach that provides for a snapshot of the applicable current national best bid of the security are justified because snapshot capability will aid broker-dealers in dealing with time lags in receiving data regarding the national best bid from different data sources and facilitate verification of whether a short sale order was executed or displayed at a permissible price.

We considered whether our estimates of the costs to broker-dealers for implementation and on-going monitoring and surveillance of the proposed modified uptick rule included in the Proposal [1013] would change under the circuit breaker approach of Rule 201, but, as discussed below, concluded that these estimates continue to represent reasonable estimates under the circuit breaker approach combined with the alternative uptick rule.

As discussed previously,[1014] despite some commenters' concerns regarding the implementation costs of a circuit breaker rule,[1015] we believe that the circuit breaker approach will result in largely the same implementation costs as we estimated would be incurred if we adopted a permanent, market-wide short sale price test restriction.[1016] We believe that that there will be only minimal, if any, implementation costs for a circuit breaker approach in addition to the costs we estimated previously for the implementation of a permanent, market-wide short sale price test rule because broker-dealers relying on Rule 201(c) or Rule 201(d)(6) are required to establish written policies and procedures required to comply with those provisions regardless of whether the short sale price test restriction is adopted on a permanent, market-wide basis or, in the case of Rule 201, adopted in conjunction with a circuit breaker. Several other commenters agreed, stating that the costs of the circuit breaker approach would be similar to, or only incrementally higher than, the costs of a permanent, market-wide approach.[1017]

In addition, with respect to on-going monitoring and surveillance costs of the circuit breaker approach, we recognize, as noted by one commenter,[1018] that broker-dealers relying on Rule 201(c) or Rule 201(d)(6) will need to continuously monitor whether a security is subject to the provisions of Rule 201 and that there will be costs associated with such

[1004] *See supra* notes 709 to 715 and accompanying text and notes 978 to 980 and accompanying text (discussing comments on the impact of the alternative uptick rule on implementation and on-going monitoring and compliance costs).

[1005] *See* Regulation NMS Adopting Release, 70 FR 37496; *see also* 17 CFR 242.611.

[1006] *See, e.g.,* letter from FIF (June 2009); letter from RBC (June 2009).

[1007] *See, e.g.,* letter from MFA (Oct. 2009).

[1008] *See, e.g.,* letter from GE.

[1009] *See, e.g.,* letter from Credit Suisse (June 2009); letter from STANY (June 2009); letter from FIF (June 2009); letter from Lime Brokerage (June 2009); letter from NSCP.

[1010] *See, e.g.,* letter from STANY (June 2009); letter from FIF (June 2009).

[1011] *See, e.g.,* letter from STANY (June 2009); letter from FIF (June 2009); letter from NSCP; letter from Direct Edge (June 2009).

[1012] *See* letter from STA (Sept. 2009).

[1013] *See* Proposal, 74 FR at 18093–18094.

[1014] *See supra* Section IX.E.1. (discussing estimated burdens of the collection of information requirements applicable to trading centers under Rule 201).

[1015] *See supra* note 676.

[1016] *See* Proposal, 74 FR at 18093–18094.

[1017] *See, e.g.,* letter from Nasdaq OMX Group (Oct. 2009); letter from Credit Suisse (Sept. 2009); letter from STA (June 2009).

[1018] *See* letter from Glen Shipway (June 2009).

monitoring. However, we believe that these costs will be offset because, under the circuit breaker approach, the alternative uptick rule will be time limited and will only apply on a stock by stock basis, which will reduce our previously estimated costs for on-going monitoring and surveillance. This is because broker-dealers relying on Rule 201(c) will only need to monitor and surveil for compliance with the alternative uptick rule, and broker-dealers relying on Rule 201(d)(6) will only need to monitor for compliance with the requirements of that provision, during the limited period of time that the circuit breaker is in effect with respect to a specific security. As such, the circuit breaker approach will allow regulatory, supervisory and compliance resources to focus on, and to address, those situations where a specific security is experiencing significant downward price pressure.[1019]

On balance, we believe that the estimates of the costs to broker-dealers for implementation and on-going monitoring and surveillance of the proposed modified uptick rule included in the Proposal [1020] are appropriate with respect to the broker-dealer provision of Rule 201(c) and the riskless principal provision of Rule 201(d)(6). Thus, our estimates have not changed from the Proposal, except to the extent that total cost estimates have changed because we have updated the estimated number of broker-dealers.[1021] Our estimates of the implementation costs to broker-dealers include the costs of surveillance and reprogramming costs for enforcing, monitoring, and updating trading, execution management, and surveillance systems under Rule 201, systems changes to computer software, as well as staff time and technology resources. Our estimates of the on-going monitoring and surveillance costs include the commitment of resources associated with compliance oversight, market surveillance, data storage and enforcement, with attendant opportunity costs.

As detailed in PRA Section IX.E.2., above, we realize that the exact nature and extent of the required policies and procedures that a broker-dealer is required to establish under the broker-dealer provision in Rule 201(c), as well as under the riskless principal provision in Rule 201(d)(6), likely will vary depending upon the type, size and nature of the broker-dealer (*e.g.,* full service broker-dealer vs. market maker). Thus, our estimates take into account different types of broker-dealers and we realize that these estimates may be on the low-end for some broker-dealers while they may be on the high-end for other broker-dealers.

As detailed in PRA Section IX.E.2., above, we estimate a total one-time initial cost of $354,076,818 for all broker-dealers relying on the broker-dealer provision in Rule 201(c) and the riskless principal provision in Rule 201(d)(6) to establish written policies and procedures reasonably designed to prevent the incorrect identification of orders as being priced in accordance with the broker-dealer provision or, in the case of the riskless principal provision, to assure that, at a minimum: (i) The customer order was received prior to the offsetting transaction; (ii) the offsetting transaction is allocated to a riskless principal or customer account within 60 seconds of execution; and (iii) that it has supervisory systems in place to produce records that enable the broker-dealer to accurately and readily reconstruct, in a time-sequenced manner, all orders on which the broker-dealer relies pursuant to this provision.[1022]

Once a broker-dealer has established written policies and procedures so that it may rely on the broker-dealer provision in Rule 201(c) and the riskless principal provision in Rule 201(d)(6), we estimate a total annual on-going cost of $96,248,664 for all broker-dealers relying on either of these provisions to ensure that their written policies and procedures are up-to-date and remain in compliance with Rule 201.[1023] In addition, with regard to on-going monitoring for and enforcement of trading in compliance with the broker-dealer provision in Rule 201(c) and the riskless principal provision in Rule 201(d)(6), as detailed in PRA Section IX.E.2., above, we believe that, once the tools necessary to carry out on-going monitoring have been put in place, a broker-dealer will be able to incorporate on-going monitoring and enforcement within the scope of its existing surveillance and enforcement policies and procedures without a substantial additional burden. We recognize, however, that this on-going compliance will not be cost-free, and that broker-dealers will incur some additional annual costs associated with on-going compliance, including compliance costs of reviewing transactions. We estimate that each broker-dealer will incur an average annual on-going compliance cost of $102,768, for a total annual cost of $532,132,704 for all broker-dealers.[1024]

To summarize, we estimate an average one-time initial cost of $68,381 per broker-dealer for a total one-time initial cost of $354,076,818 for all broker-dealers relying on the broker-dealer provision in Rule 201(c) and the riskless principal provision in Rule 201(d)(6) to establish the written policies and procedures required to rely on the broker-dealer provision or the riskless principal provision.[1025] We estimate an average annual on-going cost of $18,588 per broker-dealer for a total annual on-going cost of $96,248,664 for all broker-dealers relying on either of these provisions to ensure that their written policies and procedures are up-to-date and remain in compliance with Rule 201.[1026] In addition, we estimate an average annual cost of $102,768 per

[1019] *See, e.g.,* letter from Nasdaq OMX Group (Oct. 2009); letter from SIFMA (Sept. 2009).

[1020] *See* Proposal, 74 FR at 18093–18094.

[1021] *See supra* note 729 (discussing the change in the estimated number of broker-dealers).

[1022] This figure was calculated by adding $250,516,818 and $103,560,000 (for outsourced legal work). The $250,516,818 figure was calculated as follows: (37 legal hours × $305) + (77 compliance hours × $313) + (23 information technology hours × $292) + (23 business operation hours × $273) = $48,381 per broker-dealer × 5,178 broker-dealers = $250,516,818 total cost for broker-dealers. The $103,560,000 figure was calculated as follows: (50 legal hours × $400 × 5,178) = $103,560,000.

Based on industry sources, we estimate that the average hourly rate for outsourced legal services in the securities industry is $400. For in-house legal services, we estimate that the average hourly rate for an attorney in the securities industry is approximately $305 per hour. In addition, we estimate that the average hourly rate for an assistant compliance director, a senior computer programmer, and a senior operations manager in the securities industry is approximately $313, $292, and $273 per hour, respectively. The estimates for in-house legal services, assistant compliance director, senior computer programmer, and senior operations manager are from SIFMA's *Management & Professional Earnings in the Securities Industry 2008,* modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[1023] This figure was calculated as follows: (2 legal hours × 12 months x $305) × 5,178 + (3 compliance hours × 12 months × $313) × 5,178 = $96,248,664.

[1024] This figure was calculated as follows: (16 compliance hours × $313) + (8 information technology hours × $292) + (4 legal hours × $305) x 12 months = $102,768 per broker-dealer × 5,178 broker-dealers = $532,132,704. As discussed above, we base our estimate of burden hours on the estimates used for Regulation NMS because it requires similar on-going monitoring and surveillance for and enforcement of trading in compliance with that regulation's policies and procedures requirement.

For in-house legal services, we estimate that the average hourly rate for an attorney in the securities industry is approximately $305 per hour. In addition, we estimate that the average hourly rate for an assistant compliance director and a senior computer programmer in the securities industry is approximately $313 and $292 per hour, respectively. These figures are from SIFMA's *Management & Professional Earnings in the Securities Industry 2008,* modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[1025] *See supra* note 1022.

[1026] *See supra* note 1023.

broker-dealer for a total annual cost of $532,132,704 for all broker-dealers for on-going monitoring for and enforcement of trading in compliance with the broker-dealer provision in Rule 201(c) and the riskless principal provision in Rule 201(d)(6).[1027]

2. Circuit Breaker Approach

Under the circuit breaker approach, the alterative uptick rule will apply only if the price of a covered security has declined by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day.[1028] In addition, this short sale price test restriction will apply for the remainder of the day and the following day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan.[1029]

a. Impact on Market Quality

As stated above, in the Proposal and Re-Opening Release, we requested comment on the costs of a circuit breaker rule,[1030] and specifically on the extent to which the proposed amendments to Regulation SHO, including the proposed circuit breaker rules, could impact or lessen some of the benefits of legitimate short selling or could lead to a decrease in market efficiency, price discovery, or liquidity.[1031]

As we stated in the Proposal, we understand that there are concerns about a potential "magnet effect" that could arise as an unintended consequence of a circuit breaker that imposes a short selling price test restriction.[1032] This "magnet effect" could result in short sellers driving down the price of an equity security in a rush to execute short sales before the circuit breaker is triggered. We are also concerned about short selling demand building until the circuit breaker is lifted.

In response to our requests for comments, several commenters stated that a short sale circuit breaker could exacerbate downward pressure on stocks as their value reached the threshold level.[1033] Commenters also discussed the possibility that short selling demand could be built up until the short selling restriction is lifted.[1034] Other commenters, however, discounted the possibility or impact of a "magnet effect," [1035] including some commenters who cited empirical studies that question whether a circuit breaker would result in artificial pressure on the price of individual securities.[1036]

After considering the comments, including studies cited by commenters, we do not believe that the evidence is clear regarding a "magnet effect." [1037] In fact, many academic studies that have analyzed circuit breakers in other contexts found no evidence of such trading patterns.[1038] We recognize, however, that some of these studies were conducted in markets dissimilar from the highly automated markets currently existing in the United States and, therefore, that limits their utility in this context. Overall, however, the most relevant studies fail to demonstrate a magnet effect and we believe that adopting the circuit breaker approach best serves our goals.

Commenters also stated that a circuit breaker could have a stigmatizing effect on affected securities by creating the impression that a stock is "down so significantly that the trading rules must change." [1039] Other commenters expressed concerns that the circuit breaker could have a negative effect on affected securities because "if a security has suffered a significant decline, additional constraints that affect the ability of market makers to provide high-quality markets may actually hasten the decline, as decreased size and wider spreads will further undermine the already battered investor confidence in the security." [1040] Another commenter noted that a circuit breaker "may exacerbate market dislocations by suddenly and unexpectedly altering the regulatory regime and liquidity characteristics of a particular security, precisely when it is under duress." [1041]

We recognize that the circuit breaker approach of Rule 201 could result in some perception of stigmatization of stocks that trigger the short sale price test restriction of Rule 201. As discussed above in Section X.B.1.a., we also recognize that imposing a short sale price test restriction may negatively impact market quality with respect to a covered security that has triggered the circuit breaker. In addition, although we agree that a circuit breaker combined with a halt on short selling could cause or exacerbate market dislocations, we do not believe that the circuit breaker approach of Rule 201 will have the same impact because it will continue to allow short selling at a price above the national best bid, even when the short sale price test restriction is in effect. Further, to the extent that the circuit breaker approach results in stigmatization, market dislocations, or other negative impacts on market quality, we believe any such costs are justified by the benefits provided by the Rule.

As discussed in detail in Section III.A.5., above, commenters' estimates and the Staff's analysis show that a 10% circuit breaker threshold generally should affect only a limited percentage of covered securities, thus will not interfere with the smooth functioning of the markets for the majority of covered securities most of the time. And, although a permanent market-wide approach that would apply to all covered securities all the time may, as one commenter stated, provide an element of predictability,[1042] we believe that the circuit breaker approach of Rule 201 is appropriate because it provides a balance between achieving our goals for adopting a short sale price test restriction and limiting impediments to the normal operations of the market. As discussed above, due to the changes in market conditions and erosion of investor confidence that occurred recently, investors have become increasingly concerned about sudden and excessive declines in prices that appear to be unrelated to issuer fundamentals.[1043] We believe that a time-limited circuit breaker that is triggered by a significant intra-day decline in price of an individual

[1027] *See supra* note 1024.

[1028] *See* Rule 201(b)(i).

[1029] *See* Rule 201(b)(ii).

[1030] *See* Proposal, 74 FR at 18090, 18100; Re-Opening Release, 74 FR at 42037.

[1031] *See* Proposal, 74 FR at 18090.

[1032] *See* Proposal, 74 FR at 18067.

[1033] *See, e.g.*, letter from Matlock Capital (May 2009); letter from Schwab; letter from Lime Brokerage (June 2009); letter from STA (June 2009); letter from Glen Shipway (June 2009); letter NYSE Euronext (June 2009); letter from Wolverine; letter from Direct Edge (June 2009); letter from Amer. Bankers Assoc.; letter from NYSE Euronext (Sept. 2009); *see also* letter from SIFMA (June 2009) (indicating that an "on/off" circuit breaker trigger could dampen any magnet effect); letter from Direct Edge (Mar. 2009).

[1034] *See* letter from STA (June 2009); letter from Wolverine.

[1035] *See* letter from BATS (May 2009); letter from Credit Suisse (June 2009); letter from Credit Suisse (Sept. 2009); letter from Hudson River Trading; letter from Virtu Financial; *see also* letter from Credit Suisse (Mar. 2009).

[1036] *See* letter from Credit Suisse (June 2009); letter from Credit Suisse (Sept. 2009); *see also* letter from Credit Suisse (Mar. 2009); letter from Nasdaq OMX Group (Oct. 2009).

[1037] *See supra* notes 280 to 285 and accompanying text (discussing comments on the "magnet effect" and our response).

[1038] *See supra* note 285.

[1039] Letter from Schwab; *see also* letter from Amer. Bankers Assoc.

[1040] Letter from EWT (June 2009).

[1041] Letter from EWT (June 2009); *see also* letter from Matlock Capital (May 2009).

[1042] *See* letter from NYSE Euronext (Sept. 2009).

[1043] *See supra* Section II.C. (discussing investor confidence); *see also* Proposal, 74 FR at 18046–18049.

security is a targeted response to address these concerns.

Commenters also expressed concerns that, during periods of volatility, "circuit breakers could potentially impact far too many stocks on any given day and damage the benefits of short selling."[1044] Similarly, a number of commenters expressed concerns that, if the trigger level for a circuit breaker were set too low, the circuit breaker would impose a short sale price test restriction that would impair trading in a stock not only due to a price decline that might indicate abusive or abnormal trading activity, but also during normal market conditions, thus impairing normal trading activity, further limiting the provision of market benefits such as liquidity and price efficiency, and causing disruptions to investors and markets.[1045]

When the markets experience periods of extreme volatility, we expect that the circuit breaker will be triggered for more securities than during periods of low volatility. We believe this is an appropriate result of Rule 201 because it is designed to impose restrictions on short selling when individual securities are undergoing significant intra-day price declines. In addition, we recognize that a 10% trigger level may capture some "normal" trading activity. However, as discussed in detail in Section III.A.5., above, commenters' estimates and the Staff's analysis show that a 10% circuit breaker threshold generally should affect only a limited percentage of covered securities. This supports the conclusion that Rule 201 provides a tailored approach that reaches a limited subset of covered securities that are experiencing a significant intra-day price decline, while generally not restricting short selling in the majority of covered securities. To the extent that Rule 201 impairs normal trading activity, we believe that such costs are justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

Several commenters expressed concerns that a circuit breaker approach "does not adequately address the negative implications of unregulated short selling" because it would permit relatively unrestricted, and potentially manipulative, short selling up to the trigger point.[1046] One commenter stated that a circuit breaker would not be effective to address manipulative short selling because "predatory short selling is not a one-day event, but the culmination of a series of events."[1047]

While it is true that, under a circuit breaker approach, the short sale price test restriction of Rule 201 will not apply to short selling in a security before the 10% intra-day decline trigger is reached, or after the duration of the restriction has passed, we believe that the circuit breaker approach is designed to strike the appropriate balance between our goal of preventing potential short sale abuse and the need to limit impediments to the normal operations of the market. As we stated in the Proposal, in discussing a short selling circuit breaker, one commenter noted that such a measure could address the issue of "bear raids" while limiting the market impact that may arise from other forms of short sale price test restrictions.[1048] As discussed above, short selling is an important tool in price discovery and the provision of liquidity to the market, and we recognize that imposition of a short selling circuit breaker that when triggered imposes the alternative uptick rule could restrict otherwise legitimate short selling activity during periods of significant volatility. To the extent that Rule 201 permits relatively unrestricted, and potentially manipulative, short selling during times when the circuit breaker has not been triggered for a particular security, we believe that such costs are justified by the benefits provided by the circuit breaker approach in not interfering with the provision of market benefits such as liquidity and price efficiency for the majority of covered securities most of the time.

After considering the comments, as discussed above, that we received with respect to the potential market impacts of a circuit breaker approach, we believe that such potential market impacts do not undermine our goals of preventing potential short sale abuse and addressing investor confidence, while balancing these goals with the need to limit impediments to the normal operations of the market. The Commission has long held the view that circuit breakers may help restore investor confidence during times of substantial uncertainty.[1049] We believe that the requirements of Rule 201 will produce such benefits. By imposing the alternative uptick rule once a security's price is experiencing a significant price decline, the short selling circuit breaker rule in Rule 201(b) is designed to target only those securities that experience significant intra-day price declines and, therefore, will help to prevent short selling from being used as a tool to exacerbate the decline in the price of those securities. This approach establishes a narrowly-tailored Rule that will target only those securities experiencing such a decline. We believe that addressing short selling in connection with such declines in individual securities will help restore investor confidence in the markets generally.

Further, as discussed above, short selling is an important tool in price discovery and the provision of liquidity to the market, and we recognize that imposition of a short selling circuit breaker that when triggered imposes the alternative uptick rule could restrict otherwise legitimate short selling activity during periods of significant volatility. Under the circuit breaker approach, the alternative uptick rule will only be imposed when a covered security has experienced an intra-day price decline of 10% or more and will only apply for the remainder of the day and the following day. We believe that the negative impact of Rule 201, if any, on the market will be limited because of the limited scope and duration of Rule 201. Further, to the extent that Rule 201 negatively impacts market quality, we believe that such costs are justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

b. Implementation and On-Going Monitoring and Surveillance Costs

We discussed in the Proposal and the Re-Opening Release the anticipated costs of the proposed circuit breaker rules[1050] and we requested comment on the costs associated with the proposed circuit breaker rules.[1051] In particular, we requested comment on the potential

[1044] Letter from Atherton Lane; *see also* letter from Citadel *et al.* (June 2009); letter from Goldman Sachs (June 2009); letter from ISE (June 2009); letter from MFA (June 2009); letter from SIFMA (June 2009); letter from Wells Fargo (June 2009); letter from SIFMA (Sept. 2009).

[1045] *See, e.g.,* letter from Citadel *et al.* (June 2009); letter from Goldman Sachs (June 2009); letter from MFA (June 2009); letter from SIFMA (June 2009); letter from SIFMA (Sept. 2009).

[1046] Letter from T. Rowe Price (June 2009); *see also* letter from Atherton Lane; letter from Chlebina (Apr. 2009); letter from Equity Insight; letter from Wells Fargo (June 2009); letter from Glen Shipway (Sept. 2009).

[1047] Letter from Equity Insight.

[1048] *See* Proposal, 74 FR at 18067, n.252 (noting a letter from Peter Brown, dated Dec. 12, 2008).

[1049] *See, e.g.,* 1998 Release, 63 FR 18477; *see also* Proposal, 74 FR at 18067.

[1050] *See* Proposal, 74 FR at 18097–18100; Re-Opening Release, 74 FR at 42035.

[1051] *See* Proposal, 74 FR at 18101–18103; Re-Opening Release, 74 FR at 42037.

costs for any modification to both computer systems and surveillance mechanisms and for information gathering, management, and recordkeeping systems or procedures.[1052]

Several commenters expressed concerns regarding the implementation costs of a circuit breaker approach in comparison to the costs of implementing a permanent, market-wide test, but did not provide specific cost estimates.[1053] One commenter stated that "the circuit breaker proposal would be the least cost effective" but did not provide a specific cost estimate with respect to a circuit breaker rule.[1054]

One commenter conducted a survey of fifty firms with respect to implementation cost and on-going monitoring costs estimates of a new short sale price test restriction.[1055] Cost estimates in response to the survey indicated that a permanent, market-wide short sale price test based on the national best bid would have implementation costs that averaged between $200,000 and $1,100,000 per firm,[1056] while a circuit breaker triggering a short sale price test based on the national best bid would have implementation costs that averaged between $235,000 and $2,000,000 per firm.[1057] This represents an estimated increase in implementation costs for a circuit breaker approach, as compared to a permanent, market-wide approach, of $35,000 to $900,000 per firm. However, we note that these cost estimates were based on a circuit breaker triggering the proposed modified uptick rule and, as such, were not specific to the alternative uptick rule.[1058] As discussed throughout this adopting release, because the alternative uptick rule does not require sequencing of the national best bid, unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price, we believe that the policies and procedures required under the alternative uptick rule will be easier and less costly to implement and monitor than would be the case under the proposed modified uptick rule or the proposed uptick rule.

We recognize that imposing a short sale-related circuit breaker rule when, currently, there is an absence of a short sale-related circuit breaker may result in costs in terms of modifications to systems and surveillance mechanisms, as well as changes to processes and procedures.[1059] Such costs will include implementation costs for market participants associated with reprogramming trading and surveillance systems to account for the requirements of the short sale related circuit breaker. We also recognize that the circuit breaker approach may impose costs on market participants related to systems changes to computer software, reprogramming costs, and surveillance and compliance costs, as well as staff time and technology resources, associated with monitoring compliance with the short sale related circuit breaker. Moreover, imposing a short sale related circuit breaker rule when there are currently no short sale related circuit breakers in place also may mean that staff (compliance personnel, associated persons, *etc.*) may need to be trained or re-trained regarding rules related to the circuit breaker requirements.

As discussed previously,[1060] despite some commenters' concerns regarding the implementation costs of a circuit breaker rule, we believe that the circuit breaker approach will result in largely the same implementation costs as we estimated would be incurred if we adopted a permanent, market-wide short sale price test restriction.[1061] We believe that there will be only minimal, if any, implementation costs for a circuit breaker approach in addition to the costs we estimated previously for the implementation of a permanent, market-wide short sale price test rule.[1062]

In addition, with respect to on-going monitoring and surveillance costs of the circuit breaker approach, we recognize, as noted by one commenter,[1063] that market participants will need to continuously monitor whether a security is subject to the provisions of Rule 201 and that there will be costs associated with such monitoring. However, we believe that these costs will be offset because, under the limited scope and duration of the circuit breaker approach, market participants will only need to monitor and surveil for compliance with the alternative uptick rule during the limited period of time that the circuit breaker is in effect with respect to a specific security. This will reduce our previously estimated costs for on-going monitoring and surveillance.[1064]

In addition, although, under the circuit breaker approach, market participants will need to monitor whether a stock is subject to Rule 201 or not, we believe that familiarity with a circuit breaker approach may help mitigate such compliance costs. As discussed in the Proposal, currently, all stock exchanges and FINRA have rules or policies to implement coordinated circuit breaker halts.[1065] Moreover, SROs have rules or policies in place to coordinate individual security trading halts corresponding to significant news events.[1066]

[1052] *See* Proposal, 74 FR at 18090.

[1053] *See supra* note 676.

[1054] Letter from T. Rowe Price (June 2009).

[1055] *See* letter from SIFMA (June 2009).

[1056] *See* letter from SIFMA (June 2009). SIFMA did not categorize estimates of the implementation costs of a permanent, market-wide short sale price test based on the national best bid by SRO trading centers, non-SRO trading centers, and other broker-dealers, but categorized responses by larger firms, with implementation cost estimates that averaged $1,000,000 per firm, with the highest estimate at $7,000,000 per firm, regional firms with estimates that averaged $200,000 per firm, with the highest estimate at $500,000 per firm, and clearing firms, with estimates that averaged $1,100,000 per firm, with the highest estimate at $1,900,000 per firm. SIFMA provided cost estimates in terms of the average estimated cost and the highest estimated cost. *See id.*

[1057] *See supra* note 918 (discussing SIFMA's survey of cost estimates with respect to the implementation costs of a circuit breaker triggering a short sale price test based on the national best bid).

[1058] We also note that the commenter's survey results covered fifty firms, categorized as large firms, regional firms, and clearing firms, rather than SRO trading centers, non-SRO trading centers and broker-dealers. Thus, it is difficult to determine costs of a circuit breaker approach to trading centers as opposed to broker-dealers from the survey results.

[1059] Although under the circuit breaker approach, a price test will not be in place all the time or for all securities, trading centers, and broker-dealers relying on Rule 201(c) or Rule 201(d)(6), will need to establish reasonable policies and procedures in advance to ensure compliance whenever the circuit breaker is triggered. We note that it would not be reasonable for a trading center, or a broker-dealer relying on Rule 201(c) or Rule 201(d)(6) to wait until the circuit breaker is triggered to begin establishing reasonable policies and procedures to prevent the execution or display of the particular covered security at a price that is less than or equal to the current national best bid. Thus, we recognize that the circuit breaker approach will result in immediate upfront costs to trading centers and to broker-dealers intending to rely on Rule 201(c) or Rule 201(d)(6). *See supra* Section X.B.1. (discussing costs of the alternative uptick rule).

[1060] *See supra* notes 676 to 684 and 723 to 727 and accompanying text (discussing the impact of the circuit breaker approach on implementation and on-going monitoring and surveillance costs to trading centers and broker-dealers).

[1061] *See* Proposal, 74 FR 18093–18094.

[1062] Several commenters agreed, stating that the costs of the circuit breaker approach would be similar to, or only incrementally higher than, the costs of a permanent, market-wide approach. *See, e.g.,* letter from Nasdaq OMX Group (Oct. 2009); letter from Credit Suisse (Sept. 2009); letter from STA (June 2009).

[1063] *See* letter from Glen Shipway (June 2009).

[1064] Commenters noted that the circuit breaker approach will allow regulatory, supervisory and compliance resources to focus on, and to address, those situations where a specific security is experiencing significant downward price pressure. *See, e.g.,* letter from Nasdaq OMX Group (Oct. 2009); letter from SIFMA (Sept. 2009).

[1065] *See supra* note 292.

[1066] *See, e.g.,* FINRA Rule 6120; *see also* Proposal, 74 FR at 18065–18066 (discussing the background on circuit breakers).

We also note that one commenter conducted a survey of firms with respect to on-going monitoring costs estimates of a new short sale price test restriction.[1067] Cost estimates in response to the survey indicated that a permanent, market-wide short sale price test based on the national best bid would have on-going monitoring costs that averaged between $50,000 and $175,000 per firm,[1068] while a circuit breaker triggering a short sale price test based on the national best bid would have on-going monitoring costs that averaged between $45,000 and $175,000 per firm.[1069] This seems to support our view that the on-going monitoring costs of a circuit breaker approach, as compared to a permanent, market-wide approach, would be largely the same.

After considering the comments, we believe that the implementation, on-going monitoring and surveillance costs of a circuit breaker triggering a short sale price test restriction will be similar to the implementation, on-going monitoring and surveillance costs of the same short sale price test restriction on a permanent, market-wide basis. Thus, we believe that our estimates of the implementation and on-going monitoring and surveillance costs of Rule 201 for trading centers and broker-dealers, as reflected in Sections X.B.1.b.i and X.B.1.b.ii., discussing the implementation and on-going monitoring and compliance costs of the alternative uptick rule, are appropriate after taking into consideration the circuit breaker approach of Rule 201. Further, we believe that such costs are justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

Under the circuit breaker approach of Rule 201, the listing market for each covered security must determine whether that covered security is subject to Rule 201.[1070] Once the listing market has determined that a security has become subject to the requirements of Rule 201, the listing market shall immediately notify the single plan processor responsible for consolidation of information for the covered security in accordance with Rule 603(b) of Regulation NMS [1071] of this fact. The plan processor must then disseminate this information.[1072] We recognize that these requirements will require changes by the listing markets and single plan processors to systems currently supported by each.[1073] We note that, because listing markets and single plan processors will require time in which to reprogram and test their systems and procedures to comply with Rule 201, the systems and programming costs associated with Rule 201 might be higher without a sufficient implementation period.[1074] We believe that the six month implementation period will provide listing markets and single plan processors with time to make required changes in a measured fashion, which will help alleviate some of the potential disruptions that may be associated with implementing Rule 201.[1075]

While we recognize that listing markets will incur initial up-front costs associated with having to update their systems, including systems changes to computer software, as well as staff time and technology resources to update their systems and surveillance mechanisms to ensure compliance with the Rule's requirements,[1076] familiarity with a circuit breaker approach may help mitigate the implementation and compliance costs. In addition, we believe that listing markets may be able to leverage some of their existing procedures to ease the implementation of Rule 201's requirements. For example, as discussed in the Proposal, currently, all stock exchanges and FINRA have rules or policies to implement coordinated circuit breaker halts [1077] and listing markets also already send information to single plan processors regarding Regulatory Halts as defined in those plans. Moreover, SROs have rules or policies in place to coordinate individual security trading halts corresponding to significant news events.[1078] In addition, we note that listing markets are familiar with making determinations regarding, and imposing trading restrictions on, individual NMS stocks.[1079] Similarly, in connection with such activities, listing markets currently monitor price changes in covered securities relative to the closing price as of the end of regular trading hours on the prior day.

Further, we note that listing markets are also trading centers, as defined by Rule 201,[1080] and as such, will have costs in connection with systems changes to implement the policies and procedures requirements of Rule 201 applicable to trading centers.[1081] We believe that the costs to listing markets associated with having to update their systems to ensure compliance with the Rule's requirements applicable to listing markets will be an incremental addition to the costs associated with the implementation of the policies and procedures requirements applicable to trading centers.[1082] We believe that the implementation and compliance costs for listing markets are justified by the benefits provided by requiring the listing market for a covered security to determine whether the security has become subject to the short sale price test restrictions of Rule 201 because this will help to ensure consistency for each covered security with respect to such determinations.

We recognize that single plan processors will also incur initial up-front costs associated with having to update their systems, including systems changes to computer software, as well as staff time and technology resources to update their systems and surveillance mechanisms in order to ensure

[1067] *See* letter from SIFMA (June 2009).

[1068] *See* letter from SIFMA (June 2009). SIFMA did not categorize estimates of the on-going costs of a permanent, market-wide short sale price test based on the national best bid by SRO trading centers, non-SRO trading centers, and other broker-dealers, but categorized responses by larger firms, with on-going monitoring cost estimates that averaged $100,000 per firm, with the highest estimate at $1,500,000 per firm, regional firms with estimates that averaged $50,000 per firm, with the highest estimate at $450,000 per firm, and clearing firms, with estimates that averaged $175,000 per firm, with the highest estimate at $250,000 per firm. SIFMA only provided the average and highest cost estimates per category. *See id.*

[1069] *See supra* note 931 (discussing SIFMA's survey of cost estimates with respect to the on-going monitoring costs of a circuit breaker triggering a short sale price test based on the national best bid).

[1070] *See* Rule 201(b)(3).

[1071] *See supra* note 368 (discussing the single plan processors for NMS stocks).

[1072] *See* Rule 201(b)(3); 17 CFR 242.603(b).

[1073] *See* letter from FIF (June 2009); *see also supra* Section III.A.6. (discussing the determination regarding securities subject to Rule 201 and dissemination of such information).

[1074] For example, commenters indicated that a circuit breaker rule triggering the alternative uptick rule would require an implementation period of between three and twelve months. *See* letter from NSCP; letter from NYSE Euronext (June 2009); letter from RBC (June 2009); letter from STA (June 2009); letter from FIF (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from Direct Edge (Sept. 2009); letter from EWT (Sept. 2009); letter from RBC (Sept. 2009); letter from SIFMA (Sept. 2009); letter from MFA (Oct. 2009); *see also* letter from Amer. Bankers Assoc.; letter from NYSE Euronext (Sept. 2009); letter from Goldman Sachs (Sept. 2009).

[1075] *See supra* Section VII. (discussing the implementation period for Rule 201); *see also supra* Section III.A.6.

[1076] *See supra* Section X.B.1. (discussing costs of the alternative uptick rule).

[1077] *See supra* note 292.

[1078] *See supra* note 684.

[1079] For example, listing markets already have rules or policies in place to coordinate trading suspensions or halts in individual NMS stocks. *See, e.g.,* Nasdaq Rule 4120 (relating to trading halts in Nasdaq-listed securities); NYSE Rule 123D (relating to delayed openings and trading halts in NYSE-listed securities).

[1080] *See* Rule 201(a)(9).

[1081] *See supra* Section IX.E.1. (discussing implementation costs to trading centers).

[1082] *See id.*

compliance with the circuit breaker requirements.[1083] We believe, however, that the single plan processors' current familiarity with receiving and disseminating information regarding individual NMS stocks will help mitigate these implementation and compliance costs. For example, the single plan processors currently receive information from listing markets regarding trading restrictions, such as Regulatory Halts as defined in those plans, on individual securities and disseminate such information. As a result, the requirements of Rule 201(b)(3) are similar to existing obligations on plan processors pursuant to the requirements of Regulation NMS, the CTA and CQ Plans and the Nasdaq UTP Plan. Two commenters agreed that dissemination of information regarding the triggering of Rule 201 would be a function similar to other functions currently performed by the plan processors.[1084] Further, we believe that the implementation and compliance costs for single plan processors are justified by the benefits provided by requiring the single plan processors to disseminate information on whether a security has become subject to the short sale price test restrictions of Rule 201 because the similarity of this function to current functions performed by the single plan processors will help to ensure the workability and smooth functioning of the Rule.

3. Implementation Period

We believe that a six month implementation period will provide trading centers, broker-dealers, listing markets, the single plan processors and other market participants with a sufficient amount of time in which to modify their systems and procedures in order to comply with the requirements of Rule 201.[1085] The six month implementation period will provide market participants with time to make required changes in a measured fashion, which will help alleviate some of the potential disruptions that may be associated with implementing Rule 201. Because trading centers, listing markets, the single plan processors and other market participants will require time in which to reprogram and test their systems and procedures to comply with Rule 201, the systems and programming costs associated with Rule 201 might be higher without a sufficient implementation period. For example, commenters indicated that a circuit breaker rule triggering the alternative uptick rule would require an implementation period of between three and twelve months.[1086]

The six month implementation period, which is longer than the implementation periods proposed in the Proposal and the Re-Opening Release, takes into consideration commenters' concerns that implementation of a short sale price test could be complex.[1087] We do not believe that an implementation period longer than 6 months is warranted because Rule 201 does not require monitoring of the sequence of bids or last sale prices, unlike other proposed short sale price tests,[1088] and because Rule 201 requires the implementation of policies and procedures similar to those required for trading centers under Regulation NMS.[1089] In addition, as discussed above, market participants will be able to leverage the numerous systems changes made and current architecture developed to facilitate compliance with Regulation NMS. These factors should reduce implementation time.

4. Marking Requirements

While the current marking requirements in Rule 200(g) of Regulation SHO, which require broker-dealers to mark all sell orders of any equity security as either "long" or "short,"[1090] will remain in effect, the amendments to Rule 200(g) will add a new marking requirement of "short exempt."[1091] In particular, if the broker-dealer chooses to rely on its own determination that it is submitting the short sale order to the trading center at a price that is above the current national best bid at the time of submission or to rely on an exception specified in the Rule, it must mark the order as "short exempt."[1092] We discussed in the Proposal the anticipated costs of the proposed amendments[1093] and, in the Proposal and Re-Opening Release, we requested comment on the costs associated with the proposed amendments.[1094]

Several commenters expressed concerns regarding the implementation costs of the "short exempt" marking requirements.[1095] Several commenters noted that the "short exempt" marking requirements would require modifications to multiple systems, including modifications to blue sheet, OATS and OTS reporting systems.[1096] One commenter noted that such modifications would be in addition to changes to order entry and routing applications.[1097] Another commenter noted that one of its primary implementation concerns was related to "re-implementation of 'Short Sale Exempt' order types in interfaces between [the commenter] and [its] Customers as well as the venues that support such exempt order types."[1098] In contrast, one commenter, in supporting adoption of the "short

[1083] *See supra* Section X.B.1. (discussing costs of the alternative uptick rule).

[1084] *See* letter from NYSE Euronext (Sept. 2009); letter from Virtu Financial.

[1085] *See supra* Section VII. (discussing the implementation period).

[1086] *See* letter from NSCP; letter from NYSE Euronext (June 2009); letter from RBC (June 2009); letter from STA (June 2009); letter from FIF (Sept. 2009); letter from Citadel *et al.* (Sept. 2009); letter from Credit Suisse (Sept. 2009); letter from Direct Edge (Sept. 2009); letter from EWT (Sept. 2009); letter from RBC (Sept. 2009); letter from SIFMA (Sept. 2009); letter from MFA (Oct. 2009); *see also* letter from Amer. Bankers Assoc.; letter from NYSE Euronext (Sept. 2009); letter from Goldman Sachs (Sept. 2009).

[1087] *See, e.g.,* letter from NSCP; letter from RBC (June 2009); letter from SIFMA (June 2009); letter from RBC (Sept. 2009); *see also* letter from Direct Edge (Sept. 2009) (stating that adoption of a circuit breaker approach will add approximately four to six weeks to the implementation time of the alternative uptick rule); letter from NYSE Euronext (Sept. 2009) (stating that "a circuit breaker approach raises significant implementation complexities"). *But cf.* letter from Credit Suisse (Sept. 2009) (stating that a circuit breaker approach will not significantly increase implementation time); letter from Nasdaq OMX Group (Oct. 2009) (stating that "[o]nce the price test is in place, there is minimal incremental effort required to add a Circuit Breaker that controls the application of the price test").

[1088] Several commenters noted that because the alternative uptick rule, unlike the other proposed price tests, does not require sequencing of bids or last sale prices, the alternative uptick rule could be implemented more quickly than the other proposed price tests, in three to six months. *See, e.g.,* letter from Credit Suisse (June 2009); letter from STA (June 2009); letter from Credit Suisse (Sept. 2009); letter from FIF (Sept. 2009). *But cf.* letter from Citadel *et al.* (Sept. 2009); letter from NYSE Euronext (Sept. 2009); letter from RBC (Sept. 2009); letter from SIFMA (Sept. 2009).

[1089] One commenter stated that implementation concerns with respect to a short sale price test restriction could be mitigated, provided that trading centers "could leverage existing architecture developed to comply with the order protection rule in Reg NMS (Rule 611)." Letter from MFA (Oct. 2009). Another commenter stated that implementation of a circuit breaker triggering the alternative uptick rule would be easier to implement, "provided that the Commission permits firms to leverage the numerous systems changes made to facilitate compliance with Regulation NMS (including the use of internal market data rather than consolidated data supplied by the industry plans)." Letter from Goldman Sachs (Sept. 2009). *But cf.* letter from FIF (June 2009); letter from NSCP; letter from RBC (June 2009).

[1090] 17 CFR 242.200(g).

[1091] *See* Rule 200(g); *see also supra* Section IV. (discussing the amendments to Rule 200(g)).

[1092] *See* Rule 200(g)(2).

[1093] *See* Proposal, 74 FR at 18100.

[1094] *See* Proposal, 74 FR at 18103; Re-Opening Release, 74 FR at 42037.

[1095] *See, e.g.,* letter from FIF (June 2009); letter from NSCP; letter from RBC (June 2009); letter from Lime Brokerage (Sept. 2009); letter from FIF (Sept. 2009).

[1096] *See, e.g.,* letter from NSCP; letter from RBC (June 2009); letter from FIF (June 2009); letter from FIF (Sept. 2009).

[1097] *See* letter from FIF (June 2009); letter from FIF (Sept. 2009).

[1098] Letter from Lime Brokerage (Sept. 2009).

exempt" marking requirements (in the event that the Commission decided to adopt a short sale price test restriction), stated that "[t]he costs of marking the orders appropriately will be worth the benefits gained."[1099]

We recognize commenters' concerns with respect to the costs of the "short exempt" marking requirement and we considered these comments in evaluating the costs of the "short exempt" marking requirement. Such costs will include one-time costs for broker-dealers for reprogramming and systems changes, including modifications to reporting systems, order entry and routing applications. In addition, the costs of the "short exempt" marking requirement will include on-going monitoring and surveillance costs for broker-dealers. However, we believe that such costs will be limited because broker-dealers already have established systems, processes, and procedures in place to comply with the current marking requirements of Rule 200(g) of Regulation SHO with respect to marking a sell order either "long" or "short" and, therefore, will likely leverage such systems, processes and procedures to comply with the "short exempt" marking requirements in Rules 200(g) and 200(g)(2). Further, we believe that the implementation and compliance costs of the "short exempt" marking requirements are justified by the benefits provided by the requirements in aiding surveillance by SROs and the Commission for compliance with the provisions of Rule 201 and providing an indication to a trading center regarding when it must execute or display a short sale order without regard to whether the order is at a price that is less than or equal to the current national best bid.

We also considered whether our estimates of the implementation and on-going monitoring and compliance costs associated with the "short exempt" marking requirements under the amendments to Rule 200(g), as proposed in conjunction with the proposed modified uptick rule[1100] would change under the circuit breaker approach of Rule 201, but concluded, as discussed below, that these estimates continue to represent reasonable estimates under the circuit breaker approach.

We believe that the "short exempt" marking requirements of Rule 200(g), in conjunction with a circuit breaker approach, will result in largely the same implementation costs as we estimated would be incurred if the "short exempt" marking requirements were combined with a market-wide short sale price test restriction.[1101] This is because broker-dealers relying on the provisions of Rule 201(c) or Rule 201(d) will need to make systems changes to implement the "short exempt" marking requirements regardless of whether the short sale price test restriction is adopted on a permanent, market-wide basis or, in the case of Rule 201, adopted in conjunction with a circuit breaker.

In addition, with respect to on-going monitoring and surveillance costs of the "short exempt" marking requirements in conjunction with a circuit breaker approach, we recognize, as noted by one commenter,[1102] that market participants will need to continuously monitor whether a security is subject to the provisions of Rule 201 and that there will be costs associated with such monitoring. However, we believe that these costs will be offset because, under the circuit breaker approach, use of the "short exempt" provisions of Rule 201(c) and Rule 201(d) and the related marking requirements will be time limited and will only apply on a stock by stock basis. As a result, broker-dealers who choose to rely on Rule 201(c) or Rule 201(d) will only need to monitor and surveil for compliance with the requirements of those provisions and will only need to mark qualifying orders "short exempt" during the limited period of time that the circuit breaker is in effect with respect to a specific security. The circuit breaker approach will allow regulatory, supervisory and compliance resources to focus on, and to address, those situations where a specific security is experiencing significant downward price pressure.[1103]

On balance, we believe our proposed estimates of the costs associated with the "short exempt" marking requirement[1104] are appropriate with respect to Rule 200(g) as adopted. Thus, our estimates have not changed from the Proposal, except to the extent that total burden estimates have changed because we have updated the estimated number of broker-dealers.[1105]

We believe that the implementation cost of the "short exempt" marking requirement will likely be similar to the implementation cost of the order marking requirements of Rule 200(g) of Regulation SHO, which had originally included the category of "short exempt." Industry sources at that time estimated initial implementation costs for the former "short exempt" marking requirement to be approximately $100,000 to $125,000.[1106] Based on these estimates, as adjusted for inflation, we estimate that the initial implementation cost of the "short exempt" marking requirement will be approximately $115,000 to $145,000 per broker-dealer[1107] for a total initial implementation cost of approximately $595,470,000 to $750,810,000 for all broker-dealers.[1108]

We recognize that there will be an on-going paperwork burden cost associated with adding the "short exempt" marking requirements. For example, as detailed in PRA Section IX.E.3., above, we estimate that the total annual cost for each broker-dealer subject to the "short exempt" marking requirements will be $93,420[1109] for a total annual on-going cost of $483,728,760 for all broker-dealers subject to the "short exempt" marking requirements.[1110]

To provide market participants with the time needed to make the changes required to comply with Rule 200(g), we are adopting an implementation period under which market participants will have to comply with these requirements six months following the effective date of the adoption of these amendments. In the Proposal, we proposed a three month implementation period for the "short exempt" marking requirements under Rule 200(g). In response to our request for comment, several commenters stated that the "short exempt" marking requirement would require systems changes.[1111] Another commenter stated that the "short exempt" marking requirement would require coding for new fields in order

[1099] Letter from STA (June 2009).

[1100] *See* Proposal, 74 FR at 18089.

[1101] *See* Proposal, 74 FR at 18100.

[1102] *See* letter from Glen Shipway (June 2009).

[1103] *See, e.g.,* letter from Nasdaq OMX Group (Oct. 2009); letter from SIFMA (Sept. 2009).

[1104] *See* Proposal, 74 FR at 18089.

[1105] *See supra* note 729.

[1106] *See* 2004 Regulation SHO Adopting Release, 69 FR at 48023.

[1107] The adjustment for inflation was calculated using information in the Consumer Price Index, U.S. Department of Labor, Bureau of Labor Statistics.

[1108] These figures were calculated as follows: ($115,000 × 5,178) = $595,470,000 and ($145,000 × 5,178) = $750,810,000.

[1109] This figure was calculated as follows: (346 hours × $270) = $93,420 per broker-dealer. The 346 hour estimate was calculated as follows: 12.9 billion "short exempt" orders/5,178 broker-dealers = 2,491,309 annual responses by each broker-dealer. Each response of marking sell orders "short exempt" will take approximately .000139 hours (.5 seconds) to complete. (2,491,309 responses × 0.000139 hours) = 346 burden hours.

Based on industry sources, we estimate that the average hourly rate for compliance attorneys is $270. The $270/hour figure for compliance attorneys is from SIFMA's *Management & Professional Earnings in the Securities Industry 2008,* modified to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits and overhead.

[1110] This figure was calculated as follows: ($93,420 × 5,178) = $483,728,760.

[1111] *See, e.g.,* letter from RBC (June 2009); letter from NSCP; letter from FIF (June 2009).

records, which should be accomplished in approximately three months.[1112]

We are sensitive to commenters' concerns that implementation of the "short exempt" marking requirement could be complex, and believe that a six month implementation period, which is longer than the 3 month implementation period proposed in the Proposal, will afford market participants sufficient time to make the necessary modifications to their systems and procedures. In addition, we believe that because it will provide broker-dealers with time to make required changes in a measured fashion, the six month implementation period will help alleviate some of the potential disruptions that may be associated with implementing the "short exempt" marking requirements.

XI. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is 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 would promote efficiency, competition, and capital formation.[1113] In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when adopting rules under the Exchange Act, to consider the impact such rules would have on competition.[1114] Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

A number of commenters noted concerns about the impact of a short sale price test restriction on efficiency, competition and capital formation.[1115] One commenter stated that "the empirical evidence from the many academic and Commission studies and experiences of [the commenters] * * * raise a substantial question about whether the proposed short sale restrictions can satisfy these standards."[1116] Another commenter noted the beneficial impact of short selling on efficiency and competition, quoting the Commission's statements that short selling provides the market with liquidity and pricing efficiency.[1117] As discussed below, we considered these concerns, and took them into account in formulating Rules 200(g) and 201, as adopted, to address, to the extent possible, these concerns.

A. Competition

We begin our consideration of potential competitive impacts with observations of the current structure of the markets with respect to trading centers and broker-dealers, mindful of the statutory requirements regarding competition. Based on our experience in regulating the securities markets, including reviewing information provided by trading centers and broker-dealers in their registrations and filings with us, and approving such registration applications, we discuss below the basic framework of the markets they comprise.

1. Market Structure for Trading Centers and Broker-Dealers

Trading centers include national securities exchanges or national securities associations that operate an SRO trading facility, ATSs,[1118] exchange market makers and OTC market makers, and any other broker-dealer that executes orders internally, whether as agent or principal.[1119] All of these entities will be required to alter their trading mechanisms to comply with Rule 200(g) and Rule 201.

The equity trading industry is a competitive one, with reasonably low barriers to entry. The intensity of competition across trading platforms in this industry has increased in the past decade as a result of a number of factors, including market reforms and technological advances. This increase in competition has resulted in decreases in market concentration, more competition among trading centers, a proliferation of trading platforms competing for order flow, and decreases in trading fees.

The reasonably low barriers to entry for trading centers are evidenced, in part, by the fact that new entities, primarily ATSs, continue to enter the market.[1120] For example, currently there are approximately 50 registered ATSs that trade covered securities. In addition, the Commission within the past few years has approved applications by two entities—BATS and Nasdaq—to become registered as national securities exchanges for trading equities, and approved proposed rule changes by two existing exchanges—ISE and CBOE—to add equity trading facilities to their existing options business. We believe that competition among trading centers has been facilitated by Rule 611 of Regulation NMS,[1121] which encourages quote-based competition between trading centers; Rule 605 of Regulation NMS,[1122] which empowers investors and broker-dealers to compare execution quality statistics across trading centers; and Rule 606 of Regulation NMS,[1123] which enables customers to monitor order routing practices.

Broker-dealers are required to register with the Commission and at least one SRO. The broker-dealer industry, including market makers, is a competitive industry, with most trading activity concentrated among several dozen larger participants and with thousands of smaller participants competing for niche or regional segments of the market.

There are 5,178 registered broker-dealers, of which 890 are small broker-dealers.[1124] Larger broker-dealers often enjoy economies of scale over smaller broker-dealers and compete with each other to service the smaller broker-dealers, who are both their competitors and customers. The reasonably low barriers to entry for broker-dealers are evidenced, for example, by the fact that the average number of new broker-dealers entering the market each year between 2001 and 2008 was 389.[1125]

[1112] *See* letter from STA (June 2009).

[1113] 15 U.S.C. 78c(f).

[1114] 15 U.S.C. 78w(a)(2).

[1115] *See, e.g.*, letter from Joseph A. Dear, Chief Investment Officer, California Public Employees' Retirement System, dated June 19, 2009; letter from Citadel *et al.* (June 2009); letter from Pershing Square; letter from Vanguard (June 2009); letter from Amer. Bar Assoc. (July 2009); letter from Amer. Bar Assoc. (Sept. 2009); letter from MFA (Oct. 2009).

[1116] Letter from Citadel *et al.* (June 2009).

[1117] *See* letter from Pershing Square (citing 2006 Price Test Elimination Proposing Release, 71 FR at 75069–75070).

[1118] Under Regulation ATS, any entity that falls within the definition of a securities exchange must apply to be a securities exchange or must register as an ATS, subject to certain exceptions. *See* 17 CFR 242.300, 301; *see also* 15 U.S.C. 78c(a)(1); 17 CFR 240.3b–16.

[1119] *See* 17 CFR 242.600(b)(78). Currently, no national securities association is a trading center, as that term is defined in Rule 600(b)(78) of Regulation NMS.

[1120] *See* Exchange Act Release No. 60997 (Nov. 13, 2009), 74 FR 61208, 61234 (Nov. 23, 2009) (discussing the reasonably low barriers to entry for ATSs and that these reasonably low barriers to entry have generally helped to promote competition and efficiency).

[1121] 17 CFR 242.611.

[1122] 17 CFR 242.605.

[1123] 17 CFR 242.606.

[1124] These numbers are based on a review of 2007 and 2008 FOCUS Report filings reflecting registered broker-dealers, and discussions with SRO staff. The number does not include broker-dealers that are delinquent on FOCUS Report filings. We discuss the impact of Rule 201 on small broker-dealers in Section XII.B., below.

[1125] This number is based on a review of FOCUS Report filings reflecting registered broker-dealers from 2001 through 2008. The number does not include broker-dealers that are delinquent on FOCUS Report filings. New registered broker-dealers for each year during the period from 2001 through 2008 were identified by comparing the

Continued

2. Discussion of Impacts of Rules 200(g) and 201 on Competition

We believe that the estimated costs associated with implementing and complying with Rules 200(g) and 201 are not so large as to raise significant barriers to entry, or otherwise significantly alter the competitive landscape of the industries involved. In industries characterized by reasonably low barriers to entry and intense competition, the viability of some of the less successful competitors may be sensitive to regulatory costs. Nonetheless, given the reasonably low barriers to entry into the market for execution services, we believe that the trading center and broker-dealer industries will remain competitive, despite the costs associated with implementing and complying with Rules 200(g) and 201, even if those costs influence to some degree the entry or exit decisions of individual trading centers or broker-dealers at the margin.

Several commenters expressed concerns about the impact of a short sale price test restriction on competition among broker-dealers.[1126] For example, one commenter noted concerns with respect to decreased competition and increased broker-dealer "internalization."[1127] Specifically, this commenter stated that, as a result of short sale price test restrictions, "a widening of bid/offer spreads and decrease in liquidity provided by professional market makers could reverse the consolidation of liquidity in the public markets, permitting some brokers once again to take advantage of decreased competition in price discovery and offer substantially inferior (but still technically legal) internalization prices to their customers."[1128] Although we considered this commenter's concerns, we note that, as discussed above, due to the circuit breaker approach of Rule 201, as well as findings by the Pilot Results regarding the market impact of former Rule 10a–1, we believe that the short sale price test restrictions of Rule 201 will have a limited, if any, negative market impact, such as widening of bid/offer spreads or decreased liquidity.[1129] Thus, we do not believe that Rule 201 will result in decreased competition in price discovery or increased internalization.

Another commenter stated that "while it will not be mandated that firms avail themselves of the [broker-dealer provision], competitive pressure is likely to mean that broker dealers will need to invest resources and time in building this functionality."[1130] We recognize that broker-dealers are faced with competitive concerns and that such concerns may influence their decision whether or not to rely on the broker-dealer provision of Rule 201(c). We also recognize that if a broker-dealer chooses to rely on the broker-dealer provision it will impose costs on such broker-dealers, and we considered these costs in determining to adopt in Rule 201 the alternative uptick rule rather than a rule that requires sequencing of the national best bid.[1131] Although commenters expressed concerns with respect to the costs of the broker-dealer provision of Rule 201(c) and the resulting impact on competition, many of these comments were not specific to the alternative uptick rule.[1132] Without a sequencing requirement under the alternative uptick rule, we believe that the policies and procedures required to rely on the broker-dealer provision under Rule 201(c) will be easier and less costly to implement and monitor than the cost concerns and estimates provided by some commenters.

Other commenters noted concerns regarding reduced competition among market makers in the absence of a bona fide market making exception.[1133] We believe, however, that due to the approach of Rule 201, that is, the combination of a circuit breaker with the alternative uptick rule, the lack of such a bona fide market maker exception will have minimal, if any, impact on competition among market makers. This is because, as noted by some commenters, equity market makers for the most part sell at their offer quote.[1134] Thus, the short sale price test restriction of Rule 201, which requires short selling at a price above the national best bid and only if the circuit breaker has been triggered, is consistent with equity market making strategies because these market makers generally sell at prices above the national best bid.[1135] This is particularly true where a security's price is declining, as market makers often provide liquidity on the opposite side of price moves to help reduce volatility. Thus, even during times when a covered security is undergoing significant downward price pressure, market makers are generally required to provide liquidity in that security.[1136]

Weighing against the competitive concerns for the trading center and broker-dealer industries, Rule 201 will advance the purposes of the Exchange Act in a number of significant ways. It will help benefit the market for a particular security by allowing market participants, when a security is undergoing a significant intra-day price decline, an opportunity to re-evaluate circumstances and respond to volatility in that security. It will also help restore investor confidence during times of substantial uncertainty because, once the circuit breaker has been triggered for a particular security, long sellers will have preferred access to bids for the security, and the security's continued price decline will more likely be due to long selling and the underlying fundamentals of the issuer, rather than to other factors. We also believe that a circuit breaker will better target short selling that may be related to potential

unique registration number of each broker-dealer filed for the relevant year to the registration numbers filed for each year between 1995 and the relevant year.

[1126] *See, e.g.,* letter from Credit Suisse (June 2009); letter from EWT (June 2009); letter from FIF (June 2009); letter from NSCP.

[1127] Letter from EWT (June 2009).

[1128] *Id.*

[1129] *See supra* Section X.B.1.a. (discussing the impact of Rule 201 on liquidity, market volume, bid-ask spreads, price discovery and volatility).

[1130] Letter from FIF (June 2009). In addition, some commenters raised concerns with respect to competitive pressure on smaller broker-dealers, in particular, in connection with a short sale price test restriction. As noted above, we discuss the impact of Rule 201 on small broker-dealers in Section XII.B., below.

[1131] *See supra* Section IX.E.2. (discussing the implementation and on-going monitoring and compliance costs of the broker-dealer provision).

[1132] *See, e.g.,* letter from STANY (June 2009); letter from FIF (June 2009); letter from Lime Brokerage (June 2009); letter from T.D. Pro Ex; letter from Taurus Compliance; letter from Credit Suisse (June 2009); letter from NSCP.

[1133] *See, e.g.,* letter from EWT (June 2009); letter from EWT (Sept. 2009); letter from GETCO (June 2009); letter from Goldman Sachs (June 2009); *but cf.* letter from Dr. Jim DeCosta (noting that there are currently few barriers to entry for market makers and abuse can arise from small market makers, who are in need of business, being willing to misuse a bona fide market making exemption in exchange for order flow). *See also supra* Section III.B.9. (discussing the decision not to include an exemption for bona fide market making).

[1134] *See, e.g.,* letter from CBOE (June 2009).

[1135] *See* letter from Direct Edge (Sept. 2009); *see also supra* note 532 (discussing a 1997 study indicating that during a sample month in 1997, market maker short sales at or below the inside bid accounted for only 2.41% of their total share volume).

[1136] *See, e.g.,* NYSE Rule 104(f) (stating that "it is commonly desirable that a member acting as [a designated market maker] engage to a reasonable degree under existing circumstances in dealings for the [designated market maker's] own account when lack of price continuity, lack of depth, or disparity between supply and demand exists or is reasonably to be anticipated"); CBOE Rule 53.23(a)(1) (stating that "[w]ith respect to each security for which it holds an Appointment, a CBSX Remote Market Maker has a continuous obligation to engage, to a reasonable degree under the existing circumstances, in dealings for its own account when there exists, or it is reasonably anticipated that there will exist, a lack of price continuity, or a temporary disparity between the supply of and demand for a particular security").

bear raids [1137] and other forms of manipulation that may be used to exacerbate a price decline in a covered security.

At the same time, however, we recognize the benefits to the market of legitimate short selling, such as the provision of liquidity and price efficiency, and considered these benefits in adopting the circuit breaker approach of Rule 201. Under the circuit breaker approach, the alternative uptick rule will only be imposed when a covered security has experienced an intra-day price decline of 10% or more and will only apply for the remainder of the day and the following day. We believe that because of the limited scope and duration of Rule 201, it will not interfere with the smooth functioning of the markets for the majority of securities, including when prices in such securities are undergoing minimal downward price pressure or are stable or rising. To the extent that Rule 201 impacts the benefits of legitimate short selling, such as the provision of liquidity and price efficiency, we believe that such costs are justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

After due consideration of all these factors and the comments we have received, we have determined that any burden on competition that Rules 200(g) and 201 may impose is necessary or appropriate in the furtherance of the purposes of the Exchange Act noted above.

B. Capital Formation

A purpose of Rule 201 is to strengthen investor confidence in the markets we regulate which should help make investors more willing to invest, resulting in the promotion of capital formation. Fair and robust secondary markets, in which legitimate short selling can play a positive role, supports the public offerings by which issuers raise capital and, as a result, investors who provided private capital realize profits and obtain liquidity. In addition, long holdings are integral to capital formation. By placing long holders ahead of short sellers in the execution queue under certain limited circumstances, Rule 201 promotes capital formation, since investors should be more willing to hold long positions if they know they may have a preferred position over short sellers when they wish to sell in the market for that security during a significant price decline in that security.

In addition, paragraphs (c) and (d) of Rule 201 include provisions that are designed to limit any adverse effects on the public offering process, which is necessary to capital formation, while at the same time not undermining the goals of Rule 201.[1138] In particular, Rule 201(d)(5) is designed to facilitate price support during the offering process by allowing broker-dealers to mark short sale orders "short exempt" if the short sale is by an underwriter or syndicate member participating in a distribution in connection with an over-allotment or if the short sale order is by an underwriter or syndicate member for purposes of a lay-off sale in connection with a distribution of securities through a rights or standby underwriting commitment.[1139]

We note that short sales can facilitate convertible securities offerings, and, as stated by some commenters,[1140] we recognize that hedges for this subset of offerings may become more expensive under Rule 201 due to the absence of an exception from Rule 201 for short selling in connection with convertible instruments. In this regard, however, we note that as adopted, as opposed to some of our alternative proposals, Rule 201 will not prohibit short selling to hedge a position, although it could marginally increase the cost of adjusting a hedge after a significant market decline. Even if these indirect costs could, at the margin, reduce the attractiveness and, therefore, the volume of certain types of offerings, we do not believe that any such reduction will be significant because short sellers will be able to sell at a price above the national best bid even during the limited time the circuit breaker is in effect. Moreover, as described above, Rule 201 includes an exception for short selling in connection with certain types of capital-raising structures. Thus, while there may be a change in the total mix of offering types, we have no reason to believe that, in light of the anticipated positive effect of Rule 201 on investor confidence, particularly confidence in long holdings, that there will be any overall negative effect on capital formation as a result of our adoption of this Rule.

We believe, and commenters agreed, that by helping to prevent short selling, including manipulative or abusive short selling, from driving down further the price of a security that has already experienced a significant intra-day price decline, Rule 201 will help restore and maintain investor confidence in the securities markets.[1141] Bolstering investor confidence in the markets will help to encourage investors to be more willing to invest in the markets, including during times of substantial uncertainty, thereby adding depth and liquidity to the markets and promoting capital formation.

C. Efficiency

Rule 201 is designed to achieve the appropriate balance between our goal of preventing short selling, including manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security and the need to allow for the continued smooth functioning of the markets, including the provision of liquidity and price efficiency in the markets. By not allowing short sellers to sell at or below the current national best bid while the circuit breaker is in effect, the short sale price test restriction in Rule 201 will allow long sellers in certain limited circumstances, by selling at the bid, to sell first in a declining market for a particular security. As the Commission has noted previously in connection with short sale price test restrictions, a goal of such restrictions is to allow long sellers to sell first in a declining market.[1142]

The term "price efficiency" has a technical meaning in financial economics, which is not the only way the term can be interpreted in the

[1137] *See supra* note 36 and accompanying text.

[1138] *See supra* Section III.B. (discussing "short exempt" provisions to Rule 201). Under these provisions, if a broker-dealer chooses to rely on its own determination that it is submitting the short sale order to the trading center at a price that is above the current national best bid at the time of submission or to rely on an exception specified in the Rule, it must mark the order as "short exempt."

[1139] *See* Rule 201(d)(5).

[1140] *See supra* notes 425 to 426 and accompanying text (noting requests by commenters for exceptions for short sales in connection with the facilitation of capital raising transactions through convertible instruments by issuers and selling shareholders, and to allow investors purchasing a convertible instrument to hedge their long exposure).

[1141] *See supra* Section II.C. (discussing restoring investor confidence); *see also* letter from Edward C. Springer, dated May 3, 2009; letter from Richard Anderson, dated May 5, 2009; letter from Mike Pascale, dated May 11, 2009; letter from Sigmon Wealth Management (June 2009); form letter type C, a petition drafted by Jim Cramer, William Furber, Eric Oberg, and Scott Rothbort and signed by 5,605 investors. Another commenter stated that adoption of the alternative uptick rule would have a beneficial impact on capital formation, stating that "[t]he most important function of the capital markets is to raise capital for American corporations," and that "by adopting the alternative uptick rule, the Commission will have chosen the best approach to deal with the loss of confidence by Congress and most importantly the investing public." Letter from Glen Shipway (Sept. 2009). We note, however, that this commenter did not support adoption of the alternative uptick rule in conjunction with a circuit breaker.

[1142] *See supra* note 17.

Exchange Act.[1143] We have, nonetheless, considered the effect of Rule 201 on price efficiency in terms of financial economic theory.[1144]

We have structured Rule 201 to mitigate its impact on price efficiency. In response to the Proposal and Re-Opening Release, several commenters cited empirical evidence showing that short selling contributes to price efficiency and that restrictions on short selling, particularly bans on short selling, may negatively impact price efficiency.[1145] We note, however, that empirical evidence on former Rule 10a–1 suggests that the former rule, which applied to all short selling all the time unless an exception or exemption applied, had minimal effect on price efficiency.[1146] Due to differences in the operation of former Rule 10a–1 and Rule 201, when it applies, the alternative uptick rule under Rule 201 will be more restrictive than former Rule 10a–1 in some circumstances and less restrictive in others.[1147] As discussed above, however, due to the circuit breaker approach in Rule 201, the alternative uptick rule of Rule 201 generally will apply to a limited number of covered securities[1148] and will apply only to a particular security for a limited period of time when the circuit breaker has been triggered for a covered security. As such, it will not be triggered for the majority of covered securities at any given time and, when triggered, will remain in effect for a short duration—that day and the following day. Thus, consistent with the empirical evidence on former Rule 10a–1, we expect that the alternative uptick rule will have a minimal impact on price efficiency.

Moreover, paragraphs (c) and (d) of Rule 201 include provisions designed to limit any adverse effects on price efficiency and liquidity, while at the same time not undermining the goals of Rule 201.[1149] In particular, paragraphs (d)(3) and (d)(4) of Rule 201 are designed to facilitate pricing efficiency through certain domestic and international arbitrage transactions. As stated above, allowing arbitrage at a price that is less than or equal to the current national best bid will potentially promote market efficiency. In addition, paragraph (d)(6) of Rule 201, which relates to riskless principal transactions, is designed to facilitate liquidity.

XII. Final Regulatory Flexibility Analysis

The Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA"), in accordance with the provisions of the Regulatory Flexibility Act.[1150] This FRFA relates to the amendments to Rules 200(g) and 201 of Regulation SHO under the Exchange Act. Rule 201 of Regulation SHO implements a short sale-related circuit breaker that, if triggered, will impose a short sale price test restriction. Specifically, Rule 201 requires that a trading center establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day. In addition, the Rule requires that the trading center establish, maintain, and enforce written policies and procedures reasonably designed to impose this short sale price test restriction for the remainder of the day and the following day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan.[1151] In addition, Rule 201 provides that the listing market for each covered security must determine whether that covered security is subject to Rule 201.[1152] Once the listing market has determined that a security has become subject to the requirements of Rule 201, the listing market shall immediately notify the single plan processor responsible for consolidation of information for the covered security in accordance with Rule 603(b) of Regulation NMS[1153] of the fact that a covered security has become subject to the short sale price test restriction of Rule 201. The plan processor must then disseminate this information.[1154] The amendments to Rule 200(g) of Regulation SHO add a new marking requirement of "short exempt."[1155] In particular, if the broker-dealer chooses to rely on its own determination that it is submitting the short sale order to the trading center at a price that is above the current national best bid at the time of submission or to rely on an exception specified in the Rule, it must mark the order as "short exempt."[1156]

A. Need for and Objectives of the Rule

We believe it is appropriate to adopt a circuit breaker in combination with the alternative uptick rule because, when triggered, it will prevent short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security and will facilitate the ability of long sellers to sell first upon such decline. This approach establishes a narrowly-tailored Rule that will target only those securities that are experiencing significant intra-day price declines. We believe that addressing short selling in connection with such declines in individual securities will help address erosion of investor confidence in our markets generally. We are also adopting amendments to Rule 200(g) of Regulation SHO in order to aid surveillance by SROs and the Commission for compliance with the provisions of Rule 201.

As discussed above, following changes in market conditions since the elimination of former Rule 10a–1, including marked increases in market volatility in the U.S. and in every major stock market around the world, we proposed to re-examine and seek comment on whether to impose short sale price test restrictions or circuit breaker restrictions on short selling.[1157]

[1143] *See supra* note 18 (defining the term "price efficiency").

[1144] *See, e.g.,* Edward M. Miller, 1977, *Risk, uncertainty, and divergence of opinion,* Journal of Finance 32, 1151–1168; Douglas W. Diamond and Robert E. Verrecchia, 1987, *Constraints on short-selling and asset price adjustment to private information,* Journal of Financial Economics 18, 277–311.

[1145] *See, e.g.,* letter from Pershing Square (citing 2006 Price Test Elimination Proposing Release, 71 FR at 75069–75070); letter from CPIC (June 2009) (citing Pedro A. C. Saffi and Kari Sigurdson, *Price Efficiency and Short Selling,* lESE Business School Working Paper No. 748 (Apr. 2008); letter from Citadel *et al.* (June 2009).

[1146] *See, e.g., supra* Section II.B. (discussing the Pilot Results).

[1147] *See, e g., supra* note 242 and accompanying text (discussing automated trade matching systems).

[1148] *See supra* notes 305 to 311 and accompanying text (discussing data reflecting that, on average, a limited number of covered securities would hit a 10% trigger level each day).

[1149] *See supra* Section III.B. (discussing "short exempt" provisions to Rule 201); *see also supra* note 1138.

[1150] 5 U.S.C. 604.

[1151] *See* Rule 201(b); *see also supra* Section III.A.7. (discussing the policies and procedures approach).

[1152] *See* Rule 201(b)(3).

[1153] Rule 603(b) of Regulation NMS provides that "[e]very national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor." 17 CFR 242.603(b).

[1154] *See* Rule 201(b)(3); 17 CFR 242.603(b).

[1155] *See* Rule 200(g); *see also supra* Section IV. (discussing the amendments to Rule 200(g)).

[1156] *See* Rule 200(g)(2).

[1157] *See* Proposal, 74 FR at 18043, 18046; *see also supra* Section II.C. (discussing the Proposal).

Although in recent months there has been an increase in stability in the securities markets, we remain concerned that excessive downward price pressure on individual securities accompanied by the fear of unconstrained short selling can undermine investor confidence in our markets generally. In addition, we are concerned about potential future market turmoil, including significant increases in market volatility and steep price declines. Thus, as discussed in more detail throughout this adopting release, after considering the comments, we have determined that it is appropriate to adopt in Rule 201 a targeted short sale price test restriction that will apply the alternative uptick rule for the remainder of the day and the following day if the price of an individual security declines intra-day by 10% or more from the prior day's closing price for that security as determined by the covered security's listing market.

By not allowing short sellers to sell at or below the current national best bid while the circuit breaker is in effect, the short sale price test restriction in Rule 201 will allow long sellers, by selling at the bid, to sell first in a declining market for a particular security. As the Commission has noted previously in connection with short sale price test restrictions, a goal of such restrictions is to allow long sellers to sell first in a declining market.[1158] A short seller that is seeking to profit quickly from accelerated, downward market moves may find it advantageous to be able to short sell at the current national best bid. In addition, by making bids accessible only by long sellers when a security's price is undergoing significant downward price pressure, Rule 201 will help to facilitate and maintain stability in the markets and help ensure that they function efficiently. It will also help restore investor confidence during times of substantial uncertainty because, once the circuit breaker has been triggered for a particular security, long sellers will have preferred access to bids for the security, and the security's continued price decline will more likely be due to long selling and the underlying fundamentals of the issuer, rather than to other factors.

In addition, combining the alternative uptick rule with a circuit breaker strikes the appropriate balance between our goal of preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security and the need to allow for the continued smooth functioning of the markets, including the provision of liquidity and price efficiency in the markets. The circuit breaker approach of Rule 201 will help benefit the market for a particular security by allowing participants, when a security is undergoing a significant intra-day price decline, an opportunity to re-evaluate circumstances and respond to volatility in that security. We also believe that a circuit breaker will better target short selling that may be related to potential bear raids[1159] and other forms of manipulation that may be used as a tool to exacerbate a price decline in a covered security.

At the same time, however, we recognize the benefits to the market of legitimate short selling, such as the provision of liquidity and price efficiency. Thus, by imposing a short sale price test restriction only when an individual security is undergoing significant price pressure, rather than on all securities all the time, the short sale price test restrictions of Rule 201 will apply to a limited number of securities and for a limited duration.[1160] Rule 201 is structured so that generally it will not be triggered for the majority of covered securities at any given time and, thereby, will not interfere with the smooth functioning of the markets for those securities, including when prices in such securities are undergoing minimal downward price pressure or are stable or rising. If the short sale price test restrictions of Rule 201 apply to a covered security it will be because and when that security is undergoing significant downward price pressure. To the extent that Rule 201 negatively affects the benefits of legitimate short selling, such as the provision of liquidity and price efficiency, we believe that such costs are justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

In addition, to help ensure the Rule's workability, we are amending Rule 200(g) of Regulation SHO, as proposed, to provide that, once the circuit breaker has been triggered for a covered security, if a broker-dealer chooses to rely on its own determination that it is submitting a short sale order to a trading center at a price that is above the current national best bid at the time of submission or to rely on an exception specified in the Rule, it must mark the order "short exempt." The short sale price test restriction of Rule 201 generally will apply to a small number of securities for a limited duration, and will continue to permit short selling rather than, for example, halting short selling when the restriction is in place. As such, we believe that the circumstances under which a broker-dealer may need to mark a short sale order "short exempt" under Rule 201 are limited.

B. Significant Issues Raised by Public Comment

In the Initial Regulatory Flexibility Analysis included in the Proposal, we requested comment on the number of small entities that would be affected by the proposed amendments and on the impact the proposed amendments would have on small entities and how to quantify the impact.[1161] The Commission did not receive any comment letters addressing the number of small entities that would be affected by the proposed amendments.

Several commenters stated that the costs of implementing and complying with the broker-dealer provision of Rule 201(c) could be particularly burdensome for smaller broker-dealers, but did not provide a cost estimate of such burdens.[1162] One commenter stated that this burden would "adversely affect the ability of smaller broker-dealers to compete or the level of service that they can provide to their customers,"[1163] while another stated that a short sale price test would "disproportionately burden smaller broker-dealers, who would likely be forced to route their flow through a handful of larger brokers, impeding competition and adding to systemic risk as flow is consolidated among fewer players."[1164]

Although we agree that implementation of the broker-dealer provision of Rule 201(c) will impose costs on broker-dealers who choose to rely on this provision, we note that Rule 201(c) is not a requirement of the Rule, but rather provides that a broker-dealer may mark a sell order for a security that has triggered the circuit breaker as "short exempt," provided that the broker-dealer identifies the order as being at a price above the current national best bid at the time of submission to the trading center and otherwise complies with the requirements of the provision.

In addition, as discussed throughout this adopting release, the alternative

[1158] *See supra* note 17.

[1159] *See supra* note 36 and accompanying text.

[1160] *See supra* Section III.A.5. (discussing the circuit breaker trigger level).

[1161] *See* Proposal, 74 FR at 18107.

[1162] *See, e.g.,* letter from Credit Suisse (June 2009); letter from NSCP; letter from T.D. Pro Ex.

[1163] Letter from NSCP.

[1164] Letter from Credit Suisse (June 2009).

uptick rule references only the current national best bid, unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price. Although commenters expressed concerns with respect to the costs of the broker-dealer provision of Rule 201(c), these comments were not specific to the alternative uptick rule.[1165] In order to rely on the broker-dealer provision, a broker-dealer must establish, maintain, and enforce written policies and procedures reasonably designed to prevent the incorrect identification of orders as being at a price above the current national best bid at the time of submission of the order to the trading center. Without a sequencing requirement under the alternative uptick rule, we believe that the policies and procedures required to rely on the broker-dealer provision under Rule 201(c) will be easier and less costly to implement and monitor than would be the case under the proposed modified uptick rule or the proposed uptick rule,[1166] and, therefore, lower than the cost concerns and estimates provided by commenters. We note that one of the commenters that expressed concerns about the implementation cost of the broker-dealer provision acknowledged that a rule "that would not require data centralization and sequencing would be significantly less complex and faster to implement."[1167]

We disagree with several commenters who stated that, although implementation and on-going monitoring and surveillance of the alternative uptick rule might be easier and/or less costly for trading centers, this would not hold true for broker-dealers.[1168] One of these commenters stated that "in order to avoid rejection of short sale orders under an alternative uptick rule, programming would need to be implemented to anticipate changes in the national best bid between the time a short sale order is entered and the time it reaches the relevant market center." [1169] However, the broker-dealer provision of Rule 201(c) is designed specifically to avoid this result. Under the broker-dealer provision, a broker-dealer may, in accordance with the policies and procedures required by the provision, identify the order as being at a price above the current national best bid at the time the order is submitted to the trading center and mark the order "short exempt." Trading centers are required to have written policies and procedures in place to permit the execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a price that is less than or equal to the current national best bid.[1170]

Commenters also expressed concerns about the competitive pressure of the broker-dealer provision, stating either that broker-dealers would feel compelled to undertake implementation of the provision, despite the high cost,[1171] which would be particularly burdensome for smaller firms,[1172] or that smaller firms would find the costs prohibitive, placing them at a competitive disadvantage.[1173] We recognize that broker-dealers are faced with competitive concerns and that such concerns may influence their decision whether or not to rely on the broker-dealer provision of Rule 201(c).

However, with respect to the cost, although we recognize that the broker-dealer provision will impose implementation costs on broker-dealers who choose to rely on this provision, we believe that this cost will not be as great as stated by some commenters because the alternative uptick rule does not require sequencing of the national best bid, unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price.[1174] We believe that, without a sequencing requirement, the policies and procedures required in order to rely on the broker-dealer provision under the alternative uptick rule will be easier and less costly to implement and monitor than would be the case under the proposed modified uptick rule or the proposed uptick rule.

In addition, we note that it is possible that some smaller broker-dealers that determine to rely on the broker-dealer provision may determine that it is cost-effective for them to outsource certain functions necessary to comply with Rule 201(c) to larger broker-dealers, rather than performing such functions in house, to remain competitive in the market. This may help mitigate costs associated with implementing and complying with Rule 201(c). Additionally, they may decide to purchase order management software from technology firms. Order management software providers may integrate changes imposed by Rules 200(g) and 201 into their products, thereby providing another cost-effective way for smaller broker-dealers to comply with the requirements of Rule 201(c).

Although we agree that the broker-dealer provision will impose costs for implementation and on-going monitoring and surveillance, we note that the policies and procedures that are required to be implemented under the broker-dealer provision are similar to those that are required under the Order Protection Rule of Regulation NMS.[1175] In order to rely on the broker-dealer provision, a broker-dealer must establish, maintain, and enforce written policies and procedures reasonably designed to prevent the incorrect identification of orders as being at a price above the current national best bid at the time of submission of the order to the trading center. Because some broker-dealers, including small broker-dealers, may have already developed or modified their surveillance mechanisms in order to comply with the policies and procedures requirement of the Order Protection Rule under Regulation NMS, broker-dealers may already have retained and trained the necessary personnel to ensure compliance with that Regulation's policies and procedures requirements and, therefore, may already have in place most of the infrastructure and potential policies and procedures necessary to comply with the broker-dealer provision of Rule 201(c). In addition, one commenter supported using a policies and procedures approach to any short sale price test restriction because it would ease implementation for broker-dealers.[1176] Thus, we believe broker-dealers will already be familiar with establishing, maintaining, and enforcing trading-related policies and procedures, including programming their trading systems in accordance with such policies and procedures.

Although several commenters stated that previous implementation of Regulation NMS would not mitigate the costs to broker-dealers of implementing

[1165] *See, e.g.,* letter from Credit Suisse (June 2009); letter from NSCP; letter from T.D. Pro Ex.

[1166] *See supra* notes 709 to 715 and accompanying text (discussing comments on the impact of the alternative uptick rule on implementation and on-going monitoring and compliance costs).

[1167] Letter from Credit Suisse (June 2009).

[1168] *See, e.g.,* letter from Citadel *et al.* (Sept. 2009); letter from EWT (Sept. 2009); letter Lime Brokerage (Sept. 2009).

[1169] Letter from Citadel *et al.* (Sept. 2009).

[1170] *See* Rule 201(b)(1)(iii).

[1171] *See, e.g.,* letter from STANY (June 2009); letter from FIF (June 2009); letter from Lime Brokerage (June 2009).

[1172] *See, e.g.,* letter from T.D. Pro Ex; letter from Taurus Compliance; letter from Credit Suisse (June 2009).

[1173] *See, e.g.,* letter from Credit Suisse (June 2009); letter from NSCP.

[1174] *See supra* note 1165 and accompanying text (discussing impact of the alternative uptick rule on commenters' cost concerns with respect to the broker-dealer provision of Rule 201(c)).

[1175] *See* Regulation NMS Adopting Release, 70 FR 37496; *see also* 17 CFR 242.611.

[1176] *See, e.g.,* letter from GE.

a short sale price test restriction,[1177] we considered these comments, as well as comments stating that previous implementation of Regulation NMS could ease implementation provided that broker-dealers could leverage existing systems in implementing Rule 201,[1178] and continue to believe that familiarity with Regulation NMS policies and procedures will reduce the implementation costs of the broker-dealer provision under Rule 201(c) on broker-dealers.[1179]

Further, we believe that the implementation and on-going monitoring and compliance costs for broker-dealers who choose to rely on the broker-dealer provision are justified by the benefits of providing broker-dealers with the option to manage their order flow, rather than having to always rely on their trading centers to manage their order flow on their behalf.

C. Small Entities Affected by the Rule

Rule 201 requires that a trading center establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day. In addition, the Rule requires that the trading center establish, maintain, and enforce written policies and procedures reasonably designed to impose this short sale price test restriction for the remainder of the day and the following day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan.[1180] Rule 201(a)(9) states that the term "trading center" shall have the same meaning as in Rule 600(b)(78) of Regulation NMS, which defines a "trading center" as "a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent."[1181]

Rule 0–10(e) under the Exchange Act provides that the term "small business" or "small organization," when referring to an exchange, means any exchange that: (i) Has been exempted from the reporting requirements of Rule 601 under the Exchange Act;[1182] and (ii) is not affiliated with any person (other than a natural person) that is not a small business or small organization, as defined by Rule 0–10.[1183] No national securities exchanges are small entities because none meets these criteria. Thus, the current national securities exchanges that are subject to Rule 201 are not "small entities" for purposes of the Regulatory Flexibility Act.

The remaining non-SRO trading centers that are subject to Rule 201 are registered broker-dealers. The Commission has determined that there are approximately 407 broker-dealers registered with the Commission that may meet the definition of a trading center,[1184] which includes broker-dealers operating as equity ATSs, broker-dealers registered as market makers or specialists in covered securities, and any broker-dealer that is in the business of executing orders internally in covered securities. Pursuant to Rule 0–10(c) under the Exchange Act, a broker-dealer is defined as a small entity for purposes of the Exchange Act and the Regulatory Flexibility Act if the broker-dealer had a total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared, and it is not affiliated with any person (other than a natural person) that is not a small entity.[1185] Of these 407 non-SRO trading centers, only five[1186] are "small entities" for purposes of the Regulatory Flexibility Act.

In addition, the broker-dealer provision of Rule 201(c) and the riskless principal provision of Rule 201(d)(6) include policies and procedures requirements to help prevent incorrect identification of orders by broker-dealers for purposes of the provisions. The entities covered by the broker-dealer provision of Rule 201(c), the riskless principal provision of Rule 201(d)(6) and the marking requirements of Rule 200(g) include small broker-dealers. Paragraph (c)(1) of Rule 0–10 under the Exchange Act, as mentioned above, states that the term "small business" or "small organization," when referring to a broker-dealer, means a broker-dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared, and is not affiliated with any person (other than a natural person) that is not a small entity.[1187] We estimate that as of 2008 there were approximately 890 broker-dealers that are "small entities" for purposes of the Regulatory Flexibility Act.[1188]

In addition, Rule 201(b)(3) provides that the listing market for each covered security must determine whether that covered security is subject to Rule 201 and must notify the single plan processor responsible for that covered security that the covered security has become subject to the short sale price test restriction of Rule 201. The plan processor must then disseminate this information.[1189] As discussed below, the entities covered by the determination and dissemination requirements of Rule 201(b)(3) do not include small entities.

Rule 201(a)(3) defines the term "listing market" to have the same meaning as defined in the effective transaction reporting plan for the covered security.[1190] Under the definitions of "listing market" of the two effective transaction reporting plans, the CTA Plan and the Nasdaq UTP Plan, "listing markets" are national securities exchanges.[1191] Rule 0–10(e) under the Exchange Act provides that the term "small business" or "small organization," when referring to an exchange, means any exchange that: (i) Has been exempted from the reporting requirements of Rule 601 under the Exchange Act;[1192] and (ii) is not affiliated with any person (other than a natural person) that is not a small

[1177] *See, e.g.,* letter from FIF (June 2009); letter from RBC (June 2009).

[1178] *See, e.g.,* letter from MFA (Oct. 2009).

[1179] *See supra* Section X.B.1.b.ii. (discussing implementation and on-going monitoring and surveillance costs to broker-dealers under Rule 201(c) and Rule 201(d)(6)).

[1180] *See* Rule 201(b)(1).

[1181] *See* Rule 201(a)(9); *see also* 17 CFR 242.600(b)(78).

[1182] *See* 17 CFR 242.601.

[1183] *See* 17 CFR 240.0–10(e); 13 CFR 121.201 (setting size standards to define small business concerns).

[1184] *See supra* note 651.

[1185] *See* 17 CFR 240.0–10(c)(1).

[1186] This number was derived from a review of 2008 FOCUS Report filings and discussion with SRO staff.

[1187] 17 CFR 240.0–10(c)(1).

[1188] These numbers are based on a review of 2008 FOCUS Report filings reflecting registered broker-dealers, including introducing broker-dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings.

[1189] *See* Rule 201(b)(3).

[1190] *See* Rule 201(a)(3). Rule 201(a)(2) provides that "[t]he term *effective transaction reporting plan for a covered security* shall have the same meaning as in § 242.600(b)(22)." Rule 201(a)(2); 17 CFR 600(b)(22).

[1191] *See supra* note 364 (discussing the definition of "listing market" in the CTA Plan and the Nasdaq UTP Plan).

[1192] *See* 17 CFR 242.601.

business or small organization, as defined by Rule 0–10.[1193] No national securities exchanges are small entities because none meets these criteria. Thus, the listing markets that are subject to Rule 201 are not "small entities" for purposes of the Regulatory Flexibility Act.

There are two effective transaction reporting plans, the CTA Plan and the Nasdaq UTP Plan. In accordance with Rule 603(b) of Regulation NMS,[1194] these plans, together with the CQ Plan, provide for the dissemination of all consolidated information for individual NMS stocks through a single plan processor. The plan processor for the CTA Plan is SIAC and the plan processor for the Nasdaq UTP Plan is Nasdaq. Rule 201(a)(6) defines the term "plan processor" to have the same meaning as in Rule 600(b)(55) of Regulation NMS.[1195] Under Rule 600(b)(55), the term "plan processor" means "any self-regulatory organization or securities information processor acting as an exclusive processor in connection with the development, implementation and/or operation of any facility contemplated by an effective national market system plan."[1196] Paragraph (g) of Rule 0–10 defines the term "small business" or "small organization," when referring to a securities information processor, to mean a securities information processor that had gross revenues of less than $10 million during the preceding fiscal year; provided service to fewer than 100 interrogation devices or moving tickers at all times during the preceding fiscal year; and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[1197] Neither SIAC nor Nasdaq meet these criteria. Thus, the plan processors that are subject to Rule 201 are not "small entities" for purposes of the Regulatory Flexibility Act.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

Rule 201 imposes some new or additional reporting, recordkeeping, or compliance costs on trading centers and other broker-dealers that are small entities. Rule 201 focuses on a trading center's written policies and procedures as the mechanism through which to help prevent the execution or display of short sale orders at a price that is less than or equal to the current national best bid, unless an exception applies. In addition, the broker-dealer provision of Rule 201(c) and the riskless principal provision of Rule 201(d)(6) include policies and procedures requirements to help prevent incorrect identification of orders by broker-dealers for purposes of those provisions.

In regard to implementation and on-going monitoring and surveillance costs of Rule 201 on trading centers that are small entities,[1198] we considered commenters' concerns that the cost and time required for trading centers' implementation and on-going monitoring and surveillance of a short sale price test restriction could be high.[1199] However, we note that the alternative uptick rule references only the current national best bid, unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price. Thus, we believe that the alternative uptick rule will be easier and less costly to implement and monitor for trading centers that are small entities than the proposed modified uptick rule or the proposed uptick rule.[1200]

In addition, we note that the policies and procedures required to be implemented for purposes of Rule 201 are similar to those that trading centers are required to have in place under the Order Protection Rule of Regulation NMS.[1201] Thus, we believe trading centers that are small entities may already be familiar with establishing, maintaining, and enforcing trading-related policies and procedures, including programming their trading systems in accordance with such policies and procedures.

Although, as discussed above, several commenters stated that previous implementation of Regulation NMS would not mitigate the costs of implementing a short sale price test restriction,[1202] we considered these comments, as well as comments stating that previous implementation of Regulation NMS could ease implementation provided that trading centers could use existing systems in implementing Rule 201,[1203] and continue to believe that familiarity with Regulation NMS policies and procedures will reduce the implementation costs for trading centers of the policies and procedures requirement under Rule 201.

Further, we believe that the implementation and on-going monitoring and compliance costs for trading centers are justified by the benefits provided by the Rule in preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security.

In regard to implementation and on-going monitoring and surveillance costs of the broker-dealer provision of Rule 201(c) or the riskless principal provision of Rule 201(d)(6) on small broker-dealers,[1204] as discussed in Section XII.B., above, several commenters stated that the costs of implementing and complying with the broker-dealer provision of Rule 201(c) could be particularly burdensome for smaller broker-dealers.[1205] Commenters also expressed concerns about the competitive pressure of the broker-dealer provision, stating either that broker-dealers would feel compelled to undertake implementation of the provision, despite the high cost,[1206] which would be particularly burdensome for smaller firms,[1207] or that smaller firms would find the costs prohibitive, placing them at a competitive disadvantage.[1208]

[1193] *See* 17 CFR 240.0–10(e); 13 CFR 121.201.

[1194] *See* 17 CFR 242.603(b).

[1195] *See* Rule 201(a)(6); 17 CFR 242.600(b)(55).

[1196] 17 CFR 242.600(b)(55).

[1197] *See* 17 CFR 240.0–10(g).

[1198] As discussed above, there are no SRO trading centers that are "small entities" for purposes of the Regulatory Flexibility Act. Of the estimated 407 non-SRO trading centers (which include broker-dealers operating as equity ATSs, broker-dealers registered as market makers or specialists in covered securities, and any broker-dealer that is in the business of executing orders internally in covered securities) we estimate that there are only 5 non-SRO trading centers that are "small entities" for purposes of the Regulatory Flexibility Act. *See supra* Section XII.C.

[1199] *See supra* Section X.B.1.b.i. (discussing comments on the implementation and on-going monitoring and compliance costs of the policies and procedures requirement of Rule 201).

[1200] *See supra* notes 661 to 669 and accompanying text (discussing comments on the effect of the alternative uptick rule on implementation and on-going monitoring and surveillance costs).

[1201] *See* Regulation NMS Adopting Release, 70 FR 37496; *see also* Proposal, 74 FR at 18087; 17 CFR 242.611.

[1202] *See supra* notes 939 to 941 and accompanying text (discussing comments that prior implementation of Regulation NMS would not mitigate the costs of implementing a short sale price test restriction).

[1203] *See supra* notes 942 to 945 and accompanying text (discussing comments that prior implementation of Regulation NMS could mitigate the costs of implementing a short sale price test restriction).

[1204] As discussed above, we estimate that as of 2008 there were approximately 890 broker-dealers that are "small entities" for purposes of the Regulatory Flexibility Act. *See supra* Section XII.C.

[1205] *See supra* notes 1162 to 1173 and accompanying text (discussing comments on the costs of the broker-dealer provision of Rule 201(c) for smaller broker-dealers).

[1206] *See, e.g.,* letter from STANY (June 2009); letter from FIF (June 2009); letter from Lime Brokerage (June 2009).

[1207] *See, e.g.,* letter from T.D. Pro Ex; letter from Taurus Compliance; letter from Credit Suisse (June 2009).

[1208] *See, e.g.,* letter from Credit Suisse (June 2009); letter from NSCP.

We considered these comments in evaluating the costs of implementation and on-going monitoring and surveillance of the broker-dealer provision of Rule 201(c) on small broker-dealers. Although we agree that implementation of the broker-dealer provision of Rule 201(c) will impose costs on broker-dealers who choose to rely on this provision, we note that Rule 201(c) is not a requirement of the Rule, but rather provides that a broker-dealer may mark a sell order for a security that has triggered the circuit breaker as "short exempt," provided that the broker-dealer identifies the order as being at a price above the current national best bid at the time of submission to the trading center and otherwise complies with the requirements of the provision. We recognize, however, that broker-dealers are faced with competitive concerns and that such concerns may influence their decision whether or not to rely on the broker-dealer provision of Rule 201(c).

With respect to the cost, although we recognize that the broker-dealer provision will impose implementation costs on broker-dealers who choose to rely on this provision, we believe that this cost will not be as great as stated by some commenters because the alternative uptick rule does not require sequencing of the national best bid, unlike the proposed modified uptick rule and the proposed uptick rule, which would have required sequencing of the national best bid or last sale price.[1209] We believe that, without a sequencing requirement, the policies and procedures required in order to rely on the broker-dealer provision under the alternative uptick rule will be easier and less costly to implement and monitor than would be the case under the proposed modified uptick rule or the proposed uptick rule.[1210]

In addition, we note that it is possible that some smaller broker-dealers that determine to rely on the broker-dealer provision may determine that it is cost-effective for them to outsource certain functions necessary to comply with Rule 201(c) to larger broker-dealers, rather than performing such functions in house, to remain competitive in the market. This may help mitigate costs associated with implementing and complying with Rule 201(c). Additionally, they may decide to purchase order management software from technology firms. Order management software providers may integrate changes imposed by Rules 200(g) and 201 into their products, thereby providing another cost-effective way for smaller broker-dealers to comply with the requirement of Rule 201(c).

In addition, we note that the policies and procedures that are required to be implemented under the broker-dealer provision are similar to those that are required under the Order Protection Rule of Regulation NMS.[1211] Thus, we believe broker-dealers will already be familiar with establishing, maintaining, and enforcing trading-related policies and procedures, including programming their trading systems in accordance with such policies and procedures.

Although several commenters stated that previous implementation of Regulation NMS would not mitigate the costs to broker-dealers of implementing a short sale price test restriction,[1212] we considered these comments, as well as comments stating that previous implementation of Regulation NMS could ease implementation provided that broker-dealers could leverage existing systems in implementing Rule 201,[1213] and continue to believe that familiarity with Regulation NMS policies and procedures will reduce the implementation costs of the broker-dealer provision under Rule 201(c) on broker-dealers.

Further, we believe that the implementation and on-going monitoring and compliance costs for broker-dealers who choose to rely on the broker-dealer provision are justified by the benefits of providing broker-dealers with the option to manage their order flow, rather than having to always rely on their trading centers to manage their order flow on their behalf.

The amendments to Rule 200(g), to add a new marking requirement of "short exempt" [1214] and to provide that a broker-dealer may mark a sell order "short exempt" only if the provisions in paragraph (c) or (d) of Rule 201 are met,[1215] may impose some new or additional reporting, recordkeeping, or compliance costs on broker-dealers that are small entities. We recognize commenters' concerns with respect to the costs of the "short exempt" marking requirement and we considered these comments in evaluating the costs of the "short exempt" marking requirement.[1216] However, we believe that such costs will be limited because small broker-dealers already have established systems, processes, and procedures in place to comply with the current marking requirements of Rule 200(g) of Regulation SHO with respect to marking a sell order either "long" or "short" and, therefore, will likely leverage such systems, processes and procedures to comply with the "short exempt" marking requirements in Rules 200(g) and 200(g)(2).[1217] Further, we believe that the implementation and compliance costs of the "short exempt" marking requirements are justified by the benefits provided by the requirements in aiding surveillance by SROs and the Commission for compliance with the provisions of Rule 201 and providing an indication to a trading center regarding when it must execute or display a short sale order without regard to whether the order is at a price that is less than or equal to the current national best bid.

In addition, to provide market participants with the time needed to make the changes required to comply with Rule 200(g), we are adopting an implementation period under which market participants will have to comply with these requirements six months following the effective date of the adoption of these amendments. We are sensitive to commenter's concerns that implementation of the "short exempt" marking requirement could be complex,[1218] and believe that a six month implementation period, which is longer than the 3 month implementation period proposed in the Proposal, will afford market participants sufficient time to make the necessary modifications to their systems and procedures. In addition, we believe the six month implementation period will help alleviate some of the potential disruptions that may be associated with implementing the "short exempt" marking requirements.

[1209] *See supra* notes 1165 to 1167 and accompanying text (discussing impact of the alternative uptick rule on commenters' cost concerns with respect to the broker-dealer provision of Rule 201(c)).

[1210] *See supra* notes 709 to 715 and accompanying text (discussing comments on the effect of the alternative uptick rule on implementation and on-going monitoring and surveillance costs).

[1211] *See* Regulation NMS Adopting Release, 70 FR 37496; *see also* 17 CFR 242.611.

[1212] *See, e.g.,* letter from FIF (June 2009); letter from RBC (June 2009).

[1213] *See, e.g.,* letter from MFA (Oct. 2009).

[1214] *See* Rule 200(g); *see also supra* Section IV. (discussing the amendments to Rule 200(g)).

[1215] *See* Rule 200(g)(2).

[1216] *See supra* notes 582 to 588 (discussing comments on the costs of the "short exempt" marking requirement).

[1217] *See supra* notes 747 to 752 (discussing estimated costs of the amendment to Rule 200(g)(2)).

[1218] *See supra* notes 582 to 588 and accompanying text (discussing comments on the implementation time for the "short exempt" marking requirement).

E. Agency Action to Minimize Effect on Small Entities

As required by the Regulatory Flexibility Act, we have considered alternatives that would accomplish our stated objectives, while minimizing any significant adverse impact on small entities. As noted above, Rule 201 imposes some new or additional reporting, recordkeeping, or compliance costs on trading centers and other broker-dealers that are small entities. However, we expect the impact of the new or additional reporting, recordkeeping, or compliance costs will be limited by the similarity of the policies and procedures requirements of Rule 201 to the policies and procedures requirement of the Order Protection Rule under Regulation NMS. Although, as discussed above, several commenters stated that previous implementation of Regulation NMS would not mitigate the costs of implementing a short sale price test restriction,[1219] we considered these comments, as well as comments stating that previous implementation of Regulation NMS could ease implementation provided that firms could use existing systems in implementing Rule 201,[1220] and continue to believe that familiarity with Regulation NMS policies and procedures will reduce the implementation costs of the broker-dealer provision under Rule 201(c) on broker-dealers.

Thus, the five non-SRO trading centers that qualify as small entities and the approximately 890 broker-dealers that qualify as small entities should already have in place most of the infrastructure necessary to comply with Rule 201. The marking requirements of the amendments to Rule 200(g) are not expected to adversely affect small entities because they impose minimal reporting, recordkeeping, or compliance requirements. Rule 200(g) currently requires that broker-dealers mark all sell orders of any equity security as either "long" or "short."[1221] Broker-dealers that are small entities should already be familiar with the current marking requirements and should already have in place mechanisms that could be used to comply with the new "short exempt" marking requirement of Rule 200(g). Moreover, it is not appropriate to develop separate requirements for small entities under either Rule 201 or Rule 200(g) because we believe that to accomplish the Commission's goals, as well as to avoid the possibility of regulatory arbitrage that would undermine the Commission's goals, all trading centers and broker-dealers, regardless of size, should be subject to the same circuit breaker short sale price test restrictions and all broker-dealers, regardless of size, should be subject to the same order marking requirements.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objective, while minimizing any significant adverse impact on small entities.[1222] In connection with Rules 201 and 200(g), we considered the following alternatives: (i) Establishing different compliance or reporting requirements or timetables that take into account the resources available to small entities; (ii) clarifying, consolidating, or simplifying compliance and reporting requirements under the Rule for small entities; (iii) using performance rather than design standards; and (iv) exempting small entities from coverage of the Rule, or any part of the Rule. First, we note that Rule 201 as adopted and the amendments to Rule 200(g) use performance standards, which we believe will help to minimize any significant adverse impact on small entities.

A primary goal of the short sale-related circuit breaker under Rule 201 is to help restore investor confidence by not allowing sellers to sell short at or below the current national best bid if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day, unless an exception applies. Rule 201 will allow long sellers, by selling at the bid, to sell first in a declining market for a particular security. As the Commission has noted previously in connection with short sale price test restrictions, a goal of such restrictions is to allow long sellers to sell first in a declining market.[1223] A short seller that is seeking to profit quickly from accelerated, downward market moves may find it advantageous to be able to short sell at the current national best bid. In addition, by making bids accessible only by long sellers when a security's price is undergoing significant downward price pressure, Rule 201 will help to facilitate and maintain stability in the markets and help ensure that they function efficiently. It will also help restore investor confidence during times of substantial uncertainty because, once the circuit breaker has been triggered for a particular security, long sellers will have preferred access to bids for the security, and the security's continued price decline will more likely be due to long selling and the underlying fundamentals of the issuer, rather than to other factors.

In addition, combining the alternative uptick rule with a circuit breaker strikes the appropriate balance between our goal of preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security and the need to allow for the continued smooth functioning of the markets, including the provision of liquidity and price efficiency in the markets. The circuit breaker approach of Rule 201 will help benefit the market for a particular security by allowing participants, when a security is undergoing a significant intra-day price decline, an opportunity to re-evaluate circumstances and respond to volatility in that security. We also believe that a circuit breaker will better target short selling that may be related to potential bear raids[1224] and other forms of manipulation that may be used as a tool to exacerbate a price decline in a covered security.

As discussed throughout this adopting release, we have designed Rule 201 to accomplish its objectives with lower costs to trading centers and broker-dealers than some of the alternatives we proposed and considered. We believe the alternative uptick rule will require less time and less costs for implementation because it does not require sequencing of bids or last sale prices.[1225] In addition, we believe that the circuit breaker approach, which limits the short sale price test restriction for an individual security to a two-day period following a significant intra-day decline in share price in that security, will also limit compliance costs for all participants.[1226]

The costs of compliance with Rules 201 and 200(g) are likely to vary among individual trading centers and broker-dealer firms. As detailed in PRA Section IX.E.1., above, we realize that the

[1219] *See supra* notes 939 to 941 and accompanying text (discussing comments that prior implementation of Regulation NMS would not mitigate the costs of implementing a short sale price test restriction).

[1220] *See supra* notes 942 to 944 and accompanying text (discussing comments that prior implementation of Regulation NMS could mitigate the costs of implementing a short sale price test restriction).

[1221] *See* 17 CFR 242.200(g).

[1222] *See* 5 U.S.C. 603(a)(5).

[1223] *See supra* note 17.

[1224] *See supra* note 36 and accompanying text.

[1225] *See supra* Section X.B.1. (discussing the costs of the alternative uptick rule).

[1226] *See supra* Section III.A.4. (discussing the circuit breaker approach).

policies and procedures that a trading center is required to establish will likewise vary depending upon the type, size, and nature of the trading center. In addition, as detailed in PRA Section IX.E.2., above, we note that the nature and extent of policies and procedures that a broker-dealer must establish under Rule 201(c) or 201(d)(6), if it determines to rely on either provision to mark an order "short exempt," likely will vary based upon the type, size, and nature of the broker-dealer.[1227] Our estimates take into account different types of trading centers and broker-dealers (including large versus small), and we realize that the applicable estimates may be on the low-end for some trading centers and broker-dealers while they may be on the high-end for others.

Although we recognize that the costs of the Rules may vary based upon the type, size, and nature of the trading center or broker-dealer, we believe that uniform application of Rules 201 and 200(g) to all trading centers and broker-dealers is necessary to prevent damaging opportunities for regulatory arbitrage and to avoid confusion in the markets. In addition, different application of the Rules' requirements for small entities could undermine the goals of the short sale related circuit breaker by potentially providing an avenue for short sellers to evade the requirements of Rule 201. Further, in relation to the already-mentioned concerns, we believe that our goal of restoring investor confidence could be undermined by actual or perceived regulatory arbitrage, market confusion, and/or evasion of Rule 201's requirements as a result of different requirements for different market participants in Rules 201 and 200(g).

Due to these concerns, we have concluded that in order for Rules 201 and 200(g) to be effective in helping to restore investor confidence by preventing short selling, including potentially manipulative or abusive short selling, from being used as a tool to exacerbate a declining market in a security, the Rules' requirements must apply uniformly to all trading centers and broker-dealers. Thus, we have determined not to adopt different compliance requirements or a different timetable for compliance requirements for small entities. In addition, and for the same reasons, we have determined not to clarify, consolidate, simplify, or otherwise modify Rules 201 and 200(g) for small entities. Finally, we believe that it is inconsistent with the purposes of the Exchange Act and the goals of adopting Rules 201 and 200(g) to except small entities from having to comply with Rules 201 and 200(g).

[1227] We note that one commenter stated that the "Commission's cost estimates seem to underestimate the cost to large, full service broker-dealers, since the volume of orders handled by these firms are likely to lead to significantly greater technology and storage costs alone as well as more frequent reviews" but did not provide a specific cost estimate. *See* letter from NSCP.

XIII. Statutory Authority

Pursuant to the Exchange Act and, particularly, Sections 2, 3(b), 6, 9(h), 10, 11A, 15, 15A, 17, 19, 23(a), and 36 thereof, 15 U.S.C. 78b, 78c(b), 78(f), 78i(h), 78j, 78k–1, 78o, 78o–3, 78q, 78s, 78w(a), and 78mm, the Commission is amending §§ 242.200 and 242.201 of Regulation SHO.

XIV. Text of the Amendments to Regulation SHO

List of Subjects in 17 CFR Part 242

Brokers, Fraud, Reporting and recordkeeping requirements, Securities.

■ For the reasons set out in the preamble, Title 17, Chapter II, Part 242, of the Code of Federal Regulations is amended as follows.

PART 242—REGULATIONS M, SHO, ATS, AC, AND NMS AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 1. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–l(c), 78*l,* 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

■ 2. Section 242.200 is amended by revising paragraph (g) introductory text and adding paragraph (g)(2) to read as follows:

§ 242.200 Definition of "short sale" and marking requirements.

* * * * *

(g) A broker or dealer must mark all sell orders of any equity security as "long," "short," or "short exempt."

(1) * * *

(2) A sale order shall be marked "short exempt" only if the provisions of § 242.201(c) or (d) are met.

* * * * *

■ 3. Section 242.201 is revised to read as follows:

§ 242.201 Circuit breaker.

(a) *Definitions.* For the purposes of this section:

(1) The term *covered security* shall mean any NMS stock as defined in § 242.600(b)(47).

(2) The term *effective transaction reporting plan for a covered security* shall have the same meaning as in § 242.600(b)(22).

(3) The term *listing market* shall have the same meaning as the term "listing market" as defined in the effective transaction reporting plan for the covered security.

(4) The term *national best bid* shall have the same meaning as in § 242.600(b)(42).

(5) The term *odd lot* shall have the same meaning as in § 242.600(b)(49).

(6) The term *plan processor* shall have the same meaning as in § 242.600(b)(55).

(7) The term *regular trading hours* shall have the same meaning as in § 242.600(b)(64).

(8) The term *riskless principal* shall mean a transaction in which a broker or dealer, after having received an order to buy a security, purchases the security as principal at the same price to satisfy the order to buy, exclusive of any explicitly disclosed markup or markdown, commission equivalent, or other fee, or, after having received an order to sell, sells the security as principal at the same price to satisfy the order to sell, exclusive of any explicitly disclosed markup or markdown, commission equivalent, or other fee.

(9) The term *trading center* shall have the same meaning as in § 242.600(b)(78).

(b)(1) A trading center shall establish, maintain, and enforce written policies and procedures reasonably designed to:

(i) Prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day; and

(ii) Impose the requirements of paragraph (b)(1)(i) of this section for the remainder of the day and the following day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan.

(iii) *Provided, however,* that the policies and procedures must be reasonably designed to permit:

(A) The execution of a displayed short sale order of a covered security by a trading center if, at the time of initial display of the short sale order, the order was at a price above the current national best bid; and

(B) The execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a price that is

less than or equal to the current national best bid.

(2) A trading center shall regularly surveil to ascertain the effectiveness of the policies and procedures required by paragraph (b)(1) of this section and shall take prompt action to remedy deficiencies in such policies and procedures.

(3) The determination regarding whether the price of a covered security has decreased by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day shall be made by the listing market for the covered security and, if such decrease has occurred, the listing market shall immediately notify the single plan processor responsible for consolidation of information for the covered security pursuant to § 242.603(b). The single plan processor must then disseminate this information.

(c) Following any determination and notification pursuant to paragraph (b)(3) of this section with respect to a covered security, a broker or dealer submitting a short sale order of the covered security in question to a trading center may mark the order "short exempt" if the broker or dealer identifies the order as being at a price above the current national best bid at the time of submission; *provided, however:*

(1) The broker or dealer that identifies a short sale order of a covered security as "short exempt" in accordance with this paragraph (c) must establish, maintain, and enforce written policies and procedures reasonably designed to prevent incorrect identification of orders for purposes of this paragraph; and

(2) The broker or dealer shall regularly surveil to ascertain the effectiveness of the policies and procedures required by paragraph (c)(1) of this section and shall take prompt action to remedy deficiencies in such policies and procedures.

(d) Following any determination and notification pursuant to paragraph (b)(3) of this section with respect to a covered security, a broker or dealer may mark a short sale order of a covered security "short exempt" if the broker or dealer has a reasonable basis to believe that:

(1) The short sale order of a covered security is by a person that is deemed to own the covered security pursuant to § 242.200, provided that the person intends to deliver the security as soon as all restrictions on delivery have been removed.

(2) The short sale order of a covered security is by a market maker to offset customer odd-lot orders or to liquidate an odd-lot position that changes such broker's or dealer's position by no more than a unit of trading.

(3) The short sale order of a covered security is for a good faith account of a person who then owns another security by virtue of which he is, or presently will be, entitled to acquire an equivalent number of securities of the same class as the securities sold; provided such sale, or the purchase which such sale offsets, is effected for the bona fide purpose of profiting from a current difference between the price of the security sold and the security owned and that such right of acquisition was originally attached to or represented by another security or was issued to all the holders of any such securities of the issuer.

(4) The short sale order of a covered security is for a good faith account and submitted to profit from a current price difference between a security on a foreign securities market and a security on a securities market subject to the jurisdiction of the United States, provided that the short seller has an offer to buy on a foreign market that allows the seller to immediately cover the short sale at the time it was made. For the purposes of this paragraph (d)(4), a depository receipt of a security shall be deemed to be the same security as the security represented by such receipt.

(5)(i) The short sale order of a covered security is by an underwriter or member of a syndicate or group participating in the distribution of a security in connection with an over-allotment of securities; or

(ii) The short sale order of a covered security is for purposes of a lay-off sale by an underwriter or member of a syndicate or group in connection with a distribution of securities through a rights or standby underwriting commitment.

(6) The short sale order of a covered security is by a broker or dealer effecting the execution of a customer purchase or the execution of a customer "long" sale on a riskless principal basis. In addition, for purposes of this paragraph (d)(6), a broker or dealer must have written policies and procedures in place to assure that, at a minimum:

(i) The customer order was received prior to the offsetting transaction;

(ii) The offsetting transaction is allocated to a riskless principal or customer account within 60 seconds of execution; and

(iii) The broker or dealer has supervisory systems in place to produce records that enable the broker or dealer to accurately and readily reconstruct, in a time-sequenced manner, all orders on which a broker or dealer relies pursuant to this exception.

(7) The short sale order is for the sale of a covered security at the volume weighted average price (VWAP) that meets the following criteria:

(i) The VWAP for the covered security is calculated by:

(A) Calculating the values for every regular way trade reported in the consolidated system for the security during the regular trading session, by multiplying each such price by the total number of shares traded at that price;

(B) Compiling an aggregate sum of all values; and

(C) Dividing the aggregate sum by the total number of reported shares for that day in the security.

(ii) The transactions are reported using a special VWAP trade modifier.

(iii) The VWAP matched security:

(A) Qualifies as an "actively-traded security" pursuant to § 242.101 and § 242.102; or

(B) The proposed short sale transaction is being conducted as part of a basket transaction of twenty or more securities in which the subject security does not comprise more than 5% of the value of the basket traded.

(iv) The transaction is not effected for the purpose of creating actual, or apparent, active trading in or otherwise affecting the price of any security.

(v) A broker or dealer shall be permitted to act as principal on the contra-side to fill customer short sale orders only if the broker's or dealer's position in the covered security, as committed by the broker or dealer during the pre-opening period of a trading day and aggregated across all of its customers who propose to sell short the same security on a VWAP basis, does not exceed 10% of the covered security's relevant average daily trading volume.

(e) No self-regulatory organization shall have any rule that is not in conformity with, or conflicts with, this section.

(f) Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms and conditions, to any person or class of persons, to any transaction or class of transactions, or to any security or class of securities to the extent that such exemption is necessary or appropriate, in the public interest, and is consistent with the protection of investors.

Dated: February 26, 2010.

By the Commission.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2010–4409 Filed 3–9–10; 8:45 am]

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Federal Register

Wednesday,
March 10, 2010

Part III

Department of Health and Human Services

45 CFR Part 170
Proposed Establishment of Certification Programs for Health Information Technology; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 170

RIN 0991–AB59

Proposed Establishment of Certification Programs for Health Information Technology

AGENCY: Office of the National Coordinator for Health Information Technology, Department of Health and Human Services.

ACTION: Proposed rule.

SUMMARY: Under the authority granted to the National Coordinator for Health Information Technology (the National Coordinator) by section 3001(c)(5) of the Public Health Service Act (PHSA) as added by the Health Information Technology for Economic and Clinical Health (HITECH) Act, this rule proposes the establishment of two certification programs for purposes of testing and certifying health information technology. While two certification programs are described in this proposed rule, we anticipate issuing separate final rules for each of the programs. The first proposal would establish a temporary certification program whereby the National Coordinator would authorize organizations to test and certify Complete EHRs and/or EHR Modules, thereby assuring the availability of Certified EHR Technology prior to the date on which health care providers seeking the incentive payments available under the Medicare and Medicaid EHR Incentives Program may begin demonstrating meaningful use of Certified EHR Technology. The second proposal would establish a permanent certification program to replace the temporary certification program. The permanent certification program would separate the responsibilities for performing testing and certification, introduce accreditation requirements, establish requirements for certification bodies authorized by the National Coordinator related to the surveillance of Certified EHR Technology, and would include the potential for certification bodies authorized by the National Coordinator to certify other types of health information technology besides Complete EHRs and EHR Modules.

DATES: To be assured consideration, written or electronic comments on the proposals for the *temporary certification program* must be received at one of the addresses provided below, no later than 5 p.m. on April 9, 2010. To be assured consideration, written or electronic comments on the proposals for the *permanent certification program* must be received at one of the addresses provided below, no later than 5 p.m. on May 10, 2010.

ADDRESSES: Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission. You may submit comments, identified by RIN 0991–AB59, by any of the following methods (please do not submit duplicate comments).

- *Federal eRulemaking Portal:* Follow the instructions for submitting comments. Attachments should be in Microsoft Word, WordPerfect, or Excel; however, we prefer Microsoft Word. *http://www.regulations.gov.*
- *Regular, Express, or Overnight Mail:* Department of Health and Human Services, Office of the National Coordinator for Health Information Technology, Attention: Certification Programs Proposed Rule, Hubert H. Humphrey Building, Suite 729D, 200 Independence Ave., SW., Washington, DC 20201. Please submit one original and two copies.
- *Hand Delivery or Courier:* Office of the National Coordinator for Health Information Technology, Attention: Certification Programs Proposed Rule, Hubert H. Humphrey Building, Suite 729D, 200 Independence Ave., SW., Washington, DC 20201. Please submit one original and two copies. (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 mail drop slots located in the main lobby of the building.)

Inspection of Public Comments: All comments received before the close of the applicable comment period will be available for public inspection, including any personally identifiable or confidential business information that is included in a comment. Please do not include anything in your comment submission that you do not wish to share with the general public. Such information includes, but is not limited to: a person's social security number; date of birth; driver's license number; State identification number or foreign country equivalent; passport number; financial account number; credit or debit card number; any personal health information; or any business information that could be considered to be proprietary. We will post all comments received before the close of the applicable comment period at *http://www.regulations.gov.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* or U.S. Department of Health and Human Services, Office of the National Coordinator for Health Information Technology, Hubert H. Humphrey Building, Suite 729D, 200 Independence Ave., SW., Washington, DC 20201 (call ahead to the contact listed below to arrange for inspection).

FOR FURTHER INFORMATION CONTACT: Steven Posnack, Policy Analyst, 202–690–7151.

SUPPLEMENTARY INFORMATION:

Acronyms

CAH Critical Access Hospital
CCHIT Certification Commission for Health Information Technology
CGD Certification Guidance Document
CMS Centers for Medicare & Medicaid Services
EHR Electronic Health Record
FACA Federal Advisory Committee Act
FFS Fee for Service (Medicare Program)
HHS Department of Health and Human Services
HIT Health Information Technology
HITECH Health Information Technology for Economic and Clinical Health
LOINC Logical Observation Identifiers Names and Codes
MA Medicare Advantage
NIST National Institute of Standards and Technology
NVLAP National Voluntary Laboratory Accreditation Program
OIG Office of Inspector General
OMB Office of Management and Budget
ONC Office of the National Coordinator for Health Information Technology
ONC–AA ONC-Approved Accreditor
ONC–ACB ONC-Authorized Certification Body
ONC–ATCB ONC-Authorized Testing and Certification Body
OPM Office of Personnel Management
PHSA Public Health Service Act
RFA Regulatory Flexibility Act
RIA Regulatory Impact Analysis
SSA Social Security Act

Table of Contents

I. Background

[If you choose to comment on the background section, please include at the beginning of your comment the caption "Background" and any additional information to clearly identify the information about which you are commenting.]

A. Previously Defined Terminology

This proposed rule is directly related to the recently published (January 13, 2010) health information technology (HIT) Standards and Certification Criteria interim final rule (75 FR 2014). Consequently, in addition to new terms and definitions discussed later in this proposed rule, the following terms have the same meaning as provided at 45 CFR 170.102.

- *Certification criteria* means criteria: (1) To establish that health information technology meets applicable standards and implementation specifications adopted by the Secretary; or (2) that are used to test and certify that health information technology includes required capabilities.
- *Certified EHR Technology* means a Complete EHR or a combination of EHR Modules, each of which: (1) Meets the

requirements included in the definition of a Qualified EHR; and (2) has been tested and certified in accordance with the certification program established by the National Coordinator as having met all applicable certification criteria adopted by the Secretary.

- *Complete EHR* means EHR technology that has been developed to meet all applicable certification criteria adopted by the Secretary.
- *Disclosure* means the release, transfer, provision of access to, or divulging in any other manner of information outside the entity holding the information.
- *EHR Module* means any service, component, or combination thereof that can meet the requirements of at least one certification criterion adopted by the Secretary.
- *Implementation specification* means specific requirements or instructions for implementing a standard.
- *Qualified EHR* means an electronic record of health-related information on an individual that: (1) Includes patient demographic and clinical health information, such as medical history and problem lists; and (2) has the capacity: (i) To provide clinical decision support; (ii) to support physician order entry; (iii) to capture and query information relevant to health care quality; and (iv) to exchange electronic health information with, and integrate such information from other sources.
- *Standard* means a technical, functional, or performance-based rule, condition, requirement, or specification that stipulates instructions, fields, codes, data, materials, characteristics, or actions.

B. Legislative and Regulatory History

1. Legislative History

The Health Information Technology for Economic and Clinical Health (HITECH) Act, Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111–5), was enacted on February 17, 2009. The HITECH Act amended the Public Health Service Act (PHSA) and created "Title XXX—Health Information Technology and Quality" (Title XXX) to improve health care quality, safety, and efficiency through the promotion of health information technology (HIT) and electronic health information exchange. Section 3001 of the PHSA establishes by statute the Office of the National Coordinator for Health Information Technology (ONC). Title XXX of the PHSA provides the National Coordinator and the Secretary of the Department of Health and Human Services (the Secretary) with new responsibilities and authorities related to HIT. The HITECH Act also amended several sections of the Social Security Act (SSA) and in doing so established the availability of incentive payments to eligible professionals and eligible hospitals to promote the adoption and meaningful use of interoperable HIT.

a. Standards, Implementation Specifications, and Certification Criteria

With the passage of the HITECH Act, two new Federal advisory committees were established, the HIT Policy Committee and the HIT Standards Committee (sections 3002 and 3003 of the PHSA, respectively). Each is responsible for advising the National Coordinator on different aspects of standards, implementation specifications, and certification criteria. The HIT Policy Committee is responsible for, among other duties, recommending priorities for the development, harmonization, and recognition of standards, implementation specifications, and certification criteria while the HIT Standards Committee is responsible for recommending standards, implementation specifications, and certification criteria for adoption by the Secretary under section 3004 of the PHSA consistent with the ONC-Coordinated Federal Health IT Strategic Plan (the "strategic plan").

Section 3004 of the PHSA defines how the Secretary adopts standards, implementation specifications, and certification criteria. Section 3004(a) of the PHSA defines a process whereby an obligation is imposed on the Secretary to review standards, implementation specifications, and certification criteria and identifies the procedures for the Secretary to follow to determine whether to adopt any grouping of standards, implementation specifications, or certification criteria included among National Coordinator-endorsed recommendations.

b. Medicare and Medicaid EHR Incentive Programs

Title IV, Division B of the HITECH Act establishes incentive payments under the Medicare and Medicaid programs for eligible professionals and eligible hospitals that meaningfully use Certified EHR Technology. The Centers for Medicare & Medicaid Services (CMS) is charged with developing the Medicare and Medicaid EHR incentive programs.

i. Medicare EHR Incentive Program

Section 4101 of the HITECH Act added new subsections to section 1848 of the SSA to establish incentive payments for the meaningful use of Certified EHR Technology by eligible professionals participating in the Medicare Fee-for-Service (FFS) program beginning in calendar year (CY) 2011 and beginning in CY 2015, downward payment adjustments for covered professional services provided by eligible professionals who are not meaningful users of Certified EHR Technology. Section 4101(c) of the HITECH Act added a new subsection to section 1853 of the SSA that provides incentive payments to Medicare Advantage (MA) organizations for their affiliated eligible professionals who meaningfully use Certified EHR Technology beginning in CY2011 and beginning in 2015, downward payment adjustments to MA organizations to account for certain affiliated eligible professionals who are not meaningful users of Certified EHR Technology.

Section 4102 of the HITECH Act added new subsections to section 1886 of the SSA that establish incentive payments for the meaningful use of Certified EHR Technology by subsection (d) hospitals (defined under section 1886(d)(1)(B) of the SSA) that participate in the Medicare FFS program beginning in Federal fiscal year (FY) 2011 and beginning in FY 2015, downward payment adjustments to the market basket updates for inpatient hospital services provided by such hospitals that are not meaningful users of Certified EHR Technology. Section 4102(b) of the HITECH Act amends section 1814 of the SSA to provide an incentive payment to critical access hospitals that meaningfully use Certified EHR Technology based on the hospitals' reasonable costs beginning in FY 2011 and downward payment adjustments for inpatient hospital services provided by such hospitals that are not meaningful users of Certified EHR Technology for cost reporting periods beginning in FY 2015. Section 4102(c) of the HITECH Act adds a new subsection to section 1853 of the SSA to provide incentive payments to MA organizations for certain affiliated eligible hospitals that meaningfully use Certified EHR Technology and beginning in FY 2015, downward payment adjustments to MA organizations for those affiliated hospitals that are not meaningful users of Certified EHR Technology.

ii. Medicaid EHR Incentive Program

Section 4201 of the HITECH Act amends section 1903 of the SSA to provide 100 percent Federal financial participation (FFP) to States for incentive payments to certain eligible health care providers participating in the Medicaid program to purchase, implement, and meaningfully use (including support services and training for staff) Certified EHR Technology and 90 percent FFP for State administrative expenses related to the incentive program.

c. HIT Certification Programs

Section 3001(c)(5) of the PHSA provides the National Coordinator with the authority to establish a certification program or programs for the voluntary certification of HIT. Specifically, section 3001(c)(5)(A) specifies that the "National Coordinator, in consultation with the Director of the National Institute of Standards and Technology, shall keep or recognize a program or programs for the voluntary certification of health information technology as being in compliance with applicable certification criteria adopted under this subtitle" (*i.e.,* certification criteria adopted by the Secretary under section 3004 of the PHSA). The certification program(s) must also "include, as appropriate, testing of the technology in accordance with section 13201(b) of the [HITECH] Act."

Section 13201(b) of the HITECH Act requires that with respect to the development of standards and implementation specifications, the Director of the National Institute of Standards and Technology (NIST), in coordination with the HIT Standards Committee, "shall support the establishment of a conformance testing infrastructure, including the development of technical test beds." The United States Congress also indicated that "[t]he development of this conformance testing infrastructure may include a program to accredit independent, non-Federal laboratories to perform testing."

2. Regulatory History and Related Guidance

a. Initial Set of Standards, Implementation Specifications, and Certification Criteria

In accordance with section 3004(b)(1) of the PHSA, the Secretary published an interim final rule with request for comments entitled "Health Information Technology: Initial Set of Standards, Implementation Specifications, and Certification Criteria for Electronic Health Record Technology" (HIT Standards and Certification Criteria interim final rule) (75 FR 2014), which adopted an initial set of standards, implementation specifications, and certification criteria. The standards, implementation specifications, and certification criteria adopted by the Secretary establish the capabilities that Certified EHR Technology must include in order to, at a minimum, support the achievement of what has been proposed for meaningful use Stage 1 by eligible professionals and eligible hospitals under the Medicare and Medicaid EHR Incentive Programs proposed rule (*see* 75 FR 1844 for more information about meaningful use and the proposed Stage 1 requirements).

b. Medicare and Medicaid EHR Incentive Programs Proposed Rule

On January 13, 2010, CMS published in the **Federal Register** (75 FR 1844) the Medicare and Medicaid EHR Incentive Program proposed rule. The rule proposes a definition for meaningful use Stage 1 and regulations associated with the incentive payments made available under Division B, Title IV of the HITECH Act. CMS has proposed that meaningful use Stage 1 would begin in 2011 and has proposed that Stage 1 would focus on "electronically capturing health information in a coded format; using that information to track key clinical conditions and communicating that information for care coordination purposes (whether that information is structured or unstructured), but in structured format whenever feasible; consistent with other provisions of Medicare and Medicaid law, implementing clinical decision support tools to facilitate disease and medication management; and reporting clinical quality measures and public health information."

c. HIT Certification Programs Proposed Rule

Section 3001(c)(5) of the PHSA, specifies that the National Coordinator "shall keep or recognize a program or programs for the voluntary certification of health information technology as being in compliance with applicable certification criteria adopted [by the Secretary] under this subtitle." We are using this authority to propose both temporary and permanent certification programs for HIT. These certification programs are necessary in order to assure that eligible professionals and eligible hospitals are able to adopt and implement Certified EHR Technology in an effort to qualify for meaningful use incentive payments.

Although the initial and primary purpose of our proposed temporary and permanent certification programs would be to test and certify Complete EHRs and EHR Modules, we believe that Congress did not intend to limit the National Coordinator's authority solely to this purpose. The National Coordinator is expressly authorized to establish a voluntary certification program or programs for "health information technology," not simply EHRs. As a result, we expect that our permanent certification program could also include the testing and certification of other types and aspects of HIT. Examples of other types of HIT that could be tested and certified under the permanent certification program include personal health records (PHRs) and networks designed for the electronic exchange of health information. We invite public comment on the need for additional HIT certifications, the types of HIT that would be appropriate for certification, and on any of the potential benefits or challenges associated with certifying other types of HIT.

d. Physician Self-Referral Prohibition and Anti-Kickback EHR Exception and Safe Harbor Final Rules and ONC Interim Guidance Regarding the Recognition of Certification Bodies

In August 2006, HHS published two final rules in which CMS and the Office of Inspector General (OIG) promulgated an exception to the physician self-referral prohibition and a safe harbor under the anti-kickback statute, respectively, for certain arrangements involving the donation of interoperable EHR software to physicians and other health care practitioners or entities (71 FR 45140 and 71 FR 45110, respectively). The exception and safe harbor provide that EHR software will be "deemed to be interoperable if a certifying body recognized by the Secretary has certified the software no more than 12 months prior to the date it is provided to the [physician/recipient]." ONC published separately a Certification Guidance Document (CGD) (71 FR 44296) to explain the factors ONC would use to determine whether to recommend to the Secretary a body for "recognized certification body" status. The CGD serves as a guide for ONC to evaluate applications for "recognized certification body" status and provides the information a body would need to apply for and obtain such status. To date, the Certification Commission for Health Information Technology (CCHIT) has been the only organization that has both applied for and been granted "recognized certification body" status under the CGD.

In section VI of the CGD, ONC notified the public, including potential

applicants, that the recognition process explained in the CGD would be formalized through notice and comment rulemaking and that when a final rule has been promulgated to govern the process by which a "recognized certification body" is determined, certification bodies recognized under the CGD would be required to complete new applications and successfully demonstrate compliance with all requirements of the final rule.

This proposed rule marks the beginning of the formal notice and comment rulemaking described in the CGD. As a result, the processes we propose for the temporary certification program and permanent certification program, once finalized, would supersede the CGD, and the authorization process would constitute the new established method for "recognizing" certification bodies, as referenced in the physician self-referral prohibition and anti-kickback EHR exception and safe harbor final rules. Consequently, certifications issued by a certification body "authorized" by the National Coordinator would enable Complete EHRs and EHR Modules to meet the definition of Certified EHR Technology, and it would constitute certification by "a certifying body recognized by the Secretary" in the context of the physician self-referral EHR exception and anti-kickback EHR safe harbor.

We request comment on whether we should construe the proposed new "authorization" process as the Secretary's method for "recognizing" certification bodies in the context of the physician self-referral EHR exception and anti-kickback EHR safe harbor.

C. Overview of Temporary Certification Program

We are proposing a temporary certification program to describe the process by which an organization would become an ONC-Authorized Testing and Certification Body (ONC–ATCB) and authorized under the temporary certification program to perform the testing and certification of Complete EHRs and/or EHR Modules. Under the temporary certification program, the National Coordinator would assume many of the responsibilities that we have proposed that other organizations would otherwise fulfill under the permanent certification program.

In order to become an ONC–ATCB, an organization (or organizations) would need to submit an application to the National Coordinator to demonstrate its competency and ability to test and certify Complete EHRs and/or EHR Modules. We propose under the temporary certification program that in order to become an ONC–ATCB, an applicant must be able to both test and certify Complete EHRs and/or EHR Modules. We anticipate that only a few organizations would qualify and become ONC–ATCBs under the temporary certification program. We also propose conditions and requirements applicable to the testing and certification of Complete EHRs and EHR Modules. Under the temporary program, the National Coordinator would accept applications for ONC–ATCB status at any time. The temporary program would sunset once the permanent certification program is established and at least one certification body has been authorized by the National Coordinator.

D. Overview of Permanent Certification Program

For the permanent certification program, we are proposing that several of the responsibilities assumed by the National Coordinator under the temporary certification program would be fulfilled by others. The National Coordinator would, where appropriate, seek to move as many of the temporary certification program's processes as possible to organizations in the private sector. We are proposing a process in the permanent certification program by which an organization would become an ONC–Authorized Certification Body (ONC–ACB). Please note, that an "ONC–ACB" in the permanent certification program is different than an "ONC–ATCB" in the temporary certification program. Under the permanent certification program, we are proposing that the National Coordinator's authorization would be valid solely for certification. We are also proposing that an applicant for ONC–ACB status must be accredited prior to submitting an application to the National Coordinator. An applicant's accreditation would be a critical factor in the National Coordinator's decision to grant it ONC–ACB status. We discuss in section III.F the process by which the National Coordinator would approve an accreditor (an "ONC–Approved Accreditor" (ONC–AA)) for certification bodies who intend to apply for ONC–ACB status.

Accreditation would also play an important role with respect to testing. As we discuss, the National Coordinator's authorization in the permanent certification program would no longer be valid for the purposes of testing Complete EHRs and EHR Modules. Instead, we propose that NIST through the National Voluntary Laboratory Accreditation Program (NVLAP) (and in accordance with section 13201(b) of the HITECH Act) would be responsible for accrediting testing laboratories and determining their competency. In this role, NIST would be solely responsible for overseeing activities related to testing laboratories. We further propose that ONC–ACBs would only be permitted to accept test results from NVLAP-accredited testing laboratories when evaluating a Complete EHR or EHR Module for certification. We also propose for the permanent certification program, similar to the temporary certification program, conditions and requirements that would apply to the certification of Complete EHRs and EHR Modules. Finally, unlike the temporary certification program, we propose that an ONC–ACB would be required to renew its status every two years under the permanent certification program.

E. Factors Influencing the Proposal of both Temporary and Permanent Certification Programs

A number of factors played a role in our decision to propose a temporary certification program that could be implemented quickly, and a permanent certification program that would be established for the long term. These factors include the recommendations of the HIT Policy Committee; the interrelationships of this proposed rule with the HIT Standards and Certification Criteria interim final rule (75 FR 2014) and the Medicare and Medicaid EHR Incentive Programs proposed rule (75 FR 1844); the need for eligible professionals and eligible hospitals to have Certified EHR Technology available in a timely manner; and our consultations with NIST.

1. HIT Policy Committee Recommendations

As noted above, section 3002(b) requires the HIT Policy Committee to make recommendations to the National Coordinator related to the implementation of a nationwide health information technology infrastructure. As part of this responsibility, the HIT Policy Committee made five recommendations to the National Coordinator on August 14, 2009, which support the approach proposed in this rule. The recommendations addressed the scope of the certification process in general and the approach the National Coordinator should take to establish certification programs. The HIT Policy Committee recommended "that in defining the certification process…the following objectives are pursued:

(1) Focus certification on Meaningful Use.

(2) Leverage the certification process to improve progress on privacy, security, and interoperability.

(3) Improve the objectivity and transparency of the certification process.

(4) Expand certification to include a range of software sources, *e.g.,* open source, self-developed, *etc.*

(5) Develop a short-term certification transition plan."

The National Coordinator reviewed and considered the recommendations made by the HIT Policy Committee and concluded that they should be used to provide direction for the proposals included in this rule. We believe that the proposals in this rule reflect the overall intent of the HIT Policy Committee's recommendations.

We interpret the HIT Policy Committee's use of the word "self-developed" and use it throughout the preamble to mean a Complete EHR or EHR Module that has been designed, modified, or created by, or under contract for, a person or entity that will assume the total costs for its testing and certification and will be a primary user of the Complete EHR or EHR Module. Self-developed Complete EHRs and EHR Modules could include brand new Complete EHRs or EHR Modules developed by a health care provider or their contractor. It could also include a previously purchased Complete EHR or EHR Module which is subsequently modified by the health care provider or their contractor and where such modifications are made to capabilities addressed by certification criteria adopted by the Secretary. We limit the scope of "modification" to only those capabilities for which the Secretary has adopted certification criteria because other capabilities (*e.g.,* a different graphical user interface (GUI)) would not affect the underlying capabilities a Complete EHR or EHR Module would need to include in order to be tested and certified.

Accordingly, we would only refer to the Complete EHR or EHR Module as "self-developed" if the health care provider paid the total costs to have the Complete EHR or EHR Module tested and certified. For example, if hospital A self-develops a Complete EHR, pays for the Complete EHR to be tested and certified, and then goes on to sell or make it freely available to additional hospitals, we would not refer to the Complete EHRs used by those hospitals (other than hospital A) as being self-developed.

2. Coordination With the HIT Standards and Certification Criteria Interim Final Rule and the Medicare and Medicaid EHR Incentive Programs Proposed Rule

This proposed rule is the third and final element of HHS's coordinated rulemakings to define the meaningful use of Certified EHR Technology and support the achievement of meaningful use.

As required by the HITECH Act, eligible professionals and eligible hospitals must demonstrate meaningful use of Certified EHR Technology in order to receive incentive payments under the Medicare and Medicaid EHR Incentive Programs. This proposed rule would create the certification programs under which Complete EHRs and EHR Modules could be tested and certified and subsequently used as Certified EHR Technology by eligible professionals and eligible hospitals. Once authorized by the National Coordinator, ONC–ATCBs under the temporary certification program and ONC–ACBs under the permanent certification program would be obligated to use the certification criteria adopted by the Secretary and identified at 45 CFR 170.302, 45 CFR 170.304, and 45 CFR 170.306. The Secretary intends to adopt subsequent certification criteria to support the requirements for future meaningful use stages once promulgated in regulation by CMS and may, where appropriate, adopt certification criteria for other types of HIT.

3. Timeliness Related to the Beginning of the Medicare and Medicaid EHR Incentive Programs

i. Public Comment Period

Congress established specific timeframes in the HITECH Act for the beginning of the Medicare EHR incentive program. The first payment year for eligible professionals was defined as calendar year 2011 (*i.e.,* the year beginning January 1, 2011) and the first payment year for eligible hospitals was defined as fiscal year 2011 (*i.e.,* the year beginning October 1, 2010). Congress specified in section 1903(t)(6)(C)(i)(I) of the SSA that "for the first year of payment to a Medicaid provider under this subsection, the Medicaid provider [must] demonstrate that it is engaged in efforts to adopt, implement, or upgrade certified EHR technology." Although there is no specified date for States to begin implementing the Medicaid EHR incentives program, Congress did set a cutoff for when first payments would no longer be permitted to Medicaid providers ("for any year beginning after 2016"). While the Medicare and Medicaid EHR Incentive Programs proposed rule provides more detail for this statutory provision, it is important to note that Medicaid providers will not be able to receive an incentive payment for "adopting, implementing, or upgrading Certified EHR Technology" until a certification program is established to allow for the testing and certification of Complete EHRs and EHR Modules.

To meet the previously mentioned timeframes, Certified EHR Technology must be available before the fall of 2010. Accomplishing this goal will require many simultaneous actions:

- Complete EHRs and EHR Modules may need to be reprogrammed or redesigned in order to meet the certification criteria adopted by the Secretary;
- A certification program must be established to allow for testing and certification of Complete EHRs and EHR Modules; and
- A collection of Complete EHRs and EHR Modules will need to be tested and certified under the established temporary certification program.

For these reasons, among others discussed below, we have chosen to propose the establishment of a temporary certification program that could be established and become quickly operational in order to assure the availability of Certified EHR Technology prior to the beginning of meaningful use Stage 1.

With these timing constraints in mind, we have provided for a 30-day public comment period on our proposals for the temporary certification program and a 60-day comment period on our proposals for the permanent certification program. Section 6(a)(1) of Executive Order 12866 on Regulatory Planning and Review (September 30, 1993, as further amended) states that "each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days." We believe that it is appropriate to follow this guidance in soliciting public comment on our proposed permanent certification program because the permanent certification program's final rule will be issued some months after the final rule for the temporary certification program. However, as discussed throughout the preamble, the circumstances and time constraints under which the temporary certification program must be established are different. As a result, we believe that a 30-day comment period provides a meaningful opportunity for the public to comment on our proposals for the temporary certification program

and that it will allow ONC to thoughtfully consider comments before issuing a timely final rule to implement the temporary certification program. In light of the common proposals we have made for certain parts of the temporary and permanent certification programs, we anticipate considering all comments made on this proposed rule when we finalize the permanent certification program's final rule.

We have proposed a temporary certification program based on our estimates that it would take too long to establish some of the elements included in our proposed permanent certification program. For example, these elements include approximately 6–9 months for the establishment of the accreditation processes for both testing laboratories by NVLAP and certification bodies by an ONC–AA as well as the time following for organizations to gain their accreditation and then subsequently apply to the National Coordinator for ONC–ACB status. Given our goal to assure availability of Certified EHR Technology prior to the beginning of meaningful use Stage 1, we believe that the establishment of a temporary certification program is a pragmatic and prudent approach to take. Additionally, we believe that a temporary certification program is necessary because even assuming the National Coordinator receives applications from organizations seeking to become ONC–ATCBs under the temporary certification program on the first possible day they can apply, we efficiently process the applications, and ultimately authorize one or more organizations, it is likely that ONC–ATCBs will not exist until May or June 2010. It will also take ONC–ATCBs time to process requests for testing and certification under the temporary certification program.

ii. Urgency of Establishing the Temporary Certification Program

As we have discussed, the HITECH Act provides that eligible professionals and eligible hospitals must demonstrate meaningful use of Certified EHR Technology in order to receive incentive payments under the Medicare and Medicaid EHR Incentive Programs.

This rule proposes the creation of a temporary certification program, in addition to a permanent certification program, under which Complete EHRs and EHR Modules could be tested and certified, and subsequently adopted and implemented by eligible professionals and eligible hospitals in order to attempt to qualify for incentive payments under meaningful use Stage 1. Establishing the temporary certification program in a timely fashion is critical to begin enabling eligible professionals and eligible hospitals to achieve meaningful use within the required timeframes. For this goal to be accomplished both the HIT industry and the Department will have to achieve several milestones before Complete EHRs and EHR Modules can be tested and certified. After the close of the public comment period for the proposed temporary certification program, ONC will review and consider timely submitted public comments and then draft and publish the temporary certification program's final rule. The HIT industry will then need to respond. Organizations seeking to apply for ONC–ATCB status will submit their applications, the National Coordinator will then review and assess them, and if necessary, seek additional information through the established process. Once the National Coordinator has authorized the first ONC–ATCB, the testing and certification of Complete EHRs and EHR Modules will need to take place in accordance with the temporary certification program provisions.

To facilitate an immediate launch of the ONC–ATCB application review process under the temporary certification program, we are also proposing that the National Coordinator accept and hold all applications for ONC–ATCB status received prior to the final rule effective date. Under the Administrative Procedure Act (5 U.S.C. 553(d)), publication of a substantive final rule must occur not less than 30 days before its effective date, absent certain statutory exceptions. In other words, a substantive rule cannot become effective until 30 days after its publication, unless an exception applies. We are consequently proposing that the National Coordinator simply accept and hold all applications for ONC–ATCB status that are received prior to the temporary certification program's final rule's effective date, so that immediately upon the final rule becoming effective, the National Coordinator could begin reviewing received applications without further delay. We request public comment on this proposal and the urgency of establishing the temporary certification program, including how this provision might affect the ability of eligible professionals and eligible hospitals to timely achieve meaningful use Stage 1.

4. Consultations With NIST

Section 3001(c)(5) of the PHSA directs the National Coordinator to consult with the Director of the NIST in the development of a certification program or programs. Consistent with this statutory provision, we have developed our proposed certification programs with the guidance and cooperation of NIST subject matter experts in testing and certification. Based on NIST recommendations, we believe it is appropriate to use the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC) ISO/IEC Guide 65, ISO/IEC 17025, and ISO/IEC 17011 to structure how testing, certification, and accreditation are conducted under our proposed certification programs. The ISO Committee on conformity assessment (CASCO) prepared ISO/IEC Guide 65, ISO/IEC 17025, and ISO/IEC 17011 and we believe the use of the ISO/IEC guide and standards will help ensure that the proposed certification programs operate in a manner consistent with national and international practices for testing and certification.

Under the temporary certification program we propose that applicants for ONC–ATCB status will need to demonstrate to the National Coordinator their conformance to both ISO/IEC Guide 65:1996 (Guide 65) and ISO/IEC 17025:2005 (ISO 17025). Under the permanent certification program applicants for ONC–ACB status would be required to be accredited by an ONC–AA for certification which would require a demonstration of conformance to Guide 65. Guide 65 specifies the "general requirements for bodies operating product certification systems." The certification of products (including processes and services) to this standard provides assurance that the products comply with specified technical and business requirements. ISO 17025 is an international standard that specifies the "general requirements for competence of testing and calibration laboratories." This standard addresses how testing should be performed using standard methods, non-standard methods, and laboratory-developed methods. We believe Guide 65 and ISO 17025 are necessary and appropriate for ONC–ATCBs to follow under the temporary certification program because they provide standard procedures and requirements for testing and certification widely accepted by the information technology industry and would ensure consistency and efficiency in the testing and certification procedures ONC–ATCBs would perform.

Under the permanent certification program we believe and have proposed that an ONC–AA for certification would have to conform to ISO/IEC 17011:2004 (ISO 17011). ISO 17011 is an international standard that specifies the "general requirements for accreditation bodies accrediting conformity

assessment bodies," such as certification bodies.

The ISO/IEC documents use certain terminology that differs from the terminology used in this proposed rule. We recognize that this proposed rule has been drafted to ensure consistency with existing regulatory and/or statutory terms, whereas the ISO/IEC documents were drafted for a different purpose and have a broader application to a variety of industries. Nevertheless, we intend certain terms in Guide 65, ISO 17025, and ISO 17011 to have the same meaning as related terms in this proposed rule. To ensure a consistent application of the ISO/IEC documents in the context of this proposed rule, we are therefore proposing the following crosswalk. The indicated terms in the documents specified below would have the meanings attributed to the related terms used in this proposed rule, as provided in the following table.

Terms used in Guide 65, ISO 17025, and ISO 17011	Terms used in this Proposed Rule
• Bodies operating product certification systems.	• ONC–ATCB.
• Certification body ...	• ONC–ACB. • Testing and certification body.
• Conformity assessment bodies.	• Certification body.
• Testing and calibration laboratories.	• Testing laboratory.
• Accreditation body	• Accreditation organization. • ONC–AA.
• Products	• Complete EHRs. • EHR Modules. • HIT.

F. Additional Context for Comparing the Temporary and Permanent Certification Programs

Rather than proposing the temporary and permanent certification programs in two separate proposed rules, we have proposed them together in this notice of proposed rulemaking because we believe this approach provides the public with a broader context for each of the programs and a better opportunity to make informed comments. In an effort to prevent confusion, though, we first discuss our complete set of proposals for the temporary certification program (section II) and then our complete set of proposals for the permanent certification program (section III). As a result, some of the proposals discussed below for both proposed certification programs are very similar, if not the same, and are included twice—in the discussions of the temporary certification program and the permanent certification program. In other cases, there are significant differences between our proposals underlying the temporary and permanent certification programs. Before discussing our complete set of proposals for the temporary certification program and to provide additional context for the temporary program, we summarize some of the more significant differences between the temporary and permanent certification programs.

1. The Distinction Between Testing and Certification

We believe that there is a distinct difference between the "testing" and "certification" of a Complete EHR and/or EHR Module. In this proposed rule, "testing" is meant to describe the process used to determine the degree to which a Complete EHR or EHR Module can meet specific, predefined, measurable, quantitative requirements. These results would be able to be compared to and evaluated in accordance with predefined measures. In contrast, "certification" is meant to describe the assessment (and subsequent assertion) made by an organization, once it has analyzed the quantitative results rendered from testing along with other qualitative factors, that a Complete EHR or EHR Module has met all of the applicable certification criteria adopted by the Secretary. Qualitative factors could include whether a Complete EHR or EHR Module developer has a quality management system in place, or whether the Complete EHR or EHR Module developer has agreed to the policies and conditions associated with being certified (*e.g.,* proper logo usage). Above and beyond testing, the act of certification typically promotes confidence in the quality of a product (and the vendor that produced it), offers assurance that the product will perform as described, and helps to make it easier for consumers to differentiate which products have met specific criteria from others that have not.

A fundamental difference between testing and certification is that testing is intended to result in objective, unanalyzed data. In contrast, certification is expected to result in an overall assessment of the test results, consideration of their significance, and consideration of other factors to determine whether the prerequisites for certification have been achieved. The following is a simple example to illustrate an important difference between testing and certification.

An e-prescribing EHR Module developer that seeks to have its EHR Module certified would first submit the EHR Module to be tested. To successfully pass the established testing requirements, the e-prescribing EHR Module would, among other functions, need to transmit an electronic prescription using mock patient data according to the standards adopted by the Secretary. Provided that the e-prescribing EHR Module successfully passed this test it would next be evaluated for certification. Certification could require that the EHR Module developer agree to a number of provisions, including, for example, displaying the EHR Module's version and revision number so potential purchasers could compare when the EHR Module was last updated or certified. If the EHR Module developer agreed to all of the applicable certification requirements and the EHR Module achieved a passing test result, the e-prescribing EHR Module would be certified. In these situations, both the EHR Module passing the technical requirements tests and the EHR Module vendor meeting the other certification requirements would be required for the EHR Module to achieve certification.

2. Accreditation

We have proposed, in the interest of expediency and to facilitate timely certification of Complete EHRs and EHR Modules, that ONC–ATCBs under temporary certification program would be authorized (and required) to perform both the testing and certification of Complete EHRs and/or EHR Modules. Under the temporary certification program, the National Coordinator would serve in a role similar to an accreditor and would assess an ONC–ATCB applicant's competency to perform both testing and certification before granting the applicant ONC–ATCB status. However, we do not believe that this would be an optimal or practical approach for the long-term because specialized accreditors in the private sector are better equipped to react effectively and efficiently to changes in the HIT market and to more rigorously oversee the certification bodies they accredit. Moreover, we have observed in other industries, such as the manufacturing of water-conserving products, that testing and certification processes are typically handled independently and separately.[1] Consequently, under the permanent certification program, we have proposed to shift the accreditation responsibilities for testing laboratories and certification bodies from the National Coordinator to other organizations. As previously

[1] *See http://www.epa.gov/watersense/partners/certification.html.*

mentioned, we understand that it may take several months to establish separate accreditation programs for testing laboratories and certification bodies and this factor weighed heavily in our decision to propose a temporary certification program. We consequently believe that the additional time the temporary certification program would afford the Department and HIT industry to develop a HIT-oriented accreditation program would greatly assist the HIT industry's transition to the accreditation process we have proposed under the permanent certification program.

Under the permanent certification program, we propose the use of accreditation as a mechanism to ensure that organizations that test and certify Complete EHRs and/or EHR Modules possess the requisite competencies to perform such actions with a high degree of precision. We believe that the proposed accreditation process will also introduce rigor, transparency, trust, and objectivity to the permanent certification program. Additionally, accreditation provides an oversight mechanism to ensure that testing laboratories and certification bodies are properly performing their respective duties. Consequently, in order for an applicant under the permanent certification program to become an ONC–ACB, we would require that it be accredited by an "ONC-Approved Accreditor" (ONC–AA) for certification in addition to meeting our other proposed application requirements. Along these lines, we propose a process by which accreditation organizations can request the National Coordinator's approval to become an ONC–AA. We believe this process is necessary because we propose several responsibilities for an ONC–AA to fulfill in order to ensure our programmatic objectives for the permanent certification program are met. Additionally, an approval process for an ONC–AA is necessary in order for potential applicants for ONC–ACB status to know from whom they can request accreditation.

As we mention above, under the permanent certification program, the National Coordinator would only authorize organizations to engage in certification. We emphasize that this is not meant to preclude, limit, or in any way prevent an organization from also performing the testing of Complete EHRs and/or EHR Modules. However, in order for a single organization (which may comprise subsidiaries or components) to perform both testing and certification under the permanent certification program it would need to be: (1) Accredited by an ONC–AA and subsequently become an ONC–ACB; and (2) accredited by the NVLAP. We request public comment on whether we should give organizations who are "dual accredited" and also become an ONC–ACB a special designation to indicate to the public that such an organization would be capable of performing both testing and certification under the permanent certification program.

The NVLAP, established by the NIST, develops specific laboratory accreditation programs (LAPs) for testing and calibration laboratories in response to legislative or administrative actions, requests from government agencies or, in special circumstances, from private sector entities.[2] The National Coordinator would make a final determination about whether to issue a request to NVLAP to develop a LAP for testing laboratories after considering public comments on our proposals for the permanent certification program. To ensure that ONC–ACBs review test results from legitimate and competent testing laboratories, we propose that ONC–ACBs would only be permitted to certify Complete EHRs and/or EHR Modules that have been tested by a NVLAP-accredited testing laboratory.

3. Surveillance

Under the permanent certification program we propose requirements for ONC–ACBs related to the surveillance of certified Complete EHRs and certified EHR Modules. We also propose certain requirements relating to surveillance for ONC–ATCBs under the temporary certification program. However, we anticipate that the temporary certification program would end close to the time an appropriate sample size of implemented certified Complete EHRs and certified EHR Modules would be available for ONC–ATCBs to perform ongoing surveillance. As a result of this limitation, we have proposed affording less weight to surveillance requirement compliance as well as less stringent requirements for ONC–ATCBs related to surveillance in the temporary certification program than we have proposed for ONC–ACBs under the permanent certification program.

We previously mentioned that we would require applicants for ONC–ACB status to be accredited by an ONC–AA. We propose that an ONC–AA in performing accreditation verify a certification body's conformance, at a minimum, to Guide 65. As a result, we expect that ONC–ACBs will perform surveillance in accordance at a minimum with Guide 65, which in section 13, among other provisions, provides that the "certification body [or 'ONC–ACB'] shall periodically evaluate the marked [or 'certified'] products to confirm that they continue to conform to the [adopted] standards." ONC–ACBs consequently would be required to evaluate and reevaluate previously certified Complete EHRs and/or EHR Modules to determine whether the Complete EHRs and/or EHR Modules they had certified in a controlled environment also perform in an acceptable, if not the same, manner in the field as they had performed when they were being certified. We discuss our proposals related to surveillance in the permanent certification program at section III.D.1.c.iii.

[2] "What is the NVLAP" *http://ts.nist.gov/Standards/upload/What-is-the-NVLAP.pdf.*

II. Provisions of the Temporary Certification Program

[If you choose to comment on the provisions of the temporary certification program, please include at the beginning of your comment the specific section title and any additional information to clearly identify the proposal about which you are commenting. For example, "Definitions" or "Sunset."]

A. Applicability

This subpart would establish the processes that applicants for ONC–ATCB status must follow to be granted ONC–ATCB status by the National Coordinator, the processes the National Coordinator would follow when assessing applicants and granting ONC–ATCB status, and the requirements of ONC–ATCBs for testing and certifying Complete EHRs and/or EHR Modules in accordance with the applicable certification criteria adopted by the Secretary in subpart C.

B. Definitions

1. Definition of Applicant

We propose that the term *applicant* mean a single organization or a consortium of organizations that seeks to become an ONC–ATCB by requesting and subsequently submitting an application for ONC–ATCB status to the National Coordinator.

2. Definition of Day or Days

We propose that unless otherwise explicitly specified, the term *day* or *days* shall mean a calendar day or calendar days.

3. Definition of ONC–ATCB

We propose *ONC–ATCB* to mean an organization or a consortium of organizations that has applied to and been authorized by the National Coordinator pursuant to the sections

below to perform the testing and certification of Complete EHRs and/or EHR Modules under the temporary certification program.

C. Correspondence With the National Coordinator

Throughout the following sections, we have proposed numerous instances where applicants for ONC–ATCB status and ONC–ATCBs would have to correspond with the National Coordinator and vice versa. These instances are almost always associated with specific timeframes (*e.g.,* the amount of days an applicant has to respond to a deficient application notice, *etc.*). Additionally, because such timeframes either trigger the beginning of a review process or the close of a response period it is important for there to be clear, unambiguous beginnings and endings for when such events must occur (*e.g.,* receipt of an application).

Moreover, it is the National Coordinator's preference to use e-mail whenever possible to communicate with an applicant for ONC–ATCB status or an ONC–ATCB. Therefore, we generally propose that any communication by the National Coordinator would be via e-mail and, where applicable, that we would consider the official date of receipt of any e-mail between the National Coordinator and an applicant for ONC–ATCB status or an ONC–ATCB to be the day the e-mail was sent, as indicated by the e-mail time-stamp. Where it is necessary for correspondence to take place via regular or express mail, we propose to use "delivery confirmation" documentation to establish the official date of receipt.

D. Temporary Certification Program Application Process for ONC–ATCB Status

1. Application for ONC–ATCB Status

In order to be considered for ONC–ATCB status, we propose that an applicant must submit an application to the National Coordinator. The application would be comprised of two parts. In order to receive an application, an applicant would have to request one in writing from the National Coordinator (requests would be made to the following e-mail address: *ATCBapplication@hhs.gov*).

a. Types of Applicants

We propose that single organizations and consortia would be eligible to apply for ONC–ATCB status under the temporary certification program. We expect a consortium, for example, would be comprised of one organization that would serve as a testing laboratory and a separate organization that would serve as a certification body. When viewed as a single applicant, this applicant would be able to perform all of the required responsibilities of an ONC–ATCB under the temporary certification program. We support this approach and believe that the combined expertise of two or more organizations could also result in a qualified applicant.

b. Types of ONC–ATCB Authorization

In order to properly categorize the application provided to an applicant, we would require applicants to indicate the type of testing and certification they seek authorization to perform under the temporary certification program. We propose that applicants must request authorization to perform the testing and certification of Complete EHRs or solely EHR Modules. We would treat a request for authorization to perform the testing and certification of Complete EHRs to encompass a request for authorization to perform the testing and certification of EHR Modules because, by default, an ONC–ATCB authorized to test and certify Complete EHRs would be able to test and certify all of the certification criteria adopted by the Secretary at 45 CFR part 170, subpart C. Therefore, we believe, from a technical perspective, that if an ONC–ATCB can test and certify a Complete EHR it would also be capable of testing and certifying EHR Modules. With respect to EHR Modules, this does not mean that an ONC–ATCB would be expected to determine whether one certified EHR Module would be able to seamlessly integrate with another EHR Module. Again, as discussed in the HIT Standards and Certification Criteria interim final rule, if an eligible professional or eligible hospital chooses to use a combination of certified EHR Modules to customize their HIT to meet the definition of Certified EHR Technology, they have the responsibility to ensure that the certified EHR Modules can properly work together. Please note, though, that some EHR Modules may be subject to certain additional Federal requirements.

We request public comment on whether ONC–ATCBs should also be required to test and certify that any EHR Module presented by one EHR Module developer for testing and certification would properly work (*i.e.,* integrate) with another EHR Module presented by a different EHR Module developer (this request for public comment would also apply to ONC–ACBs under the permanent certification program).

Additionally, we request public comment on whether the National Coordinator should permit applicants to seek authorization to test and certify only Complete EHRs designed for an ambulatory setting or, alternatively, Complete EHRs designed for an inpatient setting. Under our current proposal, an applicant seeking authorization to perform Complete EHR testing and certification would be required to test and certify Complete EHRs designed for both ambulatory and inpatient settings. However, if we were to separately authorize Complete EHR testing and certification, we see certain benefits for the temporary certification program as well as some negative effects. Among the benefits, this approach could create the potential that more organizations would apply for ONC–ATCB status because fewer resources may be needed and could be focused on one type of testing and certification. Among the negative effects, this approach could result in a situation in which no ONC–ATCB exists to certify one or another type of Complete EHR. This would prevent the testing and certification of Complete EHRs designed for either an ambulatory or inpatient setting from being able to be tested and certified.

With respect to EHR Modules, we would require applicants to identify the type(s) of EHR Module(s) they seek authorization to test and certify and would restrict any authorization granted to only those types of EHR Module(s). For example, if an applicant requests authorization to test and certify electronic prescribing EHR Modules, and is subsequently authorized to do so, it would not also be authorized to test and certify other EHR Modules, such as those related to clinical decision support.

c. Application Part One

We propose that an applicant must address the following four sections in part one of its application:

i. Under section one, the applicant would be required to provide the following general information to, among other reasons, ensure that we have proper contact information:

- The name, address, city, State, ZIP code, and Web site of the applicant;
- The name, title, phone number, and e-mail of the person who will serve as the point of contact for the applicant. This person must be legally authorized to execute and submit an application on behalf of the applicant (we refer to this person as an "authorized representative").

ii. Under section two, the applicant would be required to provide the following information in an effort to demonstrate conformance to Guide 65

(which specifies the standards for operating a certification program):

- The results of a completed self-audit to all sections of Guide 65. We expect that applicants would complete this self-audit to the best of their ability. Because the temporary certification program will only be in existence for a relatively short period of time, we recognize that certain limitations exist with respect to specific sections of Guide 65. In particular, while we expect an applicant to address Guide 65 section 13 (surveillance), we anticipate putting relatively little weight on the specific responsibilities for ONC–ATCBs related to surveillance in the temporary certification program;
- A description of the applicant's management structure according to section 4.2 of Guide 65 (Section 4.2 requires an applicant to provide a description of its organization including, but not limited to, legal or ownership status, decision making processes, assurance of objectivity and impartiality in order to justify its ability to appropriately operate a certification program);
- A copy of the applicant's quality manual that has been developed according to section 4.5.3 of Guide 65 (Section 4.5.3 requires a quality manual documenting the organization's quality system, including, but not limited to, quality objectives and commitment to quality, and associated policies and procedures to ensure quality);
- The applicant's policies and approach to confidentiality according to section 4.10 of Guide 65 (Section 4.10 requires documentation of arrangements for safeguarding confidentiality of information, consistent with applicable laws);
- The qualifications of each of the applicant's personnel who oversee or perform certification according to section 5.2 of Guide 65 (Section 5.2 requires information on the relevant qualifications, training, and expertise of each staff member involved in the *certification* process to be retained and kept up-to-date);
- A copy of the applicant's evaluation reporting procedures according to section 11 of Guide 65 (Section 11 requires a description of evaluation reporting procedures for conformity or nonconformity of products with all certification requirements, including any remedial actions necessary for conformity); and
- A copy of the applicant's policies for use and display of certificates (*e.g.,* logos) according to section 14 of Guide 65 (Section 14 requires evidence of policies and procedures for use and display of certificates, as appropriate).

iii. Under section three, the applicant would be required to provide the following information in an effort to demonstrate conformance to ISO 17025 (which specifies the standards for operating a testing program):

- The results of a completed self-audit to all sections of ISO 17025;
- A copy of the applicant's quality system document according to section 4.2.2 of ISO 17025 (Section 4.2.2 requires a quality system document to describe the management system policies related to quality, including a quality policy statement covering such items as purpose, objectives, and commitment to appropriate standards and best professional practices);
- A copy of the applicant's policies and procedures for handling testing nonconformities according to section 4.9.1 of ISO 17025 (Section 4.9.1 requires a description of policies and procedures used to identify, evaluate, and correct any nonconformity to testing procedures or other requirements); and
- The qualifications of each of the applicant's personnel who oversee or perform testing according to section 5.2 of ISO 17025 (Section 5.2 requires personnel competency records on the relevant qualifications, training, and expertise of each staff member involved in performing *testing* to be retained and kept up-to-date).

iv. Under section four, the applicant would be required to submit a properly executed agreement that it will adhere to the "Principles of Proper Conduct for ONC–ATCBs." The Principles of Proper Conduct for ONC–ATCBs would require an ONC–ATCB to:

- Operate its certification program in accordance with Guide 65 and its testing program in accordance with ISO 17025.
- Maintain an effective quality management system which addresses all requirements of ISO 17025.
- Attend all mandatory ONC training and program update sessions.
- Maintain a training program that includes documented procedures and training requirements to ensure its personnel are competent to test and certify Complete EHRs and/or EHR Modules.
- Use testing tools and procedures published by NIST (*e.g.,* published on its Web site or through a notice in the **Federal Register**) or functionally equivalent testing tools and procedures published by another entity for the purposes of assessing Complete EHRs and/or EHR Modules compliance with the certification criteria adopted by the Secretary.
- Report to ONC within 15 days any changes that materially affect its:
  - Legal, commercial, organizational, or ownership status;
  - Organization and management, including key testing and certification personnel;
  - Policies or procedures;
  - Location;
  - Facilities, working environment or other resources;
  - ONC authorized representative (point of contact); or
  - Other such matters that may otherwise materially affect its ability to test and certify Complete EHRs and/or EHR Modules.
- Allow ONC, or its authorized agents(s), to periodically observe on site (unannounced or scheduled) during normal business hours, any testing and/or certification performed to demonstrate compliance with the requirements of the temporary certification program.
- Provide ONC, no less frequently than weekly, a current list of Complete EHRs and/or EHR Modules that have been tested and certified which includes, at a minimum, the vendor name (if applicable), the date certified, product version, the unique certification number or other specific product identification, and where applicable, the certification criterion or certification criteria to which each EHR Module has been tested and certified.
- Retain all records related to the testing and certification of Complete EHRs and/or EHR Modules for the duration of the temporary certification program and provide copies of all testing and certification records to ONC at the sunset of the temporary certification program.
- Promptly refund any and all fees received for tests and certifications that will not be completed.

We believe that adherence to these principles is necessary because they will help protect the integrity of the certification program and ensure that an applicant is capable of satisfactorily carrying out the required duties and responsibilities of an ONC–ATCB.

With respect to the third-to-the last principle listed, and in an effort to make it easier for eligible professionals and eligible hospitals to cross-validate that they have in fact adopted Certified EHR Technology, the National Coordinator intends to make a master "certified HIT products list" of all Complete EHRs and EHR Modules tested and certified by ONC–ATCBs available on the ONC Web site. This Web site would be a public service and would be a single, aggregate source of all the certified product information ONC–ATCBs provide to the

National Coordinator. The master certified HIT products list would also represent all of the Complete EHRs and EHR Modules that could be used to meet the definition of Certified EHR Technology. Over time, we anticipate adding features to this Web site, which could include interactive functions to enable eligible professionals and eligible hospitals to use to determine whether a combination of certified EHR Modules, for instance, constitutes Certified EHR Technology.

With respect to the second to the last listed principle of proper conduct, because we anticipate that the temporary certification program will sunset in a relatively short period of time, we have proposed that all testing and certification records created by ONC–ATCBs must be retained, at a minimum, for the duration of the temporary certification program rather than proposing a specific preset length of time for record retention. Further, we propose that when the temporary certification program sunsets, all ONC–ATCBs would be required to provide to the National Coordinator copies of all of their testing and certification records. We also propose a specific minimum time period for record retention in the permanent certification program.

d. Application Part Two

In part two of the ONC–ATCB application process, applicants would be required to complete a proficiency examination. A proficiency examination would be used to assess whether an applicant can competently test and certify Complete EHRs and/or EHR Modules. Because the National Coordinator under the temporary certification program is performing a role similar to an accreditor, we believe a proficiency examination is a necessary requirement. We propose to create the proficiency examination with NIST's assistance and to design it to evaluate an applicant's knowledge and understanding of HIT functionality and standards and certification criteria, as well as their ability to properly test and certify Complete EHRs and/or EHR Modules. We believe that key personnel directly employed by applicants should be primarily responsible for completing the proficiency examination. Due to the topics it will cover, we anticipate that several key personnel may be required to complete the proposed proficiency examination. While we have not proposed to prohibit applicants from consulting with outside experts to complete their application, applicants would still need to clearly demonstrate in the material they submit to the National Coordinator that they will be able to competently operate a testing and certification program. In reviewing applications, the National Coordinator would take such assistance into account in order to determine whether an applicant's purported competency is not artificially inflated by temporarily retained outside expertise.

We propose to include questions in each proficiency exam from the following three sections. While a proficiency examination would address each of the sections below, we plan to generate a pool of questions from which a random selection would be used for an individual proficiency examination to ensure that no two proficiency examinations will be exactly the same. We have provided example questions for each section, but we do not believe that the specific proficiency exam questions should be made publicly available. The purpose of a proficiency examination is for an applicant to prove to the National Coordinator at the time of application submission that it possesses an adequate level of knowledge to competently perform the testing and certification of Complete EHRs and/or EHR Modules. Consequently, our rationale for posing different questions in each proficiency examination is the same as our reason for not making the specific proficiency examination questions available prior to an applicant submitting a satisfactory application—we seek to prevent an applicant from preparing answers in advance, which could inaccurately reflect an applicant's true competency. We are proposing that the applicant also affirmatively attest that it will not copy, retain, disclose, or in any way divulge any information from the proficiency examination.

- Section 1—Knowledge Quiz

This section would require an applicant to demonstrate a solid understanding of, and technical expertise in, Complete EHRs and/or EHR Modules. The applicant would be required to address the following concepts in a quiz format: Basic health IT knowledge; familiarity with the standards, implementation specifications, and certification criteria adopted by the Secretary; familiarity with test methods associated with the certification criteria adopted by the Secretary; and ability to determine how a test should be performed for a particular set of certification criteria.

An example question for section 1 would be: Please indicate the certification criteria adopted by the Secretary that also require compliance with specific standards. For each certification criterion, indicate its purpose and, if applicable, the potential alternative standard(s) adopted by the Secretary to which a Complete EHR or EHR Module could be tested and certified.

- Section 2—Identification of Test Tools

This section would require an applicant to demonstrate that it can correctly identify and use test tools published by ONC for Complete EHRs and EHR Modules. The test tools and functional testing techniques for the certification criteria adopted by the Secretary have been or will be developed by NIST. We expect that these test tools will available prior to, or at the same time as the temporary certification program's final rule is published.

An example question for section 2 would be: Please describe the steps you would take to test the capability of a Complete EHR or EHR Module to generate a patient summary record.

- Section 3—Proper Use of Test Tools and Understanding Test Results

This section would require an applicant to demonstrate that it can properly use test tools (*e.g.,* a continuity of care document (CCD) validation tool), can correctly interpret test results generated by test tools, and further when using test tools that the test results the applicant produces are consistent.

An example question for section 3 would be: Using the XYZ test tool with the following sample data sets, please indicate which data sets passed the test, which data sets failed because of errors, and for those that data sets that resulted in a failure discuss why such a failure occurred.

2. Application Review

An applicant would be permitted to submit its application electronically via e-mail or on paper, or via regular or express mail (we believe that electronic applications would be the most efficient). We propose that the National Coordinator be permitted up to 30 days to review an application once it has been received (the National Coordinator would notify the applicant's authorized representative to acknowledge that the application was received). We propose to review applications for ONC–ATCB status in the order in which they are received and to review and rule on an application's parts sequentially (*i.e.,* we will first review part one of an application and if deficiencies are found we will not review part two). We propose to notify the applicant if: (1) Its entire application was reviewed and

found to be satisfactory or; (2) if its application was reviewed and deficiencies were found in either part one or part two of the application. In instances where deficiencies have been found, we propose to return the entire application with the deficiencies identified in the applicable part of the application.

a. Satisfactory Application

Applicants with satisfactory applications would be notified of their successful achievement of ONC–ATCB status and upon receipt of this notification would be permitted to represent themselves as "ONC–ATCBs" and begin testing and certifying Complete EHRs and/or EHR Modules, as applicable.

b. Deficient Application Returned and Opportunity To Revise

We propose to formally return an application if part one or part two contains deficiencies. If we discover deficiencies in part one of an application, we would not review part two until part one is satisfactory. In the event that a portion of an applicant's response to its proficiency examination is determined to be deficient, the National Coordinator may pose an equivalent replacement question for an applicant to respond to from the appropriate question pool. We propose that the National Coordinator would have the discretion to have an element of an application clarified or request that an inadvertent error or minor omission be corrected. In these cases, before issuing a formal deficiency notice, we propose that the National Coordinator may request such information from the applicant's authorized representative as an addendum to its application. If the applicant fails to provide such information to the National Coordinator in the timeframe specified by the National Coordinator, but no less than 5 days, the National Coordinator could issue a formal deficiency notice. In other circumstances, the National Coordinator could immediately send a formal deficiency notice if it is determined that significant deficiencies exist which cannot be addressed by a clarification or correction of a minor omission. A formal deficiency notice would be sent to the applicant's authorized representative and would include all deficiencies related to a part of an application requiring correction. If the National Coordinator issues a formal deficiency notice, we propose to permit an applicant one opportunity per application part to revise the relevant application part in response and that a revised application part must be received by the National Coordinator within 15 days of the applicant's receipt of a formal deficiency notice. If an applicant receives a formal deficiency notice related to part one of its application, because we have noted that part two would not have been reviewed, the applicant would be free to revise part two at the same time it is revising part one and resubmit an entirely updated application.

We propose that the National Coordinator be permitted up to 15 days to review a revised application once it has been received. If, upon a second review of the application, the National Coordinator determines that the revised application still contains deficiencies, the applicant will be issued a denial notice stating that it will no longer be considered for ONC–ATCB status under the temporary certification program. We propose to permit applicants to request that the National Coordinator reconsider this decision only when the applicant can demonstrate that clear, factual errors were made in the review of its application and that the errors' correction could lead to the applicant receiving ONC–ATCB status. Requests for reconsideration of revised applications will be conducted according to the process described in the next section. We seek public comment on whether there are other instances in which the National Coordinator should reconsider an application that has been deemed deficient multiple times.

We also request public comment on whether it would be preferable for applicants to have their entire application reviewed all at once and then issued a formal deficiency notice or whether we should, as proposed, review applications in parts. While the former may seem more efficient for an applicant, the latter would potentially be more efficient overall because the National Coordinator would be able to notify an applicant about deficiencies earlier as well as spend less time and resources reviewing an application that may need significant corrections.

3. ONC–ATCB Application Reconsideration Requests

We propose that an applicant for ONC–ATCB status who has had part 1 or part 2 of its application returned twice because of deficiencies and has subsequently received a denial notice would be able to request that the National Coordinator reconsider this determination. For applicants, this would be at most a formal third and final opportunity (per application part) to continue their pursuit of ONC–ATCB status. While we believe the following would be highly unlikely, it is possible that an applicant's request for reconsideration of part 2 of their application could constitute their sixth formal opportunity (*i.e.,* three opportunities for part 1 and two prior opportunities for part 2 before the reconsideration request) to continue their pursuit of ONC–ATCB status. Again, per our request for public comment above, if we were to change our approach to reviewing applications for ONC–ATCB status, the amount of formal opportunities to revise an application would be reduced.

As previously discussed, we would only permit applicants to request the National Coordinator to reconsider a deficient application when the applicant could demonstrate that clear, factual errors were made in the review of its application and that the errors' correction could lead to the applicant receiving ONC–ATCB status.

In order to make a reconsideration request, an applicant would be required to submit to the National Coordinator, within 15 days of receipt of a denial notice, a written statement (preferably via e-mail) contesting the decision and explaining what factual errors it believes can account for the denial. An applicant would be required to include sufficient documentation to support its explanation. If the applicant does not file the reconsideration request within the specified timeframe, the National Coordinator could reject the reconsideration request.

Upon receipt of the reconsideration request, the National Coordinator would be permitted up to 15 days to review the information submitted by the applicant. If, based on the documentation submitted, the National Coordinator determines that when the application was reviewed a clear factual error(s) was made and that correction of the error(s) would lead to the applicant receiving ONC–ATCB status, the National Coordinator would notify the applicant's authorized representative that such an error occurred and that its application would continue to be processed. If the National Coordinator determined that a clear factual error(s) was made in part 1 of an application and that correction of the error(s) would lead to a satisfactory submission for part 1 of an application, the National Coordinator would subsequently review part 2 of the application. If the National Coordinator determined that a clear factual error(s) was made in part 2 of an application and that correction of the error(s) would lead to a completely satisfactory application, the applicant's authorized representative would be

notified that the applicant successfully achieved ONC–ATCB status. If, however, after reviewing an applicant's reconsideration request the National Coordinator determines that the applicant did not provide sufficient evidence in its explanation to identify the factual error or errors that were made during the review of its application, the National Coordinator could reject the applicant's reconsideration request.

4. ONC–ATCB Status

a. Acknowledgement and Representation

We propose to make publicly available at *http://healthit.hhs.gov* the name of each ONC–ATCB, the date each ONC–ATCB was authorized by the National Coordinator, and the type(s) of testing and certification each ONC–ATCB is authorized to perform. Further, to prevent an ONC–ATCB from misrepresenting the scope of its authorization, we propose that an ONC–ATCB must prominently and unambiguously identify on its Web site and in all marketing and communications statements (written and oral) the scope of its authorization (*e.g.,* the HIT Certification Group is an ONC–ATCB for e-prescribing EHR Modules).

b. Expiration of Status Under the Temporary Certification Program

As previously mentioned, we expect to publish a final rule for the permanent certification program within a few months of publishing the temporary certification program's final rule. When this occurs, we would immediately begin to implement the permanent certification program's final provisions with the goal of having ONC–ACBs authorized under the permanent certification program by or before the beginning of calendar year 2012 in order to coincide with the certification activities that would need to take place in the coming months for meaningful use Stage 2. We believe it will take between 8 to 16 months to implement the permanent certification program, and therefore, we expect ONC–ATCBs under the temporary certification program would only be responsible for testing and certifying Complete EHRs and/or EHR Modules to the certification criteria adopted by the Secretary that are applicable to meaningful use Stage 1. Moreover, we will be working to assure that ONC–ACBs authorized under the permanent certification program will be in place with sufficient time to certify Complete EHRs and EHR Modules to the certification criteria adopted by the Secretary that are applicable to meaningful use Stage 2. However, if the transition to the permanent certification program occurs prior to the end of 2011, it is possible that a small percentage of late or new-to-market Complete EHRs and/or EHR Modules developed to meet the certification criteria associated with meaningful use Stage 1 may wind up being tested and certified according to the policies established in the permanent certification program.

Because the temporary certification program would be operational only for a short period of time (less than 2 years), we do not believe that it is necessary to require an ONC–ATCB to renew their "authorized status" under the temporary certification program. As a result, we have not proposed a renewal requirement for ONC–ATCB status. All ONC–ATCBs would maintain their status (unless revoked) until the temporary certification program sunsets (*see* section II.F). The chart below illustrates the anticipated operational periods (denoted by quarters within each calendar year) for the temporary and permanent certification programs, along with the respective proposed meaningful use Stage 1 and 2 beginning points for eligible hospitals (Q4) and eligible professionals (Q1).

Beginning of Proposed Meaningful Use Stage				Stage 1								Stage 2	
Quarter		Q2/ 10	Q3/ 10	Q4/ 10	Q1/ 11	Q2/ 11	Q3/ 11	Q4/ 11	Q1/ 12	Q2/ 12	Q3/ 12	Q4/ 12	Q1/ 13+
Certification Program	Temporary												
	Permanent												

E. ONC–ATCB Performance of Testing and Certification and Maintaining Good Standing as an ONC–ATCB

1. Authorization To Test and Certify Complete EHRs

We propose that authorization to test and certify Complete EHRs under the temporary certification program would require an ONC–ATCB to be capable of performing "complete" testing and certification. Complete testing and certification would result in the ONC–ATCB testing and certifying Complete EHRs to all applicable certification criteria adopted by the Secretary. For example, the certification criteria applicable to Complete EHRs that eligible professionals would adopt would need to be tested and certified to all of the certification criteria at 45 CFR 170.302 and 45 CFR 170.304.

2. Authorization To Test and Certify EHR Modules

We propose that authorization to test and certify EHR Modules under the temporary certification program would require an ONC–ATCB to do so in accordance with the applicable certification criterion or certification criteria adopted by the Secretary. Furthermore, because an EHR Module, once certified, can be used in combination with other certified EHR Modules to meet the definition of Certified EHR Technology, we propose that an ONC–ATCB authorized to test and certify EHR Modules would be required to clearly indicate the certification criterion or certification criteria to which an EHR Module has been tested and certified. We believe this requirement would benefit potential adopters of certified EHR Modules and make it easier for them to determine the full capabilities that a combination of certified EHR Modules includes. To benefit potential adopters of certified EHR Modules, we would also expect EHR Module developers to clearly indicate the certification criterion or certification criteria to which an EHR Module they have developed has been tested and certified.

a. Certification Criterion Scope

As specified at 45 CFR 170.102, the definition of EHR Module means "any service, component, or combination thereof that can meet the requirements of at least one certification criterion adopted by the Secretary." In some cases, the certification criteria specified at 45 CFR 170.302, 45 CFR 170.304, and 45 CFR 170.306 simply reference a criterion at the first paragraph level, for example, 45 CFR 170.302, paragraph "(f)" states, "Smoking Status. Enable a user to electronically record, modify, and retrieve the smoking status of a patient. Smoking status types must

include: current smoker, former smoker, or never smoked." In other cases, for example, a certification criterion like "Drug-Drug, Drug-Allergy, Drug-Formulary Checks" at 45 CFR 170.302 paragraph "(a)" includes a second level "(1)" through "(4)" which articulate partial aspects of a single, complete capability. For the purposes of testing and certifying an EHR Module, we therefore interpret "one certification criterion" in the definition of EHR Module to mean the entirety of the capabilities encompassed by what is specified at the first paragraph level.

b. When Privacy and Security Certification Criteria Apply to EHR Modules

We believe that EHR Modules hold great promise with respect to innovation. However, we also recognize that the potential innovative benefits EHR Modules can provide will be significantly compromised if these same EHR Modules do not include appropriate privacy and security safeguards to instill trust.

EHR Modules can come in many forms and can provide a large set of capabilities or a single capability. This variability, which promotes innovation, also poses several challenges to determining when it is appropriate to require EHR Modules be tested and certified to the privacy and security certification criteria adopted by the Secretary (45 CFR 170.302(o) through (v)). Our goal for determining when this should occur is two-fold: (1) Assure eligible professionals and eligible hospitals that EHR Modules will not negatively affect how Certified EHR Technology in its entirety protects electronic health information; and (2) appropriately require (or not require) the testing and certification of EHR Modules to privacy and security certification criteria.

In the context of EHR Modules and testing and certification, it is important to keep in mind that we are discussing a point before "implementation" in the HIT lifecycle. Accordingly, ONC–ATCBs will test and certify EHR Modules independent of, and disassociated from, their potential operating environments. Below, we identify several challenges to determining when an ONC–ATCB should be required to test and certify EHR Modules to the privacy and security certification criteria adopted by the Secretary. After discussing these challenges, we propose, and request public comment on a potential approach that establishes when ONC–ATCBs should be required to test and certify EHR Modules to the privacy and security certification criteria adopted by the Secretary in addition to the capability or capabilities the EHR Module may be specifically designed to provide.

One challenge with respect to determining when EHR Modules should be tested and certified to the privacy and security certification criteria adopted by the Secretary occurs when EHR Modules operate in an environment separate from other EHR Modules—when they are so-to-speak "autonomous." For example, an e-prescribing EHR Module or a patient portal EHR Module provided by an application service provider (ASP) could be hosted and maintained by the ASP (not by the end-user). In these cases, an end-user (*e.g.,* eligible professional) may be unable to control or specify the level or amount of privacy and security safeguards associated with the health information stored, modified, or transmitted by the EHR Module. We believe that it would be irresponsible and potentially dangerous to permit such EHR Modules to be tested and certified solely to their specific capability, and not to the privacy and security certification criteria adopted by the Secretary.

On the flipside, a second challenge relates to EHR Modules that, by design, may provide specific capabilities which make it technically infeasible to require that they separately meet the privacy and security certification criteria adopted by the Secretary. One example could be a medication reconciliation EHR Module which, from a technical perspective, would be designed to function "behind the scenes" as part of the internal workings of Certified EHR Technology. In all likelihood, it would therefore depend on another EHR Module's or EHR Modules' privacy and security capabilities. In this example, we believe that it would be technically infeasible for the medication reconciliation EHR Module to have its own authentication capability because, in all likelihood, an end-user would have had to have been authenticated prior to gaining access to the medication reconciliation EHR Module. Conversely, while it is unlikely that the medication reconciliation EHR Module would retain or store health information, other EHR Modules might, and it may be appropriate to require such EHR Modules to be tested and certified to some or all of the privacy and security certification criteria adopted by the Secretary.

Because of the context specific nature of EHR Modules, and the fact that we expect them to provide many different capabilities, it is difficult to establish with absolute certainty an approach that will work for all EHR Modules. However, we believe that an appropriate starting point for such an approach should focus first on protecting individuals' health information and then on whether there exist appropriate exceptions to the approach that would exempt EHR Modules from the requirement to be tested and certified to adopted privacy and security certification criteria. As a result, we propose that ONC–ATCBs would be required to test and certify all EHR Modules to the privacy and security certification criteria adopted by the Secretary unless the EHR Modules is/are presented for testing and certification in one of the following manners:

- The EHR Module(s) are presented for testing and certification as a pre-coordinated, integrated "bundle" of EHR Modules, which could otherwise constitute a Complete EHR. In such instances, the EHR Module(s) would be tested and certified in the same manner as a Complete EHR. Because the bundle of EHR Modules would constitute a single, integrated product, we believe that it would be unnecessary in such cases to require each EHR Module to be tested and certified independently to privacy and security certification criteria. We propose one variation to this exception for pre-coordinated bundles of EHR Modules which include EHR Module(s) that would not be part of an eligible professional or eligible hospital's local system and under its direct control (*e.g.,* a patient portal EHR Module that is not hosted and maintained). In these situations, the constituent EHR Modules of such an integrated bundle would need to be separately tested and certified to all privacy and security certification criteria;
- An EHR Module is presented for testing and certification, and the presenter can demonstrate to the ONC–ATCB that it would be technically infeasible for the EHR Module to be tested and certified in accordance with some or all of the privacy and security certification criteria. For example, we believe that it would be technically infeasible for an EHR Module that does not store even temporarily, or maintain any health information to be required to include a capability to encrypt health information at rest or include an audit log. Alternatively, it would presumably be technically infeasible for an EHR Module that does not provide a capability for exchange to be required to include the capabilities to encrypt health information for exchange or account for treatment, payment, or health care operations disclosures; or

• An EHR Module is presented for testing and certification, and the presenter can demonstrate to the ONC–ATCB that the EHR Module is designed to perform a specific privacy and security capability. In such instances, we do not believe that it should be tested and certified to the other privacy and security certification criteria adopted by the Secretary. For example, an encryption EHR Module would *not* be required to be tested and certified as also including the capability to terminate an electronic session after a predetermined time of inactivity.

We believe that the approach we have articulated above provides an appropriate framework for determining when ONC–ATCBs would be required to test and certify EHR Modules to the privacy and security certification criteria adopted by the Secretary. We request public comment on whether there are additional alternatives to the ones proposed above and other circumstances where an EHR Module should be tested and certified to none, some, or all of the privacy and security certification criterion adopted by the Secretary.

3. Authorized Testing and Certification Methods

We propose that in being authorized to test and certify Complete EHRs and/or EHR Modules, ONC–ATCBs must have the capacity to test and certify Complete EHRs and/or EHR Modules at their facility. We propose further that an ONC–ATCB must also have the capacity to test and certify Complete EHRs and/or EHR Modules through some secondary means or at a secondary location. Such secondary methods would include testing and certification: (1) At the site (*i.e.,* physical location) where a Complete EHR or EHR Module has been developed (*e.g.,* at a Complete EHR developer's facility); or (2) at the site (*i.e.,* physical location) where the Complete EHR or EHR Module resides (*e.g.,* at a hospital where the HIT has been installed); or (3) remotely (*i.e.,* through other means, such as through secure electronic transmissions and automated Web-based tools, or at a location other than the ONC–ATCB's facilities). We believe that these secondary testing and certification methods will better accommodate self-developed Complete EHRs and EHR Modules. For example, a Complete EHR developer may submit a Complete EHR to an ONC–ATCB to be tested and certified at the ONC–ATCB's facility. In other cases, it may not be practicable for a hospital with a self-developed Complete EHR to submit its Complete EHR to an ONC–ATCB for testing and certification at the ONC–ATCBs facility and, in these cases, we expect that ONC–ATCBs would either test and certify the hospital's Complete EHR at the hospital where the Complete EHR resides or remotely through other means that do not require the ONC–ATCB to be physically present at the hospital. We expect that the most common form of remote testing and certification will employ the use of automated programs that can be accessed by the hospital via the Internet to demonstrate to the ONC–ATCB that its Complete EHR meets all applicable certification criteria adopted by the Secretary. Other forms of remote testing and certification may include an employee of the ONC–ATCB walking through a particular scripted scenario with predefined data that the hospital would have to "plug-in" to their Complete EHR and then convey the result (*e.g.,* the hospital would be asked to enter fabricated information on a group of "test" patients into its Complete EHR and provide responses to specific questions asked by the ONC–ATCB employee). We request public comment on whether an ONC–ATCB should be required to perform any of the secondary methods discussed above in addition to testing and certifying Complete EHRs and/or EHR Modules at its facility.

Our proposals do not preclude eligible professionals and eligible hospitals who have already adopted and implemented HIT that they believe meets the definition of Certified EHR Technology from seeking to have such HIT tested and certified themselves. Rather than relying on the vendor(s) that supplied their HIT to them to apply for testing and certification, eligible professionals and eligible hospitals could go directly to an ONC–ATCB to get their HIT tested and certified. However, eligible professionals and eligible hospitals should keep in mind that they alone would bear the full costs of testing and certification if they went directly to an ONC–ATCB.

4. The Testing and Certification of "Minimum Standards"

In the HIT Standards and Certification Criteria interim final rule (75 FR 2014), we explained how we would approach the testing and certification of Complete EHRs and EHR Modules for certain vocabulary code set standards. Our approach included the establishment of these standards as "minimum standards." Adopting a particular version of the code set as a "minimum" permits a Complete EHR and/or EHR Module to be tested and certified to a permitted newer version of an adopted code set without the need for additional rulemaking on the part of the Secretary. For example, on the day the HIT Standards and Certification Criteria interim final rule was put on display by the **Federal Register** for public inspection a new version (version 2.29) of Logical Observation Identifiers Names and Codes (LOINC®) was released. In that regard, we stated the following in the HIT Standards and Certification Criteria interim final rule:

> [W]e understand that certain types of standards, specifically code sets, must be maintained and frequently updated to serve their intended purpose effectively * * * To address this need and accommodate industry practice, we have in this interim final rule indicated that certain types of standards will be considered a floor for certification. We have implemented this approach by preceding references to specific adopted standards with the phrase, "at a minimum." In those instances, the certification criterion requires compliance with the version of the code set that has been adopted through incorporation by reference, or any subsequently released version of the code set. This approach will permit Complete EHRs and EHR Modules to be tested and certified, to, "at a minimum," the version of the standard that has been adopted or a more current or subsequently released version. This will also enable Certified EHR Technology to be updated from an older, "minimum," adopted version of a code set to a more current version without adversely affecting Certified EHR Technology's "certified status." We intend to elaborate in the upcoming HIT Certification Programs proposed rule on how testing and certification would be conducted using standards we have adopted and designated as "minimums" in certain certification criteria. That being said, we understand that this approach has certain limitations. In some cases, for instance, rather than simply maintaining, correcting, or slightly revising a code set, a code set maintaining organization will modify the structure or framework of a code set to meet developing industry needs. We would consider this type of significant revision to a code set to be a "modification," rather than maintenance or a minor update of the code set. An example of a code set "modification" would be if a hypothetical XYZ code set version 1 were to use 7-digit numeric codes to represent health information while XYZ code set version 2 used 9-digit alphanumeric codes to represent health information. In such cases, interoperability would likely be reduced among Complete EHRs and EHR Modules that have adopted different versions of the structurally divergent code sets. If a code set that we have adopted through incorporation by reference is modified significantly, we will update the incorporation by reference of the adopted version with the more recent version of the code set prior to requiring or permitting certification according to the newer version.

At the end of this discussion we provided examples of when a standard would be considered a "minimum

standard" and the limitation to our approach. To address the identified limitation, we propose to clarify when a newer version of an adopted "minimum standard" code set would be permitted for use in testing and certification and when it would not. We believe that there are two prevailing methods the Secretary could use to determine whether a significant revision to a code set represents a "modification, rather than maintenance or a minor update of the code set" and, consequently, when a code set version should not be permitted for testing and certification above the minimum adopted by the Secretary until additional public comment can be obtained.

The first method would allow for any member of the general public to notify the National Coordinator about a new version of an identified "minimum standard" code set. For this method, we would encourage the person or entity who submits a notification to the National Coordinator to include any relevant information the National Coordinator would need to correctly identify the "minimum standard" code set (*e.g.,* name and version) and any additional information that the National Coordinator could use to determine whether the new version constitutes general maintenance or minor updates, or a significant revision or modification. Upon receipt of these notifications and a determination by the National Coordinator that the new version of the code set did not represent a significant revision or modification, the National Coordinator would request the Secretary to permit the use of the identified new version for testing and certification purposes.

The second method we considered, and solicit public comment on, would be for the Secretary to proactively identify newly published versions of adopted minimum standard code sets and issue determinations as to whether they reflect maintenance efforts or minor updates of the adopted code set and would be permitted for testing and certification.

For either method above, we propose that once the Secretary has granted permission for a new version of an adopted minimum standard code to be used:

(1) Any ONC–ATCB may test and certify Complete EHRs and/or EHR Modules according to the new version;

(2) Certified EHR Technology may be upgraded to comply with the new version of an adopted minimum standard accepted by the Secretary without adversely affecting the certification status of the Certified EHR Technology; and

(3) ONC–ATCBs would not be required to test and certify Complete EHRs and/or EHR Modules according to the new version until we updated the incorporation by reference of the adopted version to a newer version.

For either method, we also propose to regularly publish (on quarterly basis) either by presenting to the HIT Standards Committee or by posting a notification on our Web site, any Secretarial determinations that have been made with respect to "minimum standard" code sets. We request public comment on whether a quarterly publication is an appropriate notification interval. We also seek public comment on other methods we might take to identify acceptable newer versions of minimum standard code sets in addition to the two methods we have discussed. Please note that the two methods we have proposed are not mutually exclusive and we request public comment on whether it would be advantageous to pursue both methods.

5. Maintaining Good Standing as an ONC–ATCB; Violations That Could Lead to the Revocation of ONC–ATCB Status; Revocation of ONC–ATCB Status

In order to maintain good standing as an ONC–ATCB, we propose that an ONC–ATCB would have to abide by the Principles of Proper Conduct for ONC–ATCBs. In addition, we expect that an ONC–ATCB would follow other Federal and State laws to which it is subject and refrain from engaging in other types of inappropriate behavior.

Further, we propose that the National Coordinator would be capable of revoking an ONC–ATCB's status under the temporary certification program when either of two types of violations occurs. We describe these violations and the revocation process below.

a. Type-1 Violations

Type-1 violations would include violations of law or temporary certification program policies that threaten or significantly undermine the integrity of the temporary certification program. Type-1 violations would include, but are not limited to, false, fraudulent, or abusive activities that affect: The temporary certification program; a program administered by HHS; or any program administered by the Federal government. These violations could jeopardize the integrity of the temporary certification program and would include examples such as, the ONC–ATCB or a principal employee, owner, or agent of an ONC–ATCB being convicted of fraud, embezzlement or extortion or of violating a similar Federal or State securities laws while participating in the temporary certification program, falsifying or manipulating test results and certifications, or withholding information that would indicate false or fraudulent activity had occurred within the temporary certification program.

We believe that the National Coordinator must ensure that the certification program is fair and honest and provides users of Certified EHR Technology with faith in the integrity of the temporary certification program (*e.g.,* that Complete EHRs and EHR Modules have been properly tested and certified). Therefore, if the National Coordinator has evidence that an ONC–ATCB committed one or more of the above-mentioned violations (false, fraudulent, and abusive activities) the National Coordinator could issue the ONC–ATCB a notice proposing to revoke its ONC–ATCB status.

b. Type-2 Violations

"Type-2" violations would include inappropriate conduct by an ONC–ATCB under the temporary certification program. A Type-2 violation would include, but not be limited to, the failure of an ONC–ATCB to adhere to the Principles of Proper Conduct for ONC–ATCBs and engaging in other types of inappropriate behavior. Examples of these types of violations include, but are not limited to: failing to attend mandatory ONC training programs, failing to meet specified reporting requirements, misrepresenting the scope of its authorization, and an ONC–ATCB testing and certifying Complete EHRs and/or EHR Modules for which it does not have authorization.

If the National Coordinator obtains reliable evidence from fact-gathering, requesting information from an ONC–ATCB, contacting an ONC–ATCB's customers, witnessing an ONC–ATCB perform testing or certification, and/or substantiated complaints that an ONC–ATCB's conduct may indicate a failure to adhere to the Principles of Proper Conduct for ONC–ATCBs or exhibited other inappropriate behavior, the National Coordinator would notify the ONC–ATCB of a possible Type-2 violation. The notification would include all pertinent information regarding the National Coordinator's assessment.

Unless otherwise specified by the National Coordinator, an ONC–ATCB would be permitted up to 30 days from the date it is notified about possible Type-2 violation(s) to submit a written response and any accompanying documentation that could demonstrate

no violation(s) occurred or validate that violation(s) occurred and were corrected. If the ONC–ATCB fails to submit a response to the National Coordinator within 30 days, the National Coordinator could issue the ONC–ATCB a notice proposing to revoke its ONC–ATCB status.

If an ONC–ATCB submits a response, the National Coordinator would be permitted up to 30 days to evaluate the ONC–ATCB's response (and request additional information, if necessary). If the National Coordinator determines that the ONC–ATCB did not commit a Type-2 violation, or may have committed a Type-2 violation but satisfactorily corrected any violation(s) that may have occurred, a memo will be issued to the ONC–ATCB to confirm this determination. If the National Coordinator determines that the ONC–ATCB's response is insufficient and that a Type-2 violation had occurred and had not been adequately corrected, then the National Coordinator could propose to revoke an ONC–ATCB's status.

c. Proposed Revocation

We propose that the National Coordinator could propose the revocation of an ONC–ATCB's status for alleged Type-1 violations and for failing to respond to, or satisfactorily address, a notification related to a Type-2 violation.

We request public comment on whether the National Coordinator should also consider proposing the revocation of an ONC–ATCB's status for repeatedly committing Type-2 violations even if the ONC–ATCB has adequately corrected the violations each time. We further request comment on how many corrected Type-2 violations would be sufficient for proposing revocation of an ONC–ATCB and to what extent the frequency of these violations should be a consideration. While we have not repeated this request for public comment in our discussion of the permanent certification program, we nevertheless encourage comments regarding this option for that program as well.

i. Opportunity To Respond to a Proposed Revocation Notice

We propose that an ONC–ATCB could respond to a proposed revocation notice within 10 days of receipt of the proposed revocation notice in order to contest the proposed revocation and explain why its status should not be revoked. We propose that if an ONC–ATCB responds to a revocation notice, it must include sufficient documentation to support its explanation. Upon receipt of an ONC–ATCB's response to a proposed revocation notice, the National Coordinator would be permitted up to 30 days to review the information submitted by the ONC–ATCB.

During the time period provided for an ONC–ATCB to respond to the proposed revocation notice and the National Coordinator's review period, we propose to permit the ONC–ATCB to continue its operations under the temporary certification program. We believe this proposal affords the ONC–ATCB meaningful due process and would minimally impact the temporary certification program because we have proposed procedures for reaching a timely final decision on revocation. We welcome comments on this proposal and whether it would be more appropriate for the National Coordinator to immediately suspend an ONC–ATCB's operations for the time between the issuance of a proposed revocation notice and a final decision on revocation.

If the National Coordinator determines that an ONC–ATCB's status should not be revoked, the National Coordinator would notify the ONC–ATCB's authorized representative in writing to express this determination.

ii. Revocation of an ONC–ATCB's Status

We propose that the National Coordinator could revoke an ONC–ATCB's status if it is determined that revocation is appropriate after considering the information provided by the ONC–ATCB in response to the proposed revocation notice or if the ONC–ATCB does not respond to a proposed revocation notice within the specified timeframe.

We propose that a decision to revoke an ONC–ATCB's status would be final and would not be subject to further review unless the National Coordinator chooses to reconsider the revocation.

d. Extent and Duration of Revocation Under the Temporary Certification Program

We propose that the revocation of an ONC–ATCB's status would become effective as soon as the ONC–ATCB receives the revocation notice. A testing and certification body whose ONC–ATCB status has been revoked would be prohibited from accepting new requests for testing and certification and would be required to cease its current testing and certification operations related to Complete EHRs and/or EHR Modules (*i.e.,* the National Coordinator's revocation would not apply to other testing and certification operations that are not within the scope of this rule). We would also expect it to issue a complete refund to any entity whose Complete EHR or EHR Module was being tested and certified by the ONC–ATCB at the time its status was revoked. If a testing and certification body were to refuse or fail to issue a complete refund(s) upon having its ONC–ATCB status revoked, we propose that the refusal or failure should be a consideration in determining the qualifications of a testing and certification body if it were to apply at a later date to be an ONC–ACB under the proposed permanent certification program. We welcome comments on this proposal, including any potential alternatives.

Once an ONC–ATCB has had its status revoked, the testing and certification body would be permitted to reapply for ONC–ATCB status under the temporary certification program and apply under our proposed permanent certification program unless it had its status revoked for a Type-1 violation. Type-1 violations would significantly undermine the integrity of the temporary certification program and we do not believe it would be appropriate to allow the same testing and certification body to reapply for ONC–ATCB right away. Further, we believe that Type-1 violations could so significantly undermine the public's faith in our proposed certification programs that we propose to prohibit the testing and certification body from reapplying for ONC–ATCB status for 1 year and to count that 1 year prohibition towards the ONC–ACB application period under the permanent certification program if the temporary certification program sunsets during this time. We request public comment on any other alternatives regarding the treatment of "former ONC–ATCBs" that have had their status revoked.

We recognize that in instances where an ONC–ATCB has had its status revoked, some people may call into question the legitimacy of the certifications issued by the former ONC–ATCB. To address this matter, we propose that the "certified status" of Complete EHRs and/or EHR Modules certified by the former ONC–ATCB will remain intact unless a Type-1 violation was committed that calls into question the legitimacy of the certifications issued by the former ONC–ATCB. In these circumstances, which we believe would be extremely rare, we propose that the National Coordinator would review the facts surrounding the revocation of the ONC–ATCB's status and publish a notice on ONC's Web site if the National Coordinator believes that Complete EHRs and/or EHR Modules were fraudulently certified by a former

ONC–ATCB and the certification process itself failed to comply with regulatory requirements. If the National Coordinator determines that Complete EHRs and/or EHR Modules were improperly certified, we propose that the "certified status" of impacted Complete EHRs and/or EHR Modules would remain intact for 120 days after the National Coordinator publishes the notice. We believe that 120 days is a suitable timeframe for the developers of the impacted Complete EHRs and/or EHR Modules to get their HIT re-certified by an ONC–ATCB in good standing. We request public comment on our proposed approach and the timeframe for re-certification. Although highly unlikely, it is important to note that if a Complete EHR or EHR Module developer whose product was improperly certified does not seek to remedy this improper certification in the timeframe provided that all of the end-users (*e.g.,* eligible professionals and eligible hospitals) that have adopted the Complete EHR or EHR Module developer's product would no longer have HIT that meets the definition of Certified EHR Technology.

e. Alternative Considered

As noted briefly above, another alternative approach to the revocation process described above (where the National Coordinator would issue a notice to an ONC–ATCB proposing to revoke its status) would be a suspension process whereby an ONC–ATCB's status would be suspended if the ONC–ATCB is reasonably suspected of having committed a Type-1 violation or if the ONC–ATCB fails to respond in a timely manner to a possible Type-2 violation or has not appropriately addressed an admitted Type-2 violation. Such a process would result in the National Coordinator issuing an ONC–ATCB a suspension notification. Upon receipt of a suspension notification, an ONC–ATCB would have to temporarily cease testing and certifying Complete EHRs and/or EHR Modules. Additionally, during the suspension an ONC–ATCB would also be prohibited from accepting new requests for testing and certification.

If the National Coordinator issues a suspension notice to an ONC–ATCB, the ONC–ATCB could respond directly to the National Coordinator and explain in writing why its status should not have been suspended. Upon receiving the ONC–ATCB's response, the National Coordinator would review the information submitted by the ONC–ATCB and reply within 7 days. In the reply, the National Coordinator could extend the suspension for an additional 14 days to obtain further information, terminate the suspension, or propose revocation while extending suspension during the pendency of the revocation process.

We believe that a suspension process is an alternative worth considering because it could assist the National Coordinator in preventing further untoward actions by an ONC–ATCB, whereas the process we discuss above would permit, albeit presumably for a short amount of time, an ONC–ATCB to continue to test and certify Complete EHRs and/or EHR Modules while revocation procedures are underway. Therefore, we request public comment on whether the National Coordinator should also include a process to suspend an ONC–ATCB's status. We have not repeated this request for public comment in our discussion of the permanent certification program, but we encourage commenters to consider this as an option for that program as well and provide comments.

6. Validity of Complete EHR and EHR Module Certification

In the HIT Standards and Certification Criteria interim final rule, we defined Certified EHR Technology to mean "a Complete EHR or a combination of EHR Modules, each of which: (1) Meets the requirements included in the definition of a Qualified EHR; and (2) has been tested and certified in accordance with the certification program established by the National Coordinator as having met all applicable certification criteria adopted by the Secretary."

Part two of the definition of Certified EHR Technology specifies an important concept—that in order to meet the definition, a tested and certified Complete EHR or combination of separately tested and certified EHR Modules must meet *all applicable certification criteria adopted by the Secretary.* Certification represents a snapshot, a fixed point in time, where it has been confirmed that a Complete EHR or EHR Module has met all applicable certification criteria adopted by the Secretary. From that point forward, a specific Complete EHR or EHR Module version which has been certified would be forever labeled "certified." However, as the Department adopts new or modified certification criteria, previously adopted certification criteria would no longer constitute all of the applicable certification criteria to which a Complete EHR or EHR Module would need to be tested and certified. As a result, Complete EHRs and EHR Modules that had been certified to a previously adopted set of certification criteria would no longer be considered "Certified EHR Technology" for purposes of enabling an eligible professional or eligible hospital to attempt to achieve a future stage of meaningful use.

As previously mentioned in both the HIT Standards and Certification Criteria interim final rule and the Medicare and Medicaid EHR Incentive Programs proposed rule, we and CMS stated that we anticipate that the requirements for meaningful use will be adjusted every two years. Accordingly, and because the HITECH Act requires eligible professionals and eligible hospitals to use Certified EHR Technology in order to qualify for incentive payments, we expect that there will continue to be a close correlation and connection between certification criteria adopted by the Secretary and future meaningful use objectives (and their associated measures).

In that regard, when a set of objectives and measures for a future stage of meaningful use has been proposed, we anticipate that the Secretary would also propose to adopt certification criteria to replace, amend, or add to previously adopted certification criteria. Presumably, those additional or modified certification criteria would set a new, higher bar for the capabilities that Certified EHR Technology would need to include and for which eligible professionals and eligible hospitals would need in order to attempt to achieve the next proposed meaningful use stage.

We believe the planned two-year schedule for updates to meaningful use objectives and measures and correlated certification criteria creates a natural expiration for the "certified status" of Complete EHRs and EHR Modules. Accordingly, after the Secretary has adopted new or modified certification criteria, the validity of the certification associated with previously certified Complete EHRs and EHR Modules will expire and those Complete EHRs and EHR Modules would need to be re-certified in order for eligible professionals and eligible hospitals to continue to possess HIT that meets "all applicable certification criteria adopted by the Secretary" and consequently also meets the definition of Certified EHR Technology.

Stated another way, regardless of the year and meaningful use stage at which an eligible professional or eligible hospital enters the Medicare or Medicaid EHR Incentive Program, the Certified EHR Technology that would be used would have to include the capabilities necessary to meet the most current certification criteria adopted by the Secretary at 45 CFR 170 subpart C

in order to meet the definition of Certified EHR Technology. For example, if the Secretary adopts 5 new certification criteria in 2012 which would be applicable to, and in support of, meaningful use Stage 2, an eligible professional who implemented Certified EHR Technology in 2011 would need to ensure that its HIT was upgraded with newly certified software or a certified EHR Module by 2013 to include the 5 new capabilities the Secretary adopted in the certification criteria in order to continue to have HIT that meets the definition of Certified EHR Technology and could provide the capabilities they would need to continue to attempt to achieve meaningful use.

We also want to point out and clarify an apparent, yet temporary, inconsistency that would occur in 2013 and 2014 should CMS finalize its proposed staggered approach for meaningful use stages to provide flexible entry points for eligible professionals and eligible hospitals (*e.g.,* an eligible professional whose first payment year is 2013 would start at meaningful use Stage 1 in 2013, while an eligible professional whose first payment year was 2011 would be required to meet meaningful use Stage 2 requirements in 2013). The apparent inconsistency pertains to the HIT an eligible professional or eligible hospital would need to have to meet the definition of Certified EHR Technology and the meaningful use stage the eligible professional or eligible hospital would need to meet to qualify for incentive payments. As proposed, eligible professionals and eligible hospitals who seek to have their first payment year begin in 2013 or 2014 would only need to meet meaningful use stage 1 requirements; however, the Certified EHR Technology they would need to use, would need to meet the most recent certification criteria adopted by the Secretary, which at that time would be in support of meaningful use stage 2. As a result, should CMS finalize its proposed staggered approach for meaningful use stages, these eligible professionals and eligible hospitals would need to use "meaningful use stage 2 Certified EHR Technology" even though they would only have to meet meaningful use stage 1 metrics.

Should CMS finalize its proposed staggered approach for meaningful use stages, we recognize that some confusion within the HIT industry may arise during 2013 and 2014 because of this apparent inconsistency and the divergent use of the term "meaningful use." We would anticipate, therefore, that ONC–ACBs would clearly indicate the certification criteria used when certifying Complete EHRs and/or EHR Modules, and identify certifications according to the calendar year and month rather than the meaningful use stage to reflect the currency of the certification criteria against which the Complete EHRs and/or EHR Modules have been certified. Consequently, if an eligible professional or eligible hospital were seeking to obtain a certified Complete EHR or certified EHR Module in 2014, for instance, that eligible professional or eligible hospital would look for Complete EHRs and EHR Modules certified in accordance with certification criteria current in 2014, rather than Complete EHRs and EHR Modules certified as meeting certification criteria intended to support meaningful use Stage 1, Stage 2, or Stage 3. We request comments on ways to ensure greater clarity in the certification of Complete EHRs and EHR Modules.

We believe this proposed approach would benefit eligible professionals and eligible hospitals whose first payment year is in 2013 because they would already have the Certified EHR Technology they would need in order to meet meaningful use stage 2, which, as proposed, would begin for them in the following year (2014). Eligible professionals and eligible hospitals, whose first payment year is 2014, would also benefit. They would have adopted more advanced HIT and would need to be familiar with the additional capabilities it provides, because, as proposed, they would need to meet meaningful use Stage 3 requirements in the following year (2015). This approach would also assist other HIT users with whom eligible professionals and eligible hospitals would exchange information by ensuring improved interoperability among their respective HIT systems.

We again note that this apparent inconsistency would exist only for the years 2013 and 2014. By 2015, if as proposed by CMS an eligible professional or eligible hospital seeks to begin participating in the Medicare and Medicaid incentive programs, that eligible professional or eligible hospital would need to implement Complete EHRs or EHR Modules certified to certification criteria that support meaningful use Stage 3 and would have to meet meaningful use Stage 3 metrics.

F. Sunset

We propose to sunset the temporary certification program and the rules that govern it when the National Coordinator has authorized at least one ONC–ACB under the permanent certification program. We further propose that on the date at which this sunset occurs that ONC–ATCBs under the temporary certification program will be prohibited from accepting new requests to certify Complete EHRs and/or EHR Modules. That means that ONC–ATCBs will be able to review any pending applications that they will have received prior to the termination date of the temporary certification program, and complete the certification process for those Complete EHRs and EHR Modules. We request public comment on whether we should establish a set date for the temporary program to sunset, such as 12/31/2011, instead of date that depends on a particular action—the authorization of at least one ONC–ACB. A set date would provide certainty and create a clear termination point for the temporary certification program by indicating to any ONC–ATCBs and other certification bodies that in order to be authorized to certify Complete EHRs and/or EHR Modules after 12/31/2011, they would need to be accredited and reapply to become ONC–ACBs. One potential downside to a set date would be the possibility that it would temporarily prevent certifications from being issued during the time period it takes potential ONC–ACB applicants to get accredited and receive their authorizations from the National Coordinator.

III. Provisions of Permanent Certification Program

[If you choose to comment on the provisions of the permanent certification program, please include at the beginning of your comment the specific section title and any additional information to clearly identify the proposal about which you are commenting. For example, "Definitions" or "Permanent Certification Program Application Process."]

As noted above, we have chosen to propose both the temporary and permanent certification programs in this notice of proposed rulemaking. We believe this format offers the public significantly more context for our proposed policies and expect to receive more informed and detailed comments on our proposed policies. Similarly, we anticipate that some comments will be applicable to both certification programs. In that regard, we believe that this approach also reduces the amount of redundancy that would have existed had we published two separate proposed rules.

Along those same lines, we have proposed that certain aspects of the temporary certification program will be the same as certain elements of the permanent certification program. In those cases, to reduce unnecessary, duplicative text in this rule, we simply identify those proposed elements of

both programs that are the same. In all other cases, we discuss in greater detail those proposals that are unique to the permanent certification program. To remain consistent with the section structure developed above and to improve readability and comprehension, we have presented our proposals for the permanent certification program in the same order as those presented in the temporary certification program. Additionally, in our proposals for the permanent certification program that cross-reference proposed provisions of the temporary certification program, all references to ONC–ATCBs should be substituted with references to ONC–ACBs, as appropriate.

A. Applicability

This subpart would establish the processes an applicant for ONC–ACB status must follow to be granted ONC–ACB status by the National Coordinator, the processes the National Coordinator would follow when assessing applicants and granting ONC–ACB status, the requirements of ONC–ACBs for certifying Complete EHRs and/or EHR Modules in accordance with the applicable certification criteria adopted by the Secretary in subpart C. It also establishes the processes accreditation organizations would follow to request approval from the National Coordinator and that the National Coordinator in turn would follow to approve an accreditation organization under the permanent certification program as well as certain ongoing responsibilities for an ONC–AA.

B. Definitions

1. Definition of Applicant

We propose to use the same definition of applicant for the permanent certification program with the exception of replacing ONC–ATCB with ONC–ACB.

2. Definition of Day or Days

We propose that day or days would have the same meaning under the permanent certification program as we have proposed under the temporary certification program.

3. Definition of ONC-Approved Accreditor

We propose that the term *ONC-Approved Accreditor (ONC–AA)* means an accreditation organization that the National Coordinator has approved to accredit certification bodies under the permanent certification program.

4. Definition of ONC–ACB

We propose *ONC–ACB* to mean a single organization or a consortium of organizations that has applied to and been authorized by the National Coordinator to perform the certification of, at a minimum, Complete EHRs and/or EHR Modules using the applicable certification criteria adopted by the Secretary. We have included the phrase "at a minimum" in this definition to take into account the possibility that ONC–ACBs may be authorized in the future to certify other types of HIT, such as personal health records (PHRs). Please note, however, that for that to occur, the Secretary would have to adopt certification criteria applicable to these types of HIT.

C. Correspondence With the National Coordinator

We propose that when applicants for ONC–ACB status and ONC–ACBs correspond with the National Coordinator and vice versa, that these communications must comply with the same rules we have proposed for the temporary certification program.

D. Permanent Certification Program Application Process for ONC–ACB Status

Similar to the temporary certification program, we propose under the permanent certification program to permit applicants for ONC–ACB status to apply at any time.

1. Application for ONC–ACB Status

Similar to the temporary certification program, we propose that an applicant for ONC–ACB status must submit an application to the National Coordinator in the same manner ONC–ATCB applicants must under the temporary certification program in order to be considered for ONC–ACB status. However, unlike the temporary certification program, applicants would no longer need to request an application and would instead be permitted to submit an application (which we intend to make available on the ONC Web site) to the following e-mail address: *ACBapplication@hhs.gov.*

a. Types of Applicants

Because the National Coordinator's authorization in the permanent certification program is only valid with respect to certification, we do not expect that it would be necessary for organizations seeking to apply for ONC–ACB status to form a partnership or consortium. However, such an applicant would not be prevented from achieving ONC–ACB status as long as it could meet all of the requirements of the permanent certification program.

b. Types of ONC–ACB Authorization

Similar to the temporary certification program, we would require an applicant for ONC–ACB status to indicate on its application the type of certification it seeks authorization to perform under the permanent certification program. If the applicant requested authorization to certify EHR Modules we would also require it to identify the type(s) of EHR Modules which it seeks authorization to certify. The proposed requirement for an applicant to indicate the type of certification it is seeking would also apply to other types of HIT if the Secretary has adopted certification criteria for that HIT.

c. Application for ONC–ACB Status

We propose that an applicant must include the following information in its application:

i. The applicant would be required to submit the same general identifying information required under the temporary certification program and section II.D.1.c.i.

ii. The applicant would be required to submit the information necessary for ONC to confirm the applicant's accreditation by an ONC–AA.

iii. The applicant would be required to submit a properly executed agreement that it will adhere to the "Principles of Proper Conduct for ONC–ACBs." The Principles of Proper Conduct for ONC–ACBs would require an ONC–ACB to:

- Maintain its accreditation.
- Attend all mandatory ONC training and program update sessions.
- Maintain a training program that includes documented procedures and training requirements to ensure its personnel are competent to certify HIT.
- Report to ONC within 15 days any changes that materially affect its:
  - Legal, commercial, organizational, or ownership status;
  - Organization and management including key certification personnel;
  - Policies or procedures;
  - Location;
  - Personnel, facilities, working environment or other resources;
  - ONC authorized representative (point of contact); or
  - Other such matters that may otherwise materially affect its ability to certify HIT.
- Allow ONC, or its authorized agents(s), to periodically observe on site (unannounced or scheduled) any certifications performed to demonstrate compliance with the requirements of the permanent certification program.

• Provide ONC, no less frequently than weekly, a current list of Complete EHRs and/or EHR Modules that have been certified, which includes, at a minimum, the vendor name (if applicable), the date certified, the product version, the unique certification number or other specific product identification, and where applicable, the certification criterion or certification criteria to which each EHR Module has been certified.

• Retain all records related to the certification of Complete EHRs and/or EHR Modules for a minimum of 5 years.

• Only certify HIT, including Complete EHRs and/or EHR Modules that have been tested by a NVLAP-accredited testing laboratory.

• Submit an annual surveillance plan to the National Coordinator and annually report to the National Coordinator its surveillance results.

• Promptly refund any and all fees received for certifications that will not be completed.

The first difference between these Principles of Proper Conduct for ONC–ACBs and those proposed under the temporary certification program is that we have removed the principles related to Guide 65 and ISO 17025. The former would be replaced and addressed by the accreditation principle for ONC–ACBs and the latter, ISO 17025, would no longer be necessary since the National Coordinator's authorization under the permanent certification program applies solely to certification.

The second difference is that we have added the principle that ONC–ACBs would only be permitted to certify Complete EHRs and/or EHR Modules that have been tested by a NVLAP-accredited testing laboratory. We believe that NVLAP-accreditation is the best option, because the NVLAP is an internationally recognized testing laboratory accreditation program and because it will best serve the public's interests. The NVLAP will also be able to rely on the significant technical and scientific staff NIST employs who have specialized expertise in developing and performing tests for and evaluations of HIT. Moreover, Congress clearly indicated its intentions both in section 3001(c)(5) of the PHSA and in section 13201(b) of the HITECH Act by associating NIST with the testing and certification of HIT. In the latter, the HITECH Act expressly provides that the Director of NIST, in coordination with the HIT Standards Committee, "shall support the establishment of a conformance testing infrastructure * * *" and that "[t]he development of this conformance testing infrastructure may include a program to accredit independent, non-Federal laboratories to perform testing."

The third difference pertains to record retention. For the permanent certification program, we propose to require that ONC–ACBs retain their records related to the certification of Complete EHRs and EHR Modules for a minimum of five years. We understand from our consultations with NIST that this is standard industry practice for organizations involved in certification. Given the fact that it will be possible for ONC–ACBs to be authorized under the permanent certification program for many years, we believe that this time period is necessary in the event that the National Coordinator notifies an ONC–ACB of a proposed Type-2 violation or proposes to revoke an ONC–ACBs status. These records would be directly relevant to a determination by the National Coordinator that an ONC–ACB committed a Type-2 violation and/or to revoke an ONC–ACB's status. Moreover, we believe that the records will be necessary for ONC–ACBs to conduct surveillance. Finally, similar to our proposal for the temporary certification program, if an ONC–ACB loses its status for any reason it could be required to provide the National Coordinator with copies of all relevant records related to certification for up to a five year period.

The fourth and final difference is the requirement that an ONC–ACB would need to conduct surveillance of Complete EHRs and/or EHR Modules that the ONC–ACB had previously certified. As noted in section I.F.3 when we introduced the concept of surveillance, we expect that as part of ONC–ACBs' accreditation to confirm compliance at a minimum with Guide 65, they will have addressed section 13. Section 13 specifies the general surveillance requirements that a certification body must meet in order to become accredited. We propose to require that ONC–ACBs agree to submit annual surveillance plans to the National Coordinator and annually report to the National Coordinator their surveillance results. As discussed below, we also propose a requirement for the ONC–AA to have processes in place to ensure that the certification bodies it accredits properly conduct surveillance. We believe that ONC–ACBs should be given the flexibility to conduct surveillance in accordance with their accreditation. However, we recognize that it would likely benefit the HIT industry if certain common elements of surveillance could be developed and we welcome public comment on what those elements should be. We anticipate that we would issue annual guidance for ONC–ACBs before they submit their surveillance plans in order to identify ONC priorities. In that regard, we also request public comment on whether there are specific approaches to surveillance that have worked in other industries and should be replicated for HIT.

We anticipate using the results of ONC–ACB surveillance to make publicly available information related to the implementation and performance of Complete EHRs and EHR Modules in the field and as feedback for the efficient operation of the permanent certification program. We expect that these surveillance results could also be used by prospective purchasers of Complete EHRs and/or EHR Modules to determine whether a Complete EHR or EHR Module they are considering implementing has been the subject of any unsatisfactory surveillance reports (and why those unsatisfactory results occurred). We believe this requirement is important and would provide the National Coordinator and ONC–ACBs with important feedback regarding the effectiveness of the permanent certification program and what if any changes may need to be made to improve how the program operates.

We emphasize that surveillance results obtained by ONC–ACBs and reported to the National Coordinator would not immediately affect a Complete EHR or EHR Module's certification. That is, if after an ONC–ACB reevaluated a Complete EHR it previously certified and reported that the Complete EHR no longer met a certification criterion or criteria because, for example, an individual took actions to alter a capability provided by the Complete EHR such that it no longer performed according to its original design or improperly installed the Complete EHR, such a result would not automatically invalidate the Complete EHR's certification. However, we would expect ONC–ACBs upon the identification of a pattern of poorly performing previously certified Complete EHRs and/or EHR Modules to determine whether they properly certified the Complete EHR or EHR Module in the past. We believe that the publication of surveillance results and market forces will sufficiently motivate developers of Complete EHRs and/or EHR Modules to continue to improve their products and address any shortcoming identified by the ONC–ACB surveillance process. We request public comment on whether the National Coordinator should consider proactively stepping-in to protect purchasers of Complete EHRs and/or EHRs Modules by taking action such as "de-certifying" Complete EHRs and/or

EHR Modules if a pattern of unsatisfactory surveillance results emerges and the ONC–ACB has not taken any measures to evaluate the poor performance.

d. Proficiency Examination

We no longer propose the use of a proficiency exam in the permanent certification program because it would no longer serve a useful purpose. Moreover, the accreditation process for ONC–ACB applicants encompasses this requirement and we do not believe that any additional redundancy is necessary.

2. Application Review

We propose to use the same timeframes and general processes for application review under the permanent certification program as we propose for the temporary certification program. The primary difference between the permanent certification program's application review process and the temporary certification program's is the reduced number of opportunities for an applicant to submit revisions in response to formal deficiency notices (due to the fact that the application is only one part). The timeframes for review, resubmission, and reconsideration are the same as those proposed under the temporary certification program. The only other difference between our two proposals in this section is our reference to ONC–ACB instead of ONC–ATCB and that the scope of an ONC–ACBs authorization will only be valid for certification and not both testing and certification.

3. ONC–ACB Application Reconsideration Requests

We propose to use the same timeframes and processes for ONC–ACB application reconsideration requests under the permanent certification program as we propose for the temporary certification program. Again, we now refer to ONC–ACBs instead of ONC–ATCBs.

4. ONC–ACB Status

a. Acknowledgement and Representation

We propose the same policies for ONC–ACBs related to acknowledgement and representation as we do for ONC–ATCBs under the temporary certification program.

b. Expiration of Status Under the Permanent Certification Program

We propose that an ONC–ACB would be required to renew its status every two years. To renew its status, we propose that an ONC–ACB would need to submit an updated application to the National Coordinator for review 60 days prior to the expiration of its status. We request public comment on any additional information an ONC–ACB should provide the National Coordinator in order to have its status renewed, such as documentation of the ONC–ACB's current accreditation status and any additional information or updates to the original application that would aid in the National Coordinator's review of the renewal request.

E. ONC–ACB Performance of Certification and Maintaining Good Standing as ONC–ACB

1. Authorization To Certify Complete EHRs

We propose, similar to the temporary certification program, that ONC–ACBs who seek authorization under the permanent certification program to certify Complete EHRs must be capable of certifying Complete EHRs to all applicable certification criteria adopted by the Secretary.

2. Authorization To Certify EHR Modules

We again propose that ONC–ACBs who seek authorization under the permanent certification program to certify EHR Modules must be capable of certifying EHR Modules in accordance with the applicable certification criteria adopted by the Secretary. We would mirror our proposals in the temporary certification program related to the scope of a "certification criterion" and when, in this case, an ONC–ACB would be required to certify EHR Modules to the privacy and security certification criteria adopted by the Secretary in the permanent certification program.

3. Authorization To Certify Other HIT

As we mention above in the preamble, section 3001(c)(5) of the PHSA provides the National Coordinator with broad authority to establish certification programs for the "voluntary certification of health information technology as being in compliance with applicable certification criteria adopted under this subtitle." As a result, we requested public comment on the other types of HIT that the permanent certification program could include and ONC–ACBs could certify. As the statute provides, if the Secretary were to adopt certification criteria applicable to other types of HIT that the National Coordinator could subsequently authorize an ONC–ACB to certify such HIT under the permanent certification program. Therefore, we propose that if the Secretary adopts certification criteria for HIT beyond Complete EHRs and EHR Modules, a current ONC–ACB would have to submit an addendum to its original application to request authorization to certify this other type of HIT. If a new organization wanted to be authorized to certify another type of HIT it would need to follow the rules for becoming an ONC–ACB, including first receiving accreditation from an ONC–AA.

4. Authorized Certification Methods

Similar to the temporary certification program, we propose that ONC–ACBs must have the capacity to certify Complete EHRs and/or EHR Modules at their facility and one of the secondary methods we identified in the temporary certification program.

5. The Certification of "Minimum Standards"

Based on the same rationale provided in the temporary certification program discussion above, we propose to adopt the same method or methods for identifying which minimum standards (*i.e.,* code sets) that an ONC–ACB will use for certification.

6. Maintaining Good Standing as an ONC–ACB; Violations That Could Lead to Revocation of ONC–ACB Status; Revocation of ONC–ACB Status

We propose the same policies and procedures for an ONC–ACB to maintain good standing in the permanent certification program as in the temporary certification program. We also include the same descriptions for the types of violations discussed above in the temporary certification program as well as the same timeframes and processes the National Coordinator would take to revoke an ONC–ACBs status. Similar to the temporary certification program, we propose that if an ONC–ACB has its status revoked due to a Type-1 violation, it would be prohibited from reapplying for ONC–ACB status for at least 1 year. We believe this timeframe is justified because we assume that a former ONC–ACB would need a certain amount of time to reorganize its management and key personnel after having its status revoked. Additionally, depending on the type of violation that led to the former ONC–ACBs status being revoked, it is also possible that it would lose its accreditation. We request public comment on whether this timeframe should be shortened or lengthened, and whether alternative sanctions related to ONC–ACBs or former ONC–ACBs should be considered.

Again, per our discussion above, we maintain our policy proposal for the re-certification of Complete EHRs and/or EHR Modules if the National

Coordinator determines that fraudulent certifications were issued.

7. Validity of Complete EHR and EHR Module Certification

Based on the same rationale provided in the temporary certification program we do not believe that we need to adopt an explicit expiration date for the certifications associated with Complete EHRs and EHR Modules because of the natural expiration that our other regulatory actions would create. Additionally, since a new certification program would exist, which would include different processes, we emphasize that Complete EHRs and EHR Modules tested and certified under the temporary certification program by an ONC–ATCB would need to be tested and certified according to the permanent certification program once the Secretary adopts certification criteria to replace, amend, or add to previously adopted certification criteria. We anticipate that this would occur to support meaningful use Stage 2 and, as we discussed in the temporary certification program section on this matter, the capabilities eligible professionals and eligible hospitals would need from their Certified EHR Technology would also change, thereby affecting the validity and utility of the prior certification.

That being said, with respect to EHR Modules, we can envision situations, especially in the future, where measures associated with a meaningful use objective may change, but the capability a certified EHR Module would need to provide would not change. As a result, it may be impracticable or unnecessary for the EHR Module to be re-certified. For example, a hypothetical meaningful use Stage 3 measure for electronic prescribing could be 90% of all prescriptions compared to the 80% proposed for meaningful use Stage 1. In this example, it may be impracticable for a certified EHR Module for electronic prescribing to be recertified if the only thing that has changed is the meaningful use measure. Alternatively, if the certification criteria (and standard(s) associated with those certification criteria) have changed, then it would be necessary for the EHR Module to be re-certified. Therefore, we request public comment on whether there should be circumstances where EHR Modules should not have to be re-certified.

8. Differential Certification

We expect that over time the certification criteria adopted by the Secretary will increase incrementally, much like the approach CMS has proposed for meaningful use objectives and measures. As a result, after Complete EHRs and EHR Modules have been certified to meet the certification criteria associated with meaningful use Stage 1, it may benefit both Complete EHR and EHR Module developers as well as eligible professionals and eligible hospitals if some form of differential certification were available. Differential certification would comprise an ONC–ACB certifying Complete EHRs and/or EHR Modules to the differences between the certification criteria adopted by the Secretary associated with one stage of meaningful use and a subsequent stage of meaningful use. For example, if the Secretary were to adopt 5 new certification criteria to support meaningful use Stage 2 and those were the only additional capabilities that needed to be certified in order for a Complete EHR's certification to be valid again (*i.e.,* all other certification criteria remained the same) for the purposes of meaningful use Stage 2, then the Complete EHR would only have to be tested and certified to those 5 criteria rather than the entire set of certification criteria again. We request public comment on factors that could be considered to determine when differential certification would be appropriate and when it would not. Factors we have considered include, whether the standard(s) associated with a certification criterion or certification criteria change and whether additional certification criteria change in such a way that the new capabilities a Complete EHR or EHR Module would need to provide impact how other previously certified capabilities would perform.

We believe that differential certification could be a valuable and pragmatic approach for the future and that it may further reduce costs for certification and expedite the certification process. We request public comment on whether we should require ONC–ACBs to offer differential certification. In considering this request, we also ask when differential certification should begin. That is, should differential certification be permitted to begin with Complete EHRs and EHR Modules certified under the temporary certification program (*i.e.,* the differences between 2011 and 2013) or after all Complete EHRs and EHR Modules have been certified once under the permanent certification program (*i.e.,* the differences between 2013 and 2015). We ask commenters to consider this distinction because of the differences in rigor that we expect Complete EHRs and EHR Modules will go through to get certified under the permanent certification program.

F. ONC-Approved Accreditor

We propose that prior to submitting an application to the National Coordinator for ONC–ACB status, an organization would need to be accredited by an ONC–AA for certification. We propose a specific accreditation requirement for the permanent certification program in order to conform to industry best practices. We believe that the accreditation of applicants for ONC–ACB status is an important prerequisite for the permanent certification program because it not only introduces additional rigor and objectivity to the certification process, but also provides for increased confidence in, and credibility to, the certifications performed. In that regard, if Complete EHR and/or EHR Module developers believe that an ONC–ACB is not performing up to par, they would be able to notify the ONC–AA (in addition to the National Coordinator, if necessary) in order to expose any potential ONC–ACB performance problems. The ONC–AA would be able to assess whether these reports are valid, determine whether the ONC–ACB has violated any of the terms of its accreditation, and would be able to determine if any action is necessary including notifying the National Coordinator.

1. Requirements for Becoming an ONC–AA

In order to become an ONC–AA, we propose that an accreditation organization must submit a request in writing to the National Coordinator along with the following information to demonstrate its ability to serve as an ONC–AA.

- A detailed description of the accreditation organization's conformance to ISO 17011 and experience evaluating the conformance of certification bodies to Guide 65.
- A detailed description of the accreditation organization's accreditation requirements and how those requirements complement the Principles of Proper Conduct for ONC–ACBs.
- Detailed information on the accreditation organization's procedures that would be used to monitor ONC–ACBs.
- Detailed information, including education and experience, about the key personnel who review certification bodies for accreditation.

• Procedures for responding to, and investigating, complaints against ONC–ACBs.

Once the National Coordinator receives such information, we propose that the National Coordinator would be permitted up to 30 days to review and issue a determination as to whether the accreditation organization has been approved. The National Coordinator would judge ONC–AA applicants on the information they provide, the completeness of their descriptions to the elements listed above, and their overall accreditation experience. The National Coordinator would review submissions for ONC–AA status on a first come first serve basis and would "approve" the first accreditation organization that satisfactorily demonstrated its ability to serve as an ONC–AA. We propose to use the same process for reconsideration of an accreditation organization's approval request as we do for ONC–ACB applicants under the permanent certification program.

2. ONC–AA Ongoing Responsibilities

In order to ensure that our programmatic objectives for the permanent certification program are met, we propose that an ONC–AA would fulfill, at a minimum, the following ongoing responsibilities:

• Maintain conformance with ISO 17011;

• In accrediting certification bodies, verify conformance to, at a minimum, Guide 65;

• Verify that ONC–ACBs are performing surveillance in accordance with their respective annual plans; and

• Review ONC–ACB surveillance results to determine if the results indicate any substantive non-conformance with the terms set by the ONC–AA when it granted the ONC–ACB accreditation.

We request public comment on these and potentially other ongoing responsibilities that we should expressly require an ONC–AA to fulfill.

3. Number of ONC–AAs and Length of Approval

We believe that it is important for all applicants for ONC–ACB status to be accredited by the same ONC–AA. Doing so would provide stability and consistency for all ONC–ACB applicants and a common point of trust for Complete EHR and EHR Module developers. Moreover, Complete EHR and EHR Module developers would obtain a level of assurance that any ONC–ACBs' certification would be equal to another's because all of them had been accredited by the same ONC–AA. As a result, we believe that it is important from a programmatic perspective for there to be only one ONC–AA at a time and therefore we have proposed to only approve one ONC–AA at a time. We request public comment on whether it would be in the best interest of the ONC–ACB applicants and Complete EHR and EHR Module developers to allow for more than one ONC–AA at a time.

Finally, we propose that ONC–AA status would expire after 3 years. Consistent with this proposed expiration of status, we propose to again accept requests for ONC–AA status 120 days before the then current ONC–AA's status is set to expire. We believe that 3 years provides an appropriate balance between precluding other qualified accreditation organizations from requesting ONC–AA status and providing some level of consistency between the ONC–AA and ONC–ACB levels. We request public comment on whether we should extend the length of an ONC–AA's status to a maximum of 5 years before accepting requests for ONC–AA status or shortening the length to 2 years or identify a different period of time.

G. Promoting Participation in the Permanent Certification Program

In the context of the permanent certification program, it is our hope and expectation that multiple organizations will step forward to apply for and receive ONC–ACB status and that these organizations will be able to certify Complete EHRs and EHR Modules in a timely and satisfactory manner. Moreover, given the proposed Medicare and Medicaid EHR Incentive Programs, we believe that organizations will be motivated to become ONC–ACBs to meet the demand for Certified EHR Technology by eligible professionals and eligible hospitals. We do not believe that the requirements set forth in this proposed rule create prohibitively high barriers to market entry for organizations interested in becoming ONC–ACBs. However, we welcome comments on whether this proposed rule does in fact create high barriers to market entry and, if so, how we could revise the proposed requirements to lower those barriers and encourage participation. We provide cost and burden estimates in Section V (Collection of Information Requirements) and Section VI (Regulatory Impact Analysis).

HHS is responsible for the overall implementation and success of the proposed Medicare and Medicaid EHR Incentive Programs and we are acutely aware that without a properly operating certification program the overall success of the EHR incentive programs could be affected. We are concerned about two low probability, but problematic risks—there being no ONC–ACBs authorized under the permanent certification program or only one ONC–ACB that engages in monopolistic behavior. We are therefore interested in public comment regarding potential approaches that could be pursued to stimulate market involvement or remediate this situation if it were to develop, including the possibility for the National Coordinator to establish a temporary ONC-managed certification process ("ONC process") that would include some type of certification review board. This would not be a preferred option, and would come with significant limitations. Congress, in section 3001(c)(5) of the PHSA, did not expressly authorize the National Coordinator or the Secretary to assess and collect fees related to the certification of HIT and subsequently retain and use those fees to administer an ONC process if it were established. We seek public comment on other potential approaches that could be employed to address the two risks identified above.

IV. Response to Comments

Because of the large number of public comments normally received in response to **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble of that document.

V. Collection of Information Requirements

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (PRA), the Office of the Secretary (OS), Department of Health and Human Services, is publishing the following summary of proposed information collection requests for public comment. In order to fairly evaluate an information collection, section 3506(c)(2)(A) of the PRA requires that we solicit comment on the following issues:

1. Whether the information collection is necessary and useful to carry out the proper functions of the agency;

2. The accuracy of the agency's estimate of the information collection burden;

3. The quality, utility, and clarity of the information to be collected; and

4. Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

Under the PRA, the time, effort, and financial resources necessary to meet the information collection requirements referenced in this section are to be considered. We explicitly seek, and will consider, public comment on our assumptions as they relate to the PRA requirements summarized in this section. To comment on the collections of information or to obtain copies of the supporting statements and any related forms for the proposed paperwork collections referenced in this section, e-mail your comment or request, including your address and phone number 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 30 days.

Abstract

The Health Information Technology for Economic and Clinical Health (HITECH) Act, Title XIII of Division A and Title IV of Division B of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111–5), was enacted on February 17, 2009. The HITECH Act amended the Public Health Service Act (PHSA) and created "Title XXX—Health Information Technology and Quality" (Title XXX) to improve health care quality, safety, and efficiency through the promotion of health information technology (HIT) and electronic health information exchange.

Section 3001(c)(5) of the PHSA requires the National Coordinator, in consultation with the Director of the National Institute of Standards and Technology, to "keep or recognize a program or programs for the voluntary certification of health information technology as being in compliance with applicable certification criteria" adopted by the Secretary under section 3004. In this notice of proposed rulemaking implementing section 3001(c)(5), we propose to establish two certification programs, a temporary certification program and a permanent certification program. The establishment of these programs and the proposals therein would require four separate collections of information.

A. Collection of Information #1: Application for ONC–ATCB Status Under the Proposed Temporary Certification Program

Under the proposed temporary certification program, an applicant who voluntarily applies to become an ONC–ATCB would be required to submit an application to the National Coordinator. Based on prior experience, we believe that the testing and certification of Complete EHRs and/or EHR Modules will require expertise that few in the HIT marketplace possess. As a result, we assume that there will be no more than 3 applicants for ONC–ATCB status. We believe that there will be no more than 3 applicants because we have only seen evidence in the press of one organization that has committed to applying and another that has expressed its interest in entering the HIT testing and certification field. The application requirements include the completion of an application form, submission of additional documentation as specified in the application form, and completion of a proficiency examination. However, the proficiency examination is not considered "information" for PRA collection purposes because it falls under the exception to the definition of information at 5 CFR 1320.3(h)(7). We estimate that it will take approximately:

- 10 minutes for an applicant to provide the general identifying information requested in the application (section 1);
- 2 hours to complete the Guide 65 self audit and assemble associated documentation (section 2);
- 2 hours to complete the ISO 17025 self audit and assemble associated documentation (section 3); and
- 20 minutes to review and agree to the "Principles of Proper Conduct for ONC–ATCBs" (section 4).

As discussed in more detail in section VI, we base these estimates on the assumption that qualified applicants for the temporary certification program will already be familiar with the relevant requirements found in the ISO/IEC standards and will have a majority, if not all, of the documentation requested in the application already developed and available before applying for ONC–ATCB status. Therefore, with the exception of completing a proficiency examination, we believe an applicant would only spend time collecting and assembling already developed information to submit with their application rather than developing, for example, a "quality manual" from scratch.

More specifics about the temporary certification program's proposed application requirements and the information that would be collected can be found at § 170.420.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent (ONC–ATCB applicant)	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ATCB Application Section 1	3	1	10/60	.5
ATCB Application Section 2	3	1	2	6
ATCB Application Section 3	3	1	2	6
ATCB Application Section 4	3	1	20/60	1
Total	3	1	4.5	13.5

B. Collection of Information #2: Application for ONC–ACB Status Under the Proposed Permanent Certification Program

Under the proposed permanent certification program, an applicant who voluntarily applies to become an ONC–ACB would be required to submit an application to the National Coordinator. We estimate that there will be no more than 6 applicants for ONC–ACB status under the permanent certification program. While we believe that the business case for entering the HIT market to perform the certification of Complete EHRs and EHR Modules could increase as health IT adoption rates increase, we believe that it is unlikely (given the expertise needed to perform the certification of Complete EHRs and EHR Modules) that the number of applicants would extend into the tens of applicants.

The application requirements include the completion of an application form and submission of additional

documentation as specified in the application form. We estimate that it will take approximately:

- 10 minutes for an applicant to provide the general identifying information requested in the application (section 1);
- 30 minutes to assemble the information necessary to provide documentation of accreditation by an ONC–AA (section 2); and
- 20 minutes to review and agree to the "Principles of Proper Conduct for ONC–ACBs" (section 3).

While we anticipate that very few organizations will have the expertise to test and certify HIT in the temporary certification program, we have proposed to separate these responsibilities in the permanent certification program and in doing so, we believe that several private sector organizations that currently conduct only testing or only certification will be able to enter the HIT testing and certification field. Our burden estimates above are based on the assumption that these existing entities will already be familiar with many of the requirements proposed in this rule and will, for example, already have a majority—if not all—of the documentation requested in the application already developed and available before applying for ONC–ACB status.

Also, while this rule does impose record keeping requirements, we believed that the proposed 5-year requirement is in line with common industry practice and, consequently, would not represent an additional cost to ONC–ACBs as a result of this rule.

More specifics about the permanent certification program's proposed application requirements and the information that would be collected can be found at § 170.502.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent (ONC–ACB applicant)	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ACB Application Section 1	6	1	10/60	1
ACB Application Section 2	6	1	30/60	3
ACB Application Section 3	6	1	20/60	2
Total	6	1	1	6

C. Collection of Information #3: ONC–ATCB and ONC–ACB Collection and Reporting of Information Related To Complete EHR and/or EHR Module Certifications

Under both of the proposed certification programs we propose to require ONC–ATCBs and ONC–ACBs to provide ONC, no less frequently than weekly, a current list of Complete EHRs and/or EHR Modules that have been tested and certified which includes, at a minimum, the vendor name (if applicable), the date certified, the product version, the unique certification number or other specific product identification, and where applicable, the certification criterion or certification criteria to which each EHR Module has been tested and certified.

These specific proposed requirements for the temporary certification program and the permanent certification program can be found at § 170.420 and § 170.520, respectively.

For the purposes of estimating the potential burden, we assume that all of the estimated applicants in the tables above will apply and become ONC–ATCBs and ONC–ACBs under the temporary certification program and permanent certification program, respectively. We also assume, per our requirement specified in the respective Principles of Proper Conduct for ONC–ATCBs and ONC–ACBs, that ONC–ATCBs and ONC–ACBs will report weekly (*i.e.,* respondents will respond 52 times per year). Finally, we assume that the information collections would be accomplished through electronic data collection and storage and that such collection and storage would be part of ONC–ATCBs and ONC–ACBs normal course of business. Therefore, with respect to this proposed collection of information, the estimated burden is limited to the actual electronic reporting of the information to ONC.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
ONC–ATCB Testing and Certification Results	3	52	1	156
ONC–ACB Certification Results	6	52	1	312
Total	9	104	2	468

D. Collection of Information #4: Required Documentation for Requesting ONC-Approved Accreditor Status

Under the permanent certification program we propose to require accreditation organizations who seek to become an ONC–AA to submit information to the National Coordinator to demonstrate their ability to accredit certification bodies that would eventually apply for ONC–ACB status. We assume that there will only be two accreditation organizations that will prepare and submit the information sought by the National Coordinator. We believe this will be the case based on our knowledge of the HIT market and consultations with NIST related to the existence of potential accreditation organizations that could seek the National Coordinator's approval.

We have included our estimates of the approximate time commitments associated with documenting each requirement that must be included in an accreditation organization's submission:

- 20 minutes for an accreditation organization to provide a detailed description of the accreditation

organization's conformance to ISO 17011 and experience evaluating the conformance of certification bodies to Guide 65;

- 20 minutes for an accreditation organization to provide a detailed description of the accreditation organization's accreditation requirements and how the requirements complement the Principles of Proper Conduct for ONC–ACBs;
- 5 minutes for an accreditation organization to provide a copy of the procedures that would be used to monitor ONC–ACBs;
- 10 minutes for an accreditation organization to provide detailed information, including education and experience, about the key personnel who review certification bodies for accreditation; and
- 5 minutes for an accreditation organization to provide a copy of the procedures for responding to, and investigating, complaints against ONC–ACBs.

These specific proposed requirements for the permanent certification program can be found at § 170.503.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent (ONC–AA requestor)	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Documentation of Conformance to ISO 17011 and Guide 65 Experience	2	1	20/60	.67
Description of Accreditation Requirements and how they Complement the Principles of Proper Conduct for ONC–ACBs	2	1	20/60	.67
Documentation of Monitoring Procedures	2	1	5/60	.165
Documentation of Key Personnel	2	1	10/60	.33
Documentation of Procedures for Responding to and Investigating Complaints	2	1	5/60	.165
Total	2	1	1	2

As required by § 3504(h) of the Paperwork Reduction Act, we have submitted a copy of this document to the Office of Management and Budget (OMB) for its review of these information collection requirements.

VI. Regulatory Impact Analysis

A. Introduction

We have examined the impacts of this proposed rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993, as further amended), the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any one year). Based on the analysis of costs and benefits that follows, we have determined that this proposed rule, including both the temporary certification program and permanent certification program, is not an economically significant rule because we estimate that the overall costs and benefits associated with the combination of the temporary and permanent certification programs as well as the costs associated with the testing and certification of Complete EHRs and EHR Modules under both certification programs will be less than $100 million per year. Nevertheless, because of the public interest in this proposed rule, we have prepared an RIA that to the best of our ability presents the costs and benefits of the proposed rule broken down by each proposed certification program. We request comments on the economic analyses provided in this proposed rule.

B. Why This Rule is Needed?

As stated in earlier sections of this proposed rule, section 3001(c)(5) of the PHSA provides the National Coordinator with the authority to establish a certification program or programs for the voluntary certification of HIT. This proposed rule is needed to outline the processes by which the National Coordinator would exercise this authority to authorize certain organizations to test and certify Complete EHRs and/or EHR Modules. Once certified, Complete EHRs and EHR Modules would be able to be used by eligible professionals and eligible hospitals as, or be combined to create, Certified EHR Technology. Eligible professionals and eligible hospitals who seek to qualify for incentive payments under the Medicare and Medicaid EHR Incentive Programs are required by statute to use Certified EHR Technology.

C. Executive Order 12866—Regulatory Planning and Review Analyses for the Proposed Temporary and Permanent Certification Programs

As required by Executive Order 12866, we have examined the economic implications of this proposed rule as it relates to our proposed temporary and permanent certification programs. Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 12866 classifies a regulation as significant if it meets any one of a number of specified conditions, including having an annual effect on the economy of $100 million, or in a material way adversely affecting the economy, a sector of the economy, competition, or jobs. While this rule is therefore not "economically significant," as defined by Executive Order 12866, OMB has determined that this rule constitutes a "significant regulatory action" as defined by Executive Order 12866 because it raises novel legal and policy issues.

Throughout the following analyses we identify specific actions or issues for which we expressly ask for comments. The public, however, is invited to comment on any and all elements of the analyses and on all underlying assumptions.

1. Temporary Certification Program Estimated Costs

a. Application Process for ONC–ATCB Status

i. Applicant Costs

As mentioned above, we believe that the testing and certification of Complete EHRs and/or EHR Modules will require expertise that not many in the HIT marketplace currently possess. Therefore, we assume that there will be no more than 3 applicants for ONC–ATCB status. We believe that there will be no more than three applicants because we have only seen evidence in the press of one organization that has committed to applying and another that has expressed its interest in entering the HIT testing and certification field.

As part of the temporary certification program, an applicant would be required to submit an application and complete a proficiency exam. We do not believe that there will be an appreciable difference in the time commitment an applicant for ONC–ATCB status will have to make based on the type of authorization it seeks (*i.e.,* we believe the application process and time commitment will be the same for applicants seeking authorization to conduct either the testing and certification of Complete EHRs or EHR Modules). Further, we assume that qualified applicants will have reviewed the relevant requirements found in the ISO/IEC standards and will have a majority, if not all, of the documentation requested in the application already developed and available before applying for ONC–ATCB status. Without having such documentation (including policies and procedures) we believe that it would be difficult for an applicant to operate a legitimate testing and certification program. Therefore, with the exception of completing a proficiency examination, we believe an applicant would only spend time collecting and assembling already developed information to submit with their application rather than developing, for example, a "quality manual" from scratch.

Based on our assumptions and consultations with NIST, we anticipate that it will take an applicant approximately 28.5 hours to complete the application and submit the requested documentation. Our estimate includes the time discussed above in our collection of information section and approximately up to 24 hours to complete the proficiency examination—8 hours (1 full work day) to complete section 1 (demonstration of technical expertise related to Complete EHRs and/or EHR Modules); 6 hours to complete section 2 (demonstration of test tool identification); and 10 hours to complete section 3 (demonstration of proper use of test tools and understanding of test results). Moreover, after consulting with NIST we assume that:

(1) An employee equivalent to the Federal Salary Classification of GS–9 Step 1 could provide the general information requested in the application and accomplish the paperwork duties associated with the application;

(2) An employee equivalent to the Federal Salary Classification of GS–15 Step 1 would be responsible for conducting the self audits and agreeing to the "Principles of Proper Conduct for ONC–ATCBs"; and

(3) An employee or employees equivalent to the Federal Salary Classification of GS–15 Step 1 would be responsible for completing the proficiency examination.

We have taken these employee assumptions and utilized the corresponding employee hourly rates for the locality pay area of Washington, DC as published by the U.S. Office of Personnel Management (OPM), to calculate our cost estimates. We have also calculated the costs of an employee's benefits while completing the application. We have calculated these costs by assuming that an applicant expends thirty-six percent (36%) of an employee's hourly wage on benefits for the employee. We have concluded that a 36% expenditure on benefits is an appropriate estimate because it is the routine percentage used by HHS for contract cost estimates. Our calculations are expressed in Tables 1 and 2 below.

TABLE 1—TEMPORARY CERTIFICATION PROGRAM: COST TO APPLICANTS TO APPLY TO BECOME AN ONC–ATCB

Proposed requirement	Employee equivalent	Burden hours	Employee hourly wage rate	Cost of employee benefits per hour	Cost per applicant
General Identifying Information	GS–9 Step 1	10/60	$22.39	$8.06	$5.07
Self Audits and Documentation	GS–15 Step 1	4	59.30	21.35	322.60
Principles of Proper Conduct	GS–15 Step 1	20/60	59.30	21.35	26.89
Proficiency Examination	GS–15 Step 1	24	59.30	21.35	1,935.60
Total Cost Per Application					2,290.16

TABLE 2—TEMPORARY CERTIFICATION PROGRAM: TOTAL COST OF APPLICATION PROCESS

Anticipated number of applicants	Cost of application per applicant ($)	Total cost estimate ($)
3	$2,290.16	$6,870.48

We based our cost estimates on the amount of applicants that we believe will apply over the life of the temporary certification program. We assume that all applicants will apply during the first year of the program and thus all application costs should be attributed to the first year of the program. However, based on our projection that the temporary certification program will last approximately two years and that one or two applicants may choose to apply in the second year, the annualized cost of the application process would be $3,435. We invite comments on our estimated number of applicants and on the costs associated with the proposed application process under the temporary certification program.

ii. Costs to the Federal Government

We have estimated the cost to develop the ONC–ATCB application, including the development and administration of

the proficiency examination to be $33,079 based on the 473 hours we believe it will take to develop the application, prepare standard operating procedures as well as create the requisite pools of questions for the proficiency examinations. More specifically, we believe it will take 360 hours of work of a Federal Salary Classification GS–14 Step 1 employee located in Washington, DC to develop the proficiency examination, 80 hours of work by the same employee to develop the standard operation procedures and the actual application, and 33 hours to score all the exams and handle related administrative tasks.

We also anticipate that there would be costs associated with reviewing applications under the proposed temporary certification program. We believe that a GS–15 Step 1 employee would review the applications and the National Coordinator (or designated representative) would issue final decisions on all applications. We anticipate that it would take approximately 40 hours to review and reach a final decision on each application. This estimate assumes a satisfactory application (*i.e.,* no formal deficiency notifications) and includes the time necessary to verify the information in each application, assess the results of the proficiency examination, and prepare a briefing for the National Coordinator. We estimate the cost for the application review process to be $10,140.

As a result, we estimate the Federal government's overall cost of administering the entire application process, for the length of the temporary certification program, at approximately $43,219. Based on our projection that the temporary certification program will last approximately two years and that one or two applicants may choose to apply in the second year, the annualized cost to the Federal government for administering the entire application process would be $21,610.

As previously noted, we will also post the names of applicants granted ONC–ATCB status on our Web site. We believe that there would be minimal cost associated with this action and have calculated the potential cost to be approximately $156 on an annual basis for posting and maintaining the information on our Web site (a maximum of 3 hours of work for a Federal Salary Classification GS–12 Step 1 employee located in Washington, DC).

b. Temporary Certification Program: Testing and Certification of Complete EHRs and EHR Modules

Section 3001(c)(5)(A) of the PHSA indicates that certification is a voluntary act; however, due to the fact that the Medicare and Medicaid EHR Incentive Programs require eligible professionals and eligible hospitals to use Certified EHR Technology in order to qualify for incentive payments, we anticipate that a significant portion of Complete EHR and EHR Module developers will seek to have their HIT tested and certified.

In table 3 below, we estimate the costs for Complete EHRs and EHR Modules to be tested and certified under the temporary certification program. As discussed in the HIT Standards and Certification Criteria interim final rule, and to remain consistent with our previous estimates (75 FR 2039), we believe that approximately 93 commercially-developed and open source Complete EHRs and 50 EHR Modules will be tested and certified under our proposed temporary certification program. In addition to these costs, we also take into account what we believe will be the costs incurred by a small percentage of eligible professionals and eligible hospitals who themselves will incur the costs associated with the testing and certification of their self-developed Complete EHR or EHR Module.

With respect to the potential for eligible professionals to seek testing and certification for a self-developed Complete EHR or EHR Module, DesRoches approximates that only 5% of physicians are in large practices of over 50 doctors.[3] Of these large practices, 17% use an "advanced EHR system" that could potentially be tested and certified if it were self-developed (we assume that smaller physician practices do not have the resources to self-develop a Complete EHR or EHR Module). We are unaware of any reliable data on the number of large physicians groups who may have a self-developed Complete EHR or EHR Module for which they would seek to be tested and certified. As a result, we request public comment on what this percentage may be and offer the following estimate based on currently available data. We believe that the total number of eligible professionals in larger practices who both possess and would seek to have a self-developed Complete EHR or EHR Module tested and certified will be low—no more than 10%. By taking CMS's estimate of approximately 450,000 eligible professionals (75 FR 1960) we multiply through by the numbers above ($450{,}000 \times .05 \times .17 \times .10$) and then divide by a practice size of at least 50 which yields approximately 8 self-developed Complete EHRs or EHR Modules designed for an ambulatory setting that could be submitted for testing and certification.

With respect to eligible hospitals, similar to eligible professionals, we believe that only large eligible hospitals would be in a position to have self-developed a Complete EHR or EHR Module and seek to have it tested and certified. Again, we are unaware of any reliable data on the number of eligible hospitals who may have a self-developed Complete EHR or EHR Module for which they would seek to be tested and certified. As a result, we request public comment on what this percentage may be and offer the following estimate based on currently available data. We estimate that 10% of large eligible hospitals have a self-developed Complete EHR or EHR Module and that all of theses hospitals would seek to have it tested and certified. Extrapolating from the AHA survey data on hospital adoption described by Jha *et al.* in the New England Journal of Medicine, there would be only about 300 large hospitals with advanced systems and, as a result, we believe approximately 30 that would be in a position to seek to have a self-developed Complete EHR or EHR Module tested and certified.[4]

We believe that our estimates for eligible professionals and eligible hospitals are generous and that a good portion of the eligible professionals and eligible hospitals who would likely seek to qualify for incentive payments with self-developed Complete EHRs or EHR Modules would only do so for meaningful use Stage 1. After meaningful use Stage 1 we anticipate that the number of eligible professionals and eligible hospitals who would incur the costs of testing and certification themselves will go down because the effort involved to maintain a Complete EHR or EHR Module may be time and cost prohibitive as the Secretary continues to adopt additional certification criteria to support future stages of meaningful use.

Due to the fact that an ONC–ATCB will be responsible for testing and certifying Complete EHRs and/or EHR Modules, we have combined the costs

[3] DesRoches, CM *et al.* Electronic Health Records in Ambulatory Care—A National Survey of Physicians New England Journal of Medicine July 2008; 359:50–60.

[4] Jha, AK *et al.* Use of Electronic Health Records in U.S. Hospitals. New England Journal of Medicine March 2009; 360:1628–38.

for testing and certification because we believe they would be difficult to independently estimate. Our cost range for the testing and certification of Complete EHRs and EHR Modules includes consideration of how the testing and certification will be conducted (*i.e.,* by remote testing and certification, on-site testing and certification, or at the ONC–ATCB and for the complexity of an EHR Module). To illustrate, we assume that the on-site testing and certification of a Complete EHR and the testing and certification of a complex EHR Module would both be at the high end of their respective cost estimates (*i.e.,* $50,000 and $35,000).

On July 14, 2009, CCHIT testified in front of the HIT Policy Committee on the topic of EHR certification, including the certification of EHR Modules. CCHIT estimated that "EHR-comprehensive" (Complete EHRs) testing and certification would range from approximately $30,000 to $50,000. CCHIT also estimated that the testing and certification of EHR Modules would range from approximately $5,000 to $35,000 depending on the scope of the testing and certification. We believe that these estimates provide a reasonable foundation and have used them for our cost estimates. However, we assume that competition in the testing and certification market will reduce the costs of testing and certification as estimated by CCHIT but we are unable to provide a reliable estimate at this time of what the potential reduction in costs might be. Please also note, that because we have limited data on the number of self-developed Complete EHRs and EHR Modules that will be presented for testing and certification, we cannot accurately separate the costs for the testing and certification of self-developed Complete EHRs from self-developed EHR Modules. As a result, we have estimated the lowest possible cost by assuming that all of the estimated self-developed HIT that will be presented for testing and certification will be EHR Modules and that they would be tested and certified at the lowest estimated cost ($5,000 each) and then we estimated the highest possible cost by assuming that all of the estimated self-developed HIT that will be presented for testing and certification will be Complete EHRs and that they would be tested and certified at the highest estimated cost ($50,000 each). Our cost estimates are expressed in Table 3 below.

TABLE 3—TEMPORARY CERTIFICATION PROGRAM: ESTIMATED COSTS FOR TESTING AND CERTIFICATION

Type	Number tested and certified	Cost per complete EHR/EHR module ($M)			Total cost for all complete EHRs/EHR modules over 3-year period ($M)		
		Low	High	Mid-point	Low	High	Mid-point
Commercial/Open Source Complete EHR	93	$0.03	$0.05	$0.04	$2.79	$4.65	$3.72
Commercial/Open Source EHR Module	50	0.005	0.035	0.02	0.25	1.75	1
Self-Developed Complete EHRs and EHR Modules	38	0.005	0.05	0.028	0.19	1.90	1.06
Total	181				3.23	8.30	5.78

Our estimates cover anticipated testing and certification costs under the temporary certification program from 2010 through some portion of 2012 as we expect the permanent certification program to be operational by 2012. However, because we cannot predict the exact date at which the temporary certification program will sunset (and the date at which ONC–ATCBs will finish any remaining tests and certifications in their queue), we believe that it is appropriate to attribute all 2012 costs for testing and certification to both the temporary certification program and the permanent certification program to err on the side of overestimating rather than underestimating the costs of our proposals. Therefore, we also attribute the 2012 testing and certification costs associated with certification criteria adopted by the Secretary to support meaningful use Stage 1 in section C.2 below.

Consistent with our estimates in the HIT Standards and Certification Criteria interim final rule (75 FR 2041) about when Complete EHRs and EHR Modules will be prepared for testing and certification to the certification criteria adopted by the Secretary for meaningful use Stage 1, we anticipate that they will be tested and certified in the same proportions. Therefore, we believe that of the total number of Complete EHRs and EHR Modules that we have estimated (commercial, open source, and self-developed), 45% will be tested and certified in 2010, 40% will be tested and certified in 2011, and 15% will be tested and certified in 2012. Table 4 below represents this proportional distribution of the estimated costs we calculated for the testing and certification of Complete EHRs and EHR Modules to the certification criteria adopted to support meaningful use Stage 1 under the temporary certification program as expressed in Table 3 above.

TABLE 4—DISTRIBUTED TOTAL COSTS FOR THE TESTING AND CERTIFICATION OF COMPLETE EHRS AND EHR MODULES TO STAGE 1 MU BY YEAR (3-YEAR PERIOD)—TOTALS ROUNDED

Year	Ratio (percent)	Total low cost estimate ($M)	Total high cost estimate ($M)	Total average cost estimate ($M)
2010	45	$1.45	$3.74	$2.60
2011	40	1.29	3.32	2.31
2012	15	0.49	1.24	0.87
3-Year Totals		3.23	8.30	5.78

2. Permanent Certification Program Estimated Costs

a. Request for ONC–AA Status

i. Cost of Submission for Requesting ONC–AA Status

As noted in the collection of information section, we believe that only two accreditation organizations will prepare and submit the information sought by the National Coordinator. Additionally, as noted in the collection of information section, we estimate that it will take 1 hour to prepare and submit a request for ONC–AA status. We believe that an employee equivalent to the Federal Salary Classification of GS–15 Step 1 would be responsible for preparing and submitting the required information.

We have utilized the corresponding employee hourly rate for the locality pay area of Washington, DC, as published by the OPM, to calculate our cost estimates. We have also calculated the costs of an employee's benefits while preparing and submitting the required ONC–AA documentation. We have calculated these costs by assuming that an accreditation organization expends thirty-six percent (36%) of an employee's hourly wage on benefits for the employee. We have concluded that a 36% expenditure on benefits is an appropriate estimate because it is the routine percentage used by HHS for contract cost estimates. Our cost estimates are expressed in the Table 5 below.

TABLE 5—PERMANENT CERTIFICATION PROGRAM: COST TO ACCREDITATION ORGANIZATIONS TO SUBMIT THE INFORMATION REQUIRED TO BECOME AN ONC–AA

Proposed requirement	Employee equivalent	Burden hours	Hourly wage rate	Cost of employee benefits per hour	Total cost per applicant
Submission of Request for ONC–AA Status.	GS–15 Step 1	1	$59.30	$21.35	$80.65

Using our estimates above, we believe that the cost to submit the information required to become an ONC–AA will be $81 and the total cost for the two accreditation organizations that we estimate will submit requests for ONC–AA status will be $161. Based on our estimate of two accreditation organizations submitting the required documentation to be considered for ONC–AA status and on our proposal that we would seek to select an ONC–AA every three years, we estimate the annualized cost of this process to be $54. We welcome comments on our estimates for the number of accreditation organizations that will request ONC–AA status and our cost estimates.

ii. Cost to the Federal Government

We anticipate that there will be costs associated with reviewing the information provided by accreditation organizations requesting to become an ONC–AA under the proposed permanent certification program. We believe that a GS–15 Step 1 employee would review the submissions and the National Coordinator (or designated representative) would issue final decisions on all submissions. We anticipate that it would take 10 hours to review and reach a final decision on each submission. This estimate assumes a satisfactory submission (*i.e.,* no formal deficiency notifications) and includes the time necessary to verify the information in each submission and prepare a briefing for the National Coordinator. We estimate the Federal government's overall cost to review the submissions and select an ONC–AA to be $1,732. Based on our estimate of two accreditation organizations submitting the required documentation to be considered for ONC–AA status and on our proposal that we would seek to select an ONC–AA every three years, the annualized cost to the Federal government for reviewing the submissions for ONC–AA status would be $577. If we notify the public of the selection of the ONC–AA by posting the information on our Web site or by issuing a press release, we believe that we would incur negligible costs from these actions.

b. Application Process for ONC–ACB Status and Renewal

i. Applicant Costs and ONC–ACB Renewal Costs

Similar to the temporary certification program, we propose that an applicant for ONC–ACB status would be required to submit an application. However, unlike the temporary certification program, we have proposed that applicants for ONC–ACB status must be accredited in order to be a qualified ONC–ACB applicant. We estimate that there will be 6 applicants for ONC–ACB status under the permanent certification program and that those 6 applicants will first seek and become accredited by an ONC–AA. Because accreditation would include a demonstration of conformance to Guide 65 for all organizations that seek to be accredited, we do not believe that there will be a difference in the cost of accreditation for organizations who seek to become ONC–ACBs for EHR Modules versus ONC–ACBs for Complete EHRs.

Based on our consultations with NIST, we estimate that it would take approximately 2 to 5 days for an ONC–AA to complete the accreditation process at a cost of $20,000. This cost includes an estimated $5,000 administrative fee and an estimated $15,000 fee for the accreditation assessment. We expect that the accreditation renewal process will occur once between 2012 and 2016 for each ONC–ACB and assume that the accreditation renewal process will be less onerous than the initial accreditation process because the ONC–ACB would presumably apply to the same ONC–AA and that the ONC–AA would rely on prior information and not conduct a completely new review of an ONC–ACB. We believe this is a reasonable assumption because the ONC–AA will likely already be familiar with the ONC–ACB and have its documentation on file and we do not expect that the ONC–ACB would make such drastic changes to its policies or procedures which would necessitate a lengthy assessment of their competency by an ONC–AA. Accordingly, we estimate that accreditation renewal would take no more than 3 days and would cost no more than $10,000. These estimated costs are expressed in Table 7 below.

After becoming accredited by an ONC–AA, an applicant for ONC–ACB status would incur minimal costs to prepare and submit an application to the National Coordinator. As noted in the collection of information section, we believe that it will take 10 minutes to provide the general information requested in the application, 30 minutes to assemble the information necessary to provide documentation of accreditation by an ONC–AA, and 20 minutes to

review and agree to the "Principles of Proper Conduct for ONC–ACBs."

Based on our consultations with NIST, we believe that an employee equivalent to the Federal Salary Classification of GS–9 Step 1 could provide the required general identifying information and documentation of accreditation status. We believe that an employee equivalent to the Federal Salary Classification of GS–15 Step 1 would be responsible for reviewing and agreeing to the "Principles of Proper Conduct for ONC–ACBs." We have taken these employee assumptions and utilized the corresponding employee hourly rates for the locality pay area of Washington, DC, as published by the OPM, to calculate our cost estimates. We have also calculated the costs of an employee's benefits while completing the application. We have calculated these costs by assuming that an applicant expends thirty-six percent (36%) of an employee's hourly wage on benefits for the employee. We have concluded that a 36% expenditure on benefits is an appropriate estimate because it is the routine percentage used by HHS for contract cost estimates. Our cost estimates are expressed in Table 6 below.

TABLE 6—PERMANENT CERTIFICATION PROGRAM: COST TO APPLICANTS TO APPLY TO BECOME ONC–ACBS AND COST FOR ONC–ACBS TO APPLY FOR STATUS RENEWAL

Proposed requirement	Emloyee equivalent	Burden hours	Employee hourly wage rate	Cost of employee benefits per hour	Cost per applicant
General Identifying Information	GS–9 Step 1	10/60	$22.39	$8.06	$5.07
Documentation of Accreditation	GS–9 Step 1	30/60	22.39	8.06	15.23
Principles of Proper Conduct	GS–15 Step 1	20/60	59.30	21.35	26.89
Total Cost Per Applicant					47.19

We have estimated the applicant costs and ONC–ACB renewal costs through 2016, but no further, because we believe that it is premature to assume how the meaningful use requirements post-Stage 3 will change after the downward payment adjustments for eligible professionals and eligible hospitals become effective (*e.g.,* the incentive payment adjustments specified at section 1848(a)(7) of the SSA for eligible professionals) and what impact, if any, those potential changes will have on the permanent certification program. Using our estimates above, we believe that the average initial cost for an applicant to become accredited and apply to be an ONC–ACB will be approximately $20,047 and the total cost for all 6 applicants will be approximately $120,283. We estimate that between 2012 and 2016 that all applicants will renew their ONC–ACB status twice and their accreditation once. We assume that the costs for an ONC–ACB to renew its status with the National Coordinator will be similar in burden to its initial application. Furthermore, we believe that the average cost for an ONC–ACB to renew its accreditation and to apply for renewal of its ONC–ACB status twice would be approximately $10,094 and the total renewal costs for all ONC–ACBs will be approximately $60,566. We estimate that the total costs of the accreditation, application and renewal processes under the proposed permanent certification program between 2012 and 2016 would be approximately $30,142 per applicant/ONC–ACB and approximately $180,849 for all applicants/ONC–ACBs. Based on our cost estimate timeframe of 5 years (2012 through 2016), the annualized cost would be $36,170.

TABLE 7—PERMANENT CERTIFICATION PROGRAM: TOTAL COSTS OF CERTIFICATION ACCREDITATION, APPLYING FOR ONC CERTIFICATION AUTHORIZATION, AND ACCREDITATION AND AUTHORIZATION RENEWAL BETWEEN 2012 AND 2016

Anticipated number of applicants	Cost of accreditation per applicant	Cost to apply for certification authorization per applicant	Cost to renew accreditation per applicant	Cost to renew ONC–ACB status twice	Total cost estimate per applicant/ONC–ACB
6	$20,000	$47.19	$10,000	$94.38	$30,141.57
Total Cost of Accreditation, Application and Renewal					180,849.42

We invite comments on the number of entities that will seek to become accredited for certification under our proposed permanent certification program and the costs associated with accreditation, applying for ONC–ACB status, the renewal costs for both, and the timeframe we used for estimating costs.

ii. Costs to the Federal Government

We estimate the cost to develop the ONC–ACB application to be $350 based on the 5 hours of work we believe it would take a Federal Salary Classification GS–14 Step 1 employee located in Washington, DC to develop the application form. We also anticipate that there would be costs associated with reviewing applications under the proposed permanent certification program. We believe that a GS–15 Step 1 employee would review the applications and the National Coordinator (or designated representative) would issue final decisions on all applications. We anticipate that it would take approximately 20 hours to review and reach a final decision on each application. This estimate assumes a satisfactory application (*i.e.,* no formal deficiency notifications) and includes the time necessary to verify the information in each application and prepare a briefing for the National Coordinator. We estimate the cost for the application review process to be $10,392. As a result, we estimate the

Federal government's overall cost of administering the entire application process at approximately $10,742. Based on our cost estimate timeframe of 5 years (2012 through 2016), the annualized cost to the Federal government would be $2,148.

As previously noted, we would also post the names of applicants granted ONC–ACB status on our Web site. We believe that there would be minimal cost associated with this action and have calculated the potential cost to be approximately $312 on an annual basis for posting and maintaining the information on our Web site (a maximum of 6 hours of work for a Federal Salary Classification GS–12 Step 1 employee located in Washington, DC).

c. Permanent Certification Program: Testing and Certification of Complete EHRs and EHR Modules

As with the temporary certification program, we estimate below the costs that Complete EHR and EHR Module developers (commercial, open source, self-developed) will incur to have their HIT tested and certified between 2012 and 2016. As previously stated in our discussion of the appropriate timeframe for estimating costs for the ONC–ACB application process, we estimate costs through 2016, but no further, because we believe that it is premature to assume how the meaningful use requirements post-Stage 3 will change after the Medicare downward payment adjustments become effective. Although CMS has proposed to promulgate updates to the meaningful use stages every 2 years, we assume that there could be more time between stages (*i.e.,* greater than 2 years) in years post-meaningful use Stage 3 based evaluations of earlier meaningful use stages, public feedback, and other factors, which would affect when Complete EHRs and/or EHR Modules would need to be recertified. However, we do expect meaningful use requirements between 2012 and 2016, which would encompass both Stage 2 and Stage 3 requirements to become more demanding and iterate every 2 years. Therefore, we can safely assume that Complete EHRs and EHR Modules will need to be tested and certified twice during this time period.

Even though under the permanent certification program the costs for testing and certification could presumably be attributed to different entities (*i.e.,* testing costs to a NVLAP-accredited testing laboratory and certification costs to an ONC–ACB) we have included them together in an effort to reflect the overall effect of this rulemaking. As previously mentioned, we cannot predict a specific date for when the temporary certification program will sunset, and thus when ONC–ATCBs will finish testing and certifying Complete EHRs and/or EHR Modules in their queue. Therefore, as similarly calculated for the temporary certification program costs, we have estimated and attributed to the permanent certification program's costs the 2012 cost for testing and certifying 15% of the prior number of Complete EHRs and EHR Modules to associated meaningful use Stage 1 certification criteria. We have done this to account for the possibility that the ONC–ACBs could be authorized as soon as late 2011 and thus all testing and certification for 2012 would take place solely under the auspices of the permanent certification program. This 15% 2012 cost for testing and certification is represented by 15% of the number of each type of Complete EHR and EHR Module we previously estimated would be tested and certified to Meaningful Use Stage 1 multiplied by the appropriate estimated costs for testing and certification. These cost estimates are expressed in Table 8 below.

TABLE 8—PERMANENT CERTIFICATION PROGRAM: ESTIMATED 2012 COSTS FOR TESTING & CERTIFICATION ASSOCIATED WITH MEANINGFUL USE STAGE 1

Type	Number tested and certified	Cost per complete EHR/EHR module ($M)			Total cost for all complete EHRs/EHR modules over 3-year period ($M)		
		Low	High	Mid-point	Low	High	Mid-point
Commercial/Open Source Complete EHR	14	$0.03	$0.05	$0.04	$0.42	$0.70	$0.56
Commercial/Open Source EHR Module	5	0.005	0.035	0.02	0.025	0.18	0.1
Self-Developed Complete EHRs and EHR Modules	7	0.005	0.05	0.028	0.035	0.35	0.2
Total	26				0.48	1.23	0.86

In creating Tables 9A and 9B below, we make the following assumptions:

- The cost for testing and certification will remain the same in the permanent certification program as they were in the temporary certification program even with the additional requirement of surveillance on the part of ONC–ACBs (which we would expect to be included in the cost they charge Complete EHR and/or EHR Module developers). We believe this is a reasonable assumption because of the low and high ranges we have estimated.
- That testing and certification costs will be unevenly distributed across subsequent years. We assume that there will be an increase in the year preceding the next stage of meaningful use and a decline between stages. We base this assumption on the proposal CMS has made to make the reporting period for meaningful use stages as long as a full year which would consequently require that eligible professionals and eligible hospitals have HIT that meets the definition of Certified EHR Technology prior to the start of their next reporting period in order to complete a full year reporting period with Certified EHR Technology. We assumed the ratios discussed in the temporary certification program because the impetus for an increase to occur is not same for meaningful use Stage 1 as it will be for later meaningful use stages. We assumed a curve that was relatively flat for 2010 and 2011 which subsequently tapered down in 2012 because of the flexibility provided by the proposed reporting period for meaningful use Stage 1 (3 to 6 months). This shorter reporting period makes it possible for an eligible professional or eligible hospital to adopt Certified EHR Technology during the first half of their first meaningful use Stage 1 reporting year and still receive an incentive payment if they satisfy the reporting requirements. With respect to the peak years for when testing and certification costs would

most likely occur, we assume that those peak years will be 2012 and 2014, the years preceding meaningful use Stages 2 and 3, respectively. We assume that an increase would encompass 85% of the Complete EHRs and EHR Modules to be certified, which would represent most, if not all, previously certified Complete EHRs and EHR Modules and that the remaining 15% of testing and certification costs for 2013 would likely represent new EHR Module entrants to the HIT marketplace and Complete EHR or EHR Module developers who were late to get certified.

• As indicated in the HIT Standards and Certification Criteria interim final rule, we assume that Complete EHR developers would continue to consolidate due to mergers and acquisitions and that this consolidation would occur at a rate of 5% between meaningful use stages. Therefore, we believe that fewer Complete EHRs will need to be tested and certified prior to each meaningful use stage.

• Conversely, we assume that the number of EHR Modules developed that would need to be tested and certified to meet associated meaningful use Stage 2 (2013) certification criteria and beyond will grow at a rate of 20% between meaningful use stages (*i.e.,* based on our prior estimate of 50 EHR Modules between 2010 and 2012, there would be 10 new modules developed during 2012 and during meaningful use Stage 2 to meet certification criteria associated with meaningful use Stage 2). We believe our growth rate is reasonable because the cost barrier for EHR Modules to enter the market would be much less than a Complete EHR. Coupled with the ability of small or start-up HIT developers to enter the market we believe that the potential of EHR Modules would lead to a constant stream of new entrants year after year.

• The number of eligible professionals and eligible hospitals that incur the testing and certification costs for their self-developed Complete EHRs and/or EHR Modules for meaningful use Stage 2 will drop by 50% in 2012 and another 25% in 2014 and level out after 2014 due to our assumption, that by 2014, and the impending start of meaningful use Stage 3, that all of the eligible professionals and eligible hospitals who still have a self-developed Complete EHR or EHR Module are likely to maintain their HIT rather than switch to a commercial product.

Table 9A illustrates the overall costs for testing and certification associated with meaningful use Stage 2. We have factored in the assumed 5% reduction in the number of Complete EHRs and 20% increase in EHR Modules presented for testing and certification to meet the certification criteria associated with meaningful use Stage 2. That is, we believe there will be approximately 88 unique Complete EHRs and 60 EHR Modules that will be tested and certified. We also separately factor in the 50% reduction to the number of self-developed Complete EHRs and EHR Modules that will be tested and certified to meet the certification criteria associated with meaningful use Stage 2.

TABLE 9A—PERMANENT CERTIFICATION PROGRAM: ESTIMATED OVERALL COSTS FOR TESTING & CERTIFICATION ASSOCIATED WITH MEANINGFUL USE STAGE 2

Type	Number tested and certified	Cost per complete EHR/EHR module ($M)			Total cost for all complete EHRs/EHR modules over 3-year period ($M)		
		Low	High	Mid-point	Low	High	Mid-point
Commercial/Open Source Complete EHR	88	$0.03	$0.05	$0.04	$2.64	$4.40	$3.52
Commercial/Open Source EHR Module	60	0.005	0.035	0.02	0.30	2.10	1.2
Self-Developed Complete EHRs and EHR Modules	19	0.005	0.05	0.028	0.095	0.95	0.53
Total	167				3.04	7.45	5.25

Table 9B illustrates the overall costs for testing and certification associated with meaningful use Stage 3. We have again factored in the assumed 5% reduction in the number of Complete EHRs and 20% increase in EHR Modules presented for testing and certification to meet the certification criteria associated with meaningful use Stage 3. That is, we believe there will be approximately 84 unique Complete EHRs and 72 EHR Modules that will be tested and certified. We also separately factor in the 25% reduction to the number of self-developed Complete EHRs and EHR Modules that will be tested and certified to meet the certification criteria associated with meaningful use Stage 3.

TABLE 9B—PERMANENT CERTIFICATION PROGRAM: ESTIMATED OVERALL COSTS FOR TESTING & CERTIFICATION ASSOCIATED WITH MEANINGFUL USE STAGE 3

Type	Number tested and certified	Cost per complete EHR/EHR module ($M)			Total cost for all complete EHRs/EHR modules over 3-year period ($M)		
		Low	High	Mid-point	Low	High	Mid-point
Commercial/Open Source Complete EHR	84	$0.03	$0.05	$0.04	$2.52	$4.20	$3.36
Commercial/Open Source EHR Module	72	0.005	0.035	0.02	0.36	2.52	1.44
Self-Developed Complete EHRs and EHR Modules	14	0.005	0.05	0.028	0.07	0.70	0.39
Total	170				2.95	7.42	5.19

Finally, Table 9C illustrates the 85% and 15% testing and certification cost distributions we estimate would be attributable to meaningful use Stages 2 and 3 (*i.e.,* between 2012 and 2016) under the permanent certification program. Additionally, we assume that 100% of self-developed Complete EHRs and EHR Modules would be certified in year that precedes the next meaningful use stage (*i.e.,* 2012 and 2014) because eligible professionals and eligible hospitals who remain self-developers will be motivated to ensure that their HIT can meet the definition of Certified EHR Technology prior to the beginning of a new meaningful use stage in order to avoid missing out on the incentives or being subject to downward payment adjustments. As a result, the costs for self-developers to get their Complete EHRs or EHR Modules are only attributed in Table 9C to the years 2012 and 2014. The totals multiplied by their respective percentages are derived from Tables 9A and 9B above.

TABLE 9C—PERMANENT CERTIFICATION PROGRAM: ESTIMATED OVERALL COSTS FOR TESTING & CERTIFICATION ASSOCIATED WITH MEANINGFUL USE STAGES 2 AND 3 ACCOUNTING FOR DISTRIBUTED COSTS

Meaningful use stage	Year(s)	Percentage	Type	Low ($M)	High ($M)	Mid-point ($M)
Stage 2	2012	85	Complete EHRs/EHR Modules	$2.50	$5.53	$4.01
		100	Self-Developed	0.095	0.95	0.53
	2013/2014	15	Complete EHRs/EHR Modules	0.44	0.98	0.71
		0	Self-Developed	0	0	0
Stage 3	2014	85	Complete EHRs/EHR Modules	2.45	5.71	4.08
		100	Self-Developed	0.07	0.70	0.39
	2015/2016	15	Complete EHRs/EHR Modules	0.43	1.01	0.72
		0	Self-Developed	0	0	0

3. Costs for Collecting, Storing, and Reporting Certification Results Under the Temporary and Permanent Certification Programs

a. Costs to ONC–ATCBs and ONC–ACBs

Under both of the proposed certification programs we propose to require ONC–ATCBs and ONC–ACBs to provide ONC, no less frequently than weekly, an up-to-date list of Complete EHRs and/or EHR Modules that have been tested and certified which include, at a minimum, the vendor name (if applicable), the date certified, the product version, the unique certification number or other specific product identification, and where applicable, the certification criterion or certification criteria to which each EHR Module has been tested and certified.

As stated in the collection of information section, we anticipate requiring the reporting of this information on a weekly basis and that it will take ONC–ATCBs and ONC–ACBs about an hour to prepare and electronically transmit the information to ONC each week (*i.e.,* respondents will respond 52 times per year).

We believe that an employee equivalent to the Federal Classification of GS–9 Step 1 could complete the transmissions of the requested information to ONC under both proposed certification programs. We have utilized the corresponding employee hourly rate for the locality pay area of Washington, DC, as published by OPM, to calculate our cost estimates. We have also calculated the costs of the employee's benefits while completing the transmissions of the requested information. We have calculated these costs by assuming that an ONC–ATCB or ONC–ACB expends thirty-six percent (36%) of an employee's hourly wage on benefits for the employee. We have concluded that a 36% expenditure on benefits is an appropriate estimate because it is the routine percentage used by HHS for contract cost estimates. Our cost estimates are expressed in Table 10 below.

TABLE 10—ANNUAL COSTS FOR ONC–ATCBS AND ONC–ACBS TO REPORT CERTIFICATIONS TO ONC

Proposed program requirement	Employee equivalent	Annual burden hours per ONC–ATCBs/ ONC–ACBs	Employee hourly wage rate	Cost of employee benefits per hour	Total cost per ONC–ATCB/ ONC–ACB
ONC–ATCB Certification Results	GS–9 Step 1	52	$22.39	$8.06	$1,583.40
ONC–ACB Certification Results	GS–9 Step 1	52	22.39	8.06	1,583.40

To estimate the highest possible burden, we assume that all of the estimated applicants that we anticipate will apply under our proposed certification programs will become ONC–ATCBs and ONC–ACBs. Therefore, we estimate the total annual reporting cost under the temporary certification program to be $4,750 and the total annual reporting cost under the permanent certification program to be $9,500.

We believe that the proposed requirements for ONC–ATCBs to retain certification records for the length of the temporary certification program and for ONC–ACBs to retain certification records for 5 years under the permanent certification program are in line with common industry practices and, consequently, would not represent

additional costs to ONC–ATCBs and ONC–ACBs as a result of this rule.

b. Costs to the Federal Government

As stated previously in this rule, we propose, under both certification programs, to post a comprehensive list of all Certified EHR Technology on our Web site. We believe that there would be minimal cost associated with this action and have calculated the potential cost, including weekly updates, to be $5,392 on an annualized basis. This amount is based on 104 hours of yearly work of a Federal Salary Classification GS–12 Step 1 employee located in Washington, DC.

4. Temporary and Permanent Certification Program Benefits

We believe that several benefits will accrue from the establishment of both a temporary certification program and permanent certification program. The temporary certification program would allow for the rapid influx of Complete EHRs and EHR Modules to be tested and certified at a sufficient pace for eligible professionals and eligible hospitals to adopt and implement Certified EHR Technology for meaningful use Stage 1 and thus potentially qualify for incentive payments under the CMS Medicare and Medicaid EHR Incentive Programs proposed rule. The time between the temporary certification program and the permanent certification program will permit the HIT industry the time it needs for NLVAP-accredited testing laboratories to come forward, for an ONC–AA to be approved and for additional applicants for ONC–ACB status to come forward. We believe that the permanent certification program will provide more opportunities for private sector entities to participate in the testing and certification of HIT and instill more confidence in what it means for HIT to be certified because more rigorous and objective processes will be in place. We further believe that both programs will meet our overall goals of accelerating health IT adoption and increasing levels of interoperability. At this time, we cannot predict how fast all of these savings will occur or their precise magnitude as they are partly dependent on future final rules for meaningful use and the subsequent standards and certification criteria adopted by the Secretary.

D. Regulatory Flexibility Act

The RFA requires agencies to analyze options for regulatory relief of small businesses if a rule has a significant impact on a substantial number of small entities. For more information on the Small Business Administration's (SBA's) size standards, *see* the SBA's Web site.[5] For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. When conducting a RFA we are required to assess the potential effects of our proposed rule on small entities and to make every effort to minimize the regulatory burden that might be imposed on small entities. We believe that the entities that are likely to be directly affected by this proposed rule are applicants for ONC–ATCB and ONC–ACB status. Furthermore, we believe that these entities would either be classified under the North American Industry Classification System (NAICS) codes 541380 (Testing Laboratories) or 541990 (Professional, Scientific and Technical Services).[6] As previously mentioned, we believe that there will be 3 applicants for ONC–ATCB status and 6 applicants for ONC–ACB status. According to the NAICS codes identified above, this would mean SBA size standards of $12 million and $7 million in annual receipts, respectively.[7] Because this segment of the HIT industry is in a nascent stage and is comprised of very few entities, we have been unable to find reliable data from which to determine what realistic annual receipts would be. However, based on our total estimates for Complete EHRs and EHR Modules to be tested and certified, we assume that the annual receipts of any one ONC–ATCB or ONC–ACB could be in the low millions of dollars. Moreover, it is unclear, whether these entities may be involved in other testing and certification programs which would increase their annual receipts and potentially place them outside the SBA's size standards.

We believe that we have proposed the minimum amount of requirements necessary to accomplish our policy goals and that no appropriate regulatory alternatives could be developed to lessen the compliance burden for applicants for ONC–ATCB and ONC–ACB status as well as ONC–ATCBs and ONC–ACBs once they have been granted such status by the National Coordinator. Moreover, we believe that this proposed rule will create direct positive effects for entities because their attainment of ONC–ATCB or ONC–ACB status will permit them to test and certify Complete EHRs and/or EHR Modules. Thus, we expect that their annual receipts will increase as a result of becoming an ONC–ATCB or ONC–ACB.

Based on our analysis and discussion above, we have examined the economic implications of this proposed rule and do not believe that it will have a significant impact on a substantial number of small entities. The Secretary certifies that this proposed rule will not have a significant impact on a substantial number of small entities.

E. Executive Order 13132—Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications.

Nothing in this proposed rule imposes substantial direct requirement costs on State and local governments, preempts State law or otherwise has federalism implications. We are not aware of any State laws or regulations that conflict with or are impeded by either of our proposed certification programs. This proposed rule affords all States an opportunity to identify any problems that our temporary or permanent certification programs would create, and to propose constructive alternatives. We welcome comments from State and local governments.

F. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires cost-benefit and other analyses before any rulemaking if the rule includes a "Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year." The current inflation-adjusted statutory threshold is approximately $133 million. We have determined that this proposed rule which encompasses our proposals for both the temporary and permanent certification programs would not constitute a significant rule under the Unfunded Mandates Reform Act, because it would impose no mandates.

OMB reviewed this proposed rule.

List of Subjects in 45 CFR Part 170

Computer technology, Electronic health record, Electronic information system, Electronic transactions, Health, Health care, Health information

[5] *http://sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf.*

[6] *See* 13 CFR 121.201.

[7] The SBA references that annual receipts means "total income" (or in the case of a sole proprietorship, "gross income") plus "cost of goods sold" as these terms are defined and reported on Internal Revenue Service tax return forms. *http://www.sba.gov/idc/groups/public/documents/sba_homepage/guide_to_size_standards.pdf.*

technology, Health insurance, Health records, Hospitals, Incorporation by reference, Laboratories, Medicaid, Medicare, Privacy, Reporting and recordkeeping requirements, Public health, Security.

For the reasons set forth in the preamble, the Department proposes to amend 45 CFR subtitle A, subchapter D, part 170, as follows:

PART 170—HEALTH INFORMATION TECHNOLOGY STANDARDS, IMPLEMENTATION SPECIFICATIONS, AND CERTIFICATION CRITERIA AND CERTIFICATION PROGRAMS FOR HEALTH INFORMATION TECHNOLOGY

1. The authority citation for part 170 is revised to read as follows:

Authority: 42 U.S.C 300jj–11; 42 U.S.C 300jj–14; 5 U.S.C. 552.

2. In § 170.102, add in alphabetical order the definition of "Day or Day(s)" to read as follows:

§ 170.102 Definitions.

* * * * *

Day or Days means a calendar day or calendar days.

* * * * *

3. Add a new subpart D to part 170 to read as follows:

Subpart D—Temporary Certification Program for HIT

Sec.

Subpart D—Temporary Certification Program for HIT

§ 170.400 Basis and scope.

This subpart implements section 3001(c)(5) of the Public Health Service Act, and sets forth the rules and procedures related to the temporary certification program for health information technology administered by the National Coordinator for Health Information Technology.

§ 170.401 Applicability.

This subpart establishes the processes that applicants for ONC–ATCB status must follow to be granted ONC–ATCB status by the National Coordinator, the processes the National Coordinator will follow when assessing applicants and granting ONC–ATCB status, and the requirements of ONC–ATCBs for testing and certifying Complete EHRs and/or EHR Modules in accordance with the applicable certification criteria adopted by the Secretary in subpart C of this part.

§ 170.402 Definitions.

For the purposes of this subpart:

Applicant means a single organization or a consortium of organizations that seeks to become an ONC–ATCB by requesting and subsequently submitting an application for ONC–ATCB status to the National Coordinator.

ONC–ATCB or ONC–Authorized Testing and Certification Body means an organization or a consortium of organizations that has applied to and been authorized by the National Coordinator pursuant to this subpart to perform the testing and certification of Complete EHRs and/or EHR Modules under the temporary certification program.

§ 170.405 Correspondence.

(a) Correspondence and communication with the National Coordinator shall be conducted by e-mail, unless otherwise necessary. The official date of receipt of any e-mail between the National Coordinator and an applicant for ONC–ATCB status or an ONC–ATCB is the day the e-mail was sent.

(b) In circumstances where it is necessary for an applicant for ONC–ATCB status to correspond or communicate with the National Coordinator by regular or express mail, the official date of receipt will be the date of the delivery confirmation.

§ 170.410 Types of testing and certification.

Applicants may seek authorization from the National Coordinator to perform the following types of testing and certification:

(a) Complete EHR testing and certification; and/or

(b) EHR Module testing and certification.

§ 170.415 Application prerequisite.

Applicants must request in writing an application for ONC–ATCB status from the National Coordinator. Applicants must indicate:

(a) The type of authorization sought pursuant to § 170.410; and

(b) If seeking authorization to perform EHR Module testing and certification, the specific type(s) of EHR Module(s) they seek authorization to test and certify. If qualified, applicants will only be granted authorization to test and certify the types of EHR Modules for which they seek authorization.

§ 170.420 Application.

The application for ONC–ATCB status consists of two parts. Applicants must complete both parts of the application in their entirety and submit them to the National Coordinator for the application to be considered complete.

(a) *Part 1.* An applicant must provide all of the following:

(1) General identifying information including:

(i) Name, address, city, State, zip code, and Web site of applicant; and

(ii) Designation of an authorized representative, including name, title, phone number, and e-mail address of the person who will serve as the applicant's point of contact.

(2) Documentation of the completion and results of a self-audit against all sections of ISO/IEC Guide 65:1996, and the following:

(i) A description of the applicant's management structure according to section 4.2 of ISO/IEC Guide 65:1996;

(ii) A copy of the applicant's quality manual that has been developed according to section 4.5.3 of ISO/IEC Guide 65:1996;

(iii) A copy of the applicant's policies and approach to confidentiality according to section 4.10 of ISO/IEC Guide 65:1996;

(iv) A copy of the qualifications of each of the applicant's personnel who oversee or perform certification according to section 5.2 of ISO/IEC Guide 65:1996;

(v) A copy of the applicant's evaluation reporting procedures according to section 11 of ISO/IEC Guide 65:1996; and

(vi) A copy of the applicant's policies for use and display of certificates according to section 14 of ISO/IEC Guide 65:1996.

(3) Documentation of the completion and results of a self-audit against all sections of ISO/IEC 17025:2005, and the following:

(i) A copy of the applicant's quality system document according to section 4.2.2 of ISO/IEC 17025:2005;

(ii) A copy of the applicant's policies and procedures for handling testing nonconformities according to section 4.9.1 of ISO/IEC 17025:2005; and

(iii) The qualifications of each of the applicant's personnel who oversee or conduct testing according to section 5.2 of ISO/IEC 17025:2005.

(4) An agreement, properly executed by the applicant's authorized representative, that it will adhere to the Principles of Proper Conduct for ONC–ATCBs.

(b) *Part 2.* An applicant must submit a completed proficiency examination.

§ 170.423 Principles of proper conduct for ONC–ATCBs.

An ONC–ATCB shall:

(a) Operate its certification program in accordance with ISO/IEC Guide 65:1996 and testing program in accordance with ISO/IEC 17025:2005;

(b) Maintain an effective quality management system which addresses all requirements of ISO/IEC 17025:2005;

(c) Attend all mandatory ONC training and program update sessions;

(d) Maintain a training program that includes documented procedures and training requirements to ensure its personnel are competent to test and certify Complete EHRs and/or EHR Modules;

(e) Use testing tools and procedures published by NIST or functionally equivalent testing tools and procedures published by another entity for the purposes of assessing Complete EHRs and/or EHR Modules compliance with the certification criteria adopted by the Secretary;

(f) Report to ONC within 15 days any changes that materially affect its:

(1) Legal, commercial, organizational, or ownership status;

(2) Organization and management, including key testing and certification personnel;

(3) Policies or procedures;

(4) Location;

(5) Facilities, working environment or other resources;

(6) ONC authorized representative (point of contact); or

(7) Other such matters that may otherwise materially affect its ability to test and certify Complete EHRs and/or EHR Modules;

(g) Allow ONC, or its authorized agents(s), to periodically observe on site (unannounced or scheduled) during normal business hours, any testing and/or certification performed to demonstrate compliance with the requirements of the temporary certification program;

(h) Provide ONC, no less frequently than weekly, a current list of Complete EHRs and/or EHR Modules that have been tested and certified which includes, at a minimum, the vendor name (if applicable), the date certified, product version, the unique certification number or other specific product identification, and where applicable, the certification criterion or certification criteria to which each EHR Module has been tested and certified;

(i) Retain all records related to the testing and certification of Complete EHRs and/or EHR Modules for the duration of the temporary certification program and provide copies of all testing and certification records to ONC at the sunset of the temporary certification program; and

(j) Promptly refund any and all fees received for tests and certifications that will not be completed.

§ 170.425 Application submission.

(a) An applicant for ONC–ATCB status must submit its application either electronically via e-mail (or Web submission if available), or by regular or express mail.

(b) An application for ONC–ATCB status may be submitted to the National Coordinator at any time during the existence of the temporary certification program.

§ 170.430 Review of application.

(a) *Method of review and review timeframe.*

(1) Applications will be reviewed in the order they are received.

(2) The National Coordinator will review Part 1 of the application and determine whether Part 1 of the application is complete and satisfactory before proceeding to review Part 2 of the application.

(3) The National Coordinator is permitted up to 30 days to review an application (submitted for the first time) upon receipt.

(b) *Application deficiencies.*

(1) If the National Coordinator identifies an area in an application that requires the applicant to clarify a statement or correct an inadvertent error or minor omission, the National Coordinator may contact the applicant to make such clarification or correction without issuing a deficiency notice. If the National Coordinator has not received the requested information after five days, the applicant may be issued a deficiency notice specifying the error, omission, or deficient statement.

(2) If the National Coordinator determines that deficiencies in either part of the application exist, the National Coordinator will issue a deficiency notice to the applicant and return the application. The deficiency notice will identify the areas of the application that require additional information or correction.

(c) *Revised application.*

(1) An applicant is permitted to submit a revised application in response to a deficiency notice.

(2) In order to continue to be considered for ONC–ATCB status, an applicant's revised application must address the specified deficiencies and be received by the National Coordinator within 15 days of the applicant's receipt of the deficiency notice.

(3) The National Coordinator is permitted up to 15 days to review a revised application once it has been received.

(4) If the National Coordinator determines that a revised application still contains deficiencies, the applicant will be issued a denial notice indicating that the applicant will no longer be considered for authorization under the temporary certification program. An applicant may request reconsideration of this decision in accordance with § 170.435.

(d) *Satisfactory application.*

(1) An application will be deemed satisfactory if it meets all application requirements, including a passing score on the proficiency examination.

(2) The National Coordinator will notify the applicant's authorized representative of its satisfactory application and its successful achievement of ONC–ATCB status.

(3) Once notified by the National Coordinator of its successful achievement of ONC–ATCB status, the applicant may represent itself as an ONC–ATCB and begin testing and certifying Complete EHRs and/or EHR Modules consistent with its authorization.

§ 170.435 ONC–ATCB application reconsideration.

(a) An applicant may request that the National Coordinator reconsider a denial notice issued for each part of an application only if the applicant can demonstrate that clear, factual errors were made in the review of the applicable part of the application and that the errors' correction could lead to the applicant obtaining ONC–ATCB status.

(b) *Submission requirement.* An applicant is required to submit, within 15 days of receipt of a denial notice, a written statement to the National

Coordinator contesting the decision to deny its application and explaining with sufficient documentation what factual errors it believes can account for the denial. If the National Coordinator does not receive the applicant's submission within the specified timeframe, its reconsideration request may be rejected.

(c) *Reconsideration request review.* If the National Coordinator receives a timely reconsideration request, the National Coordinator is permitted up to 15 days from the date of receipt to review the information submitted by the applicant and issue a decision.

(d) *Decision.*

(1) If the National Coordinator determines that clear, factual errors were made during the review of the application and that correction of the errors would remove all identified deficiencies, the applicant's authorized representative will be notified of the National Coordinator's decision to reverse the previous decision(s) not to approve part of the applicant's application or the entire application.

(i) If the National Coordinator's decision to reverse the previous decision(s) affected part 1 of an application, the National Coordinator will subsequently review part 2 of the application.

(ii) If the National Coordinator's decision to reverse the previous decision(s) affected part 2 of an application, the applicant's authorized representative will be notified of the National Coordinator's decision as well as the applicant's successful achievement of ONC–ATCB status.

(2) If, after reviewing an applicant's reconsideration request, the National Coordinator determines that the applicant did not identify any factual errors or that correction of those factual errors would not remove all identified deficiencies in the application, the National Coordinator may reject the applicant's reconsideration request.

(3) *Final decision.* A reconsideration decision issued by the National Coordinator is final and not subject to further review.

§ 170.440 ONC–ATCB status.

(a) *Acknowledgement and publication.* The National Coordinator will acknowledge and make publicly available the names of ONC–ATCBs, including the date each was authorized and the type(s) of testing and certification each has been authorized to perform.

(b) *Representation.* Each ONC–ATCB must prominently and unambiguously identify on its Web site and in all marketing and communications statements (written and oral) the scope of its authorization.

(c) *Renewal.* ONC–ATCB status does not need to be renewed during the temporary certification program.

(d) *Expiration.* The status of all ONC–ATCBs will expire upon the sunset of the temporary certification program in accordance with § 170.490.

§ 170.445 Complete EHR testing and certification.

(a) To be authorized to test and certify Complete EHRs under the temporary certification program, an ONC–ATCB must be capable of testing and certifying Complete EHRs to all applicable certification criteria adopted by the Secretary at subpart C of this part.

(b) An ONC–ATCB that has been authorized to test and certify Complete EHRs is also authorized to test and certify all EHR Modules under the temporary certification program.

§ 170.450 EHR module testing and certification.

(a) When testing and certifying EHR Modules, an ONC–ATCB must test and certify in accordance with the applicable certification criterion or certification criteria adopted by the Secretary at subpart C of this part.

(b) EHR Modules are required to be tested and certified to at least one certification criterion.

(c) *Privacy and security testing and certification.* EHR Modules shall be tested and certified to all privacy and security certification criteria adopted by the Secretary unless the EHR Module(s) is/are presented for testing and certification in one of the following manners:

(1) The EHR Module(s) are presented for testing and certification as a pre-coordinated, integrated "bundle" of EHR Modules, which could otherwise constitute a Complete EHR. In such instances, the EHR Module(s) shall be tested and certified in the same manner as a Complete EHR. Pre-coordinated bundles of EHR Module(s) which include EHR Module(s) that would not be part of a local system and under the end user's direct control are excluded from this exception. The constituent EHR Modules of such an integrated bundle must be separately tested and certified to all privacy and security certification criteria;

(2) An EHR Module is presented for testing and certification, and the presenter can demonstrate to the ONC–ATCB that it would be technically infeasible for the EHR Module to be tested and certified in accordance with some or all of the privacy and security certification criteria; or

(3) An EHR Module is presented for testing and certification, and the presenter can demonstrate to the ONC–ATCB that the EHR Module is designed to perform a specific privacy and security capability. In such instances, the EHR Module may only be tested and certified in accordance with the applicable privacy and security certification criterion/criteria.

(d) ONC–ATCBs authorized to test and certify EHR Modules must clearly indicate the certification criterion or certification criteria to which an EHR Module has been tested and certified in its certification documentation.

§ 170.455 Testing and certification to newer versions of certain standards.

(a) ONC–ATCBs may test and certify Complete EHRs and EHR Modules to a newer version of certain identified minimum standards specified at subpart B of this part if the Secretary has accepted a newer version of an adopted minimum standard.

(b) Applicability of an accepted new version of an adopted minimum standard.

(1) ONC–ATCBs are not required to test and certify Complete EHRs and/or EHR Modules according to newer versions of an adopted minimum standard accepted by the Secretary until the incorporation by reference provision of the adopted version is updated in the **Federal Register** with a newer version.

(2) Certified EHR Technology may be upgraded to comply with newer versions of an adopted minimum standard accepted by the Secretary without adversely affecting the certification status of the Certified EHR Technology.

§ 170.457 Authorized testing and certification methods.

(a) *Primary method.* An ONC–ATCB must have the capacity to test and certify Complete EHRs and/or EHR Modules at its facility.

(b) *Secondary methods.* An ONC–ATCB must also have the capacity to test and certify Complete EHRs and/or EHR Modules through one of the following methods:

(1) At the site where the Complete EHR or EHR Module has been developed; or

(2) At the site where the Complete EHR or EHR Module resides; or

(3) Remotely (*i.e.,* through other means, such as through secure electronic transmissions and automated Web-based tools, or at a location other than the ONC–ATCB's facilities).

§ 170.460 Good standing as an ONC–ATCB.

An ONC–ATCB must maintain good standing by:

(a) Adhering to the Principles of Proper Conduct for ONC–ATCBs;

(b) Refraining from engaging in other types of inappropriate behavior, including an ONC–ATCB misrepresenting the scope of its authorization as well as an ONC–ATCB testing and certifying Complete EHRs and/or EHR Modules for which it does not have authorization; and

(c) Following all other applicable Federal and State laws.

§ 170.465 Revocation of authorized testing and certification body status.

(a) *Type-1 violations.* The National Coordinator may revoke an ONC–ATCB's status for committing a Type-1 violation. Type-1 violations include violations of law or temporary certification program policies that threaten or significantly undermine the integrity of the temporary certification program. These violations include, but are not limited to: false, fraudulent, or abusive activities that affect the temporary certification program, a program administered by HHS or any program administered by the Federal government.

(b) *Type-2 violations.* The National Coordinator may revoke an ONC–ATCB's status for failing to timely or adequately correct a Type-2 violation. Type-2 violations comprise noncompliance with § 170.460.

(1) *Noncompliance notification.* If the National Coordinator obtains reliable evidence that an ONC–ATCB may no longer be in compliance with § 170.460, the National Coordinator will issue a noncompliance notification with reasons for the notification to the ONC–ATCB requesting that the ONC–ATCB respond to the alleged violation and correct the violation, if applicable.

(2) *Opportunity to become compliant.* After receipt of a noncompliance notification, an ONC–ATCB is permitted up to 30 days to submit a written response and accompanying documentation that demonstrates that no violation occurred or that the alleged violation has been corrected.

(i) If the ONC–ATCB submits a response, the National Coordinator is permitted up to 30 days from the time the response is received to evaluate the response and reach a decision. The National Coordinator may, if necessary, request additional information from the ONC–ATCB during this time period.

(ii) If the National Coordinator determines that no violation occurred or that the violation has been sufficiently corrected, the National Coordinator will issue a memo to the ONC–ATCB confirming this determination.

(iii) If the National Coordinator determines that the ONC–ATCB failed to demonstrate that no violation occurred or to correct the area(s) of non-compliance identified under paragraph (b)(1) of this section within 30 days of receipt of the noncompliance notification, then the National Coordinator may propose to revoke the ONC–ATCB's status.

(c) *Proposed revocation.*

(1) The National Coordinator may propose to revoke an ONC–ATCB's status if the ONC–ATCB has committed a Type-1 violation; or

(2) The National Coordinator may propose to revoke an ONC–ATCB's status if, after the ONC–ATCB has been notified of a Type-2 violation, the ONC–ATCB fails to:

(i) To rebut the finding of a violation with sufficient evidence showing that the violation did not occur or that the violation has been corrected; or

(ii) Submit to the National Coordinator a written response to the noncompliance notification within the specified timeframe under paragraph (b)(2).

(3) *ONC–ATCB's operations.* An ONC–ATCB may continue its operations under the temporary certification program during the time periods provided for an ONC–ATCB to respond to a proposed revocation notice and the National Coordinator to review an ONC–ATCB's response to a proposed revocation.

(d) *Opportunity to respond to a proposed revocation notice.*

(1) An ONC–ATCB may respond to a proposed revocation notice, but must do so within 10 days of receiving the proposed revocation notice and include appropriate documentation explaining in writing why its status should not be revoked.

(2) Upon receipt of an ONC–ATCB's response to a proposed revocation notice, the National Coordinator is permitted up to 30 days to review the information submitted by the ONC–ATCB and reach a decision.

(e) *Good standing determination.* If the National Coordinator determines that an ONC–ATCB's status should not be revoked, the National Coordinator will notify the ONC–ATCB's authorized representative in writing of this determination.

(f) *Revocation.*

(1) The National Coordinator may revoke an ONC–ATCB's status if:

(i) A determination is made that revocation is appropriate after considering the information provided by the ONC–ATCB in response to the proposed revocation notice; or

(ii) The ONC–ATCB does not respond to a proposed revocation notice within the specified timeframe in paragraph (d)(1) of this section.

(2) A decision to revoke an ONC–ATCB's status is final and not subject to further review unless the National Coordinator chooses to reconsider the revocation.

(g) *Extent and duration of revocation.*

(1) The revocation of an ONC–ATCB is effective as soon as the ONC–ATCB receives the revocation notice.

(2) A testing and certification body that has had its ONC–ATCB status revoked is prohibited from accepting new requests for testing and certification and must cease its current testing and certification operations under the temporary certification program.

(3) A testing and certification body that has had its ONC–ATCB status revoked for a Type-1 violation is prohibited from reapplying for ONC–ATCB status under the temporary certification program for one year. If the temporary certification program sunsets during this time, the testing and certification body is prohibited from applying for ONC–ACB status under the permanent certification program for the time that remains within the one year prohibition.

(4) The failure of a testing and certification body that has had its ONC–ATCB status revoked, to promptly refund any and all fees for tests and/or certifications of Complete EHRs and EHR Modules not completed will be considered a violation of the Principles of Proper Conduct for ONC–ATCBs and will be taken into account by the National Coordinator if the testing and certification body reapplies for ONC–ATCB status under the temporary certification program or applies for ONC–ACB status under the permanent certification program.

§ 170.470 Effect of revocation on the certifications issued to complete EHRs and EHR modules.

(a) The certified status of Complete EHRs and/or EHR Modules certified by an ONC–ATCB that had it status revoked will remain intact unless a Type-1 violation was committed that calls into question the legitimacy of the certifications issued by the former ONC–ATCB.

(b) If the National Coordinator determines that a Type-1 violation occurred that called into question the legitimacy of certifications conducted by the former ONC–ATCB, then the National Coordinator would:

(1) Review the facts surrounding the revocation of the ONC–ATCB's status; and

(2) Publish a notice on ONC's Web site if the National Coordinator believes that Complete EHRs and/or EHR Modules were improperly certified by the former ONC–ATCB.

(c) If the National Coordinator determines that Complete EHRs and/or EHR Modules were improperly certified, the certification status of affected Complete EHRs and/or EHR Modules would only remain intact for 120 days after the National Coordinator publishes the notice. The certification status of the Complete EHR and/or EHR Module can only be maintained thereafter by being re-certified by an ONC–ATCB in good standing.

§ 170.490 Sunset of the temporary certification program.

The temporary certification program will sunset on the date when the National Coordinator has authorized at least one ONC–ACB under the permanent certification program. On the date at which this sunset occurs, ONC–ATCBs under the temporary certification program are prohibited from accepting new requests to certify Complete EHRs or EHR Modules. ONC–ATCBs may, however, complete the processing of Complete EHRs and EHR Modules that are being tested and certified at the time the sunset occurs.

4. Add a new subpart E to part 170 to read as follows:

Subpart E—Permanent Certification Program for HIT

Sec.

Subpart E—Permanent Certification Program for HIT

§ 170.500 Basis and scope.

This subpart implements section 3001(c)(5) of the Public Health Service Act, and sets forth the rules and procedures related to the permanent certification program for health information technology administered by the National Coordinator for Health Information Technology.

§ 170.501 Applicability.

This subpart establishes the processes that applicants for ONC–ACB status must follow to be granted ONC–ACB status by the National Coordinator, the processes the National Coordinator will follow when assessing applicants and granting ONC–ACB status, the requirements of ONC–ACBs for certifying Complete EHRs and/or EHR Modules in accordance with the applicable certification criteria adopted by the Secretary in subpart C of this part. It also establishes the processes accreditation organizations must follow to request approval from the National Coordinator and that the National Coordinator in turn will follow to approve an accreditation organization under the permanent certification program as well as certain ongoing responsibilities for an ONC–AA.

§ 170.502 Definitions.

For the purposes of this subpart:

Applicant means a single organization or a consortium of organizations that seeks to become an ONC–ACB by requesting and subsequently submitting an application for ONC–ACB status to the National Coordinator.

ONC–ACB or ONC-Authorized Certification Body means an organization or a consortium of organizations that has applied to and been authorized by the National Coordinator pursuant to this subpart to perform the certification of, at a minimum, Complete EHRs and/or EHR Modules using the applicable certification criteria adopted by the Secretary.

ONC-Approved Accreditor or ONC–AA means an accreditation organization that the National Coordinator has approved to accredit certification bodies under the permanent certification program.

§ 170.503 Requests for ONC–AA status and ONC–AA ongoing responsibilities.

(a) Only one ONC-Approved Accreditor (ONC–AA) shall be approved by the National Coordinator at a time.

(b) *Submission.* In order to become an ONC–AA, an accreditation organization must submit a request in writing to the National Coordinator along with the following information to demonstrate its ability to serve as an ONC–AA:

(1) A detailed description of the accreditation organization's conformance to ISO/IEC17011:2004 and experience evaluating the conformance of certification bodies to ISO/IEC Guide 65:1996;

(2) A detailed description of the accreditation organization's accreditation requirements and how the requirements complement the Principles of Proper Conduct for ONC–ACBs;

(3) Detailed information on the accreditation organization's procedures that would be used to monitor ONC–ACBs;

(4) Detailed information, including education and experience, about the key personnel who review organizations for accreditation; and

(5) Procedures for responding to, and investigating, complaints against ONC–ACBs.

(c) *Approval.* The National Coordinator is permitted up to 30 days to review a request for ONC–AA status from an accreditation organization upon receipt.

(1) The National Coordinator's determination will be based on the information provided, the completeness of the accreditation organizations' descriptions to the elements listed in paragraph (b) of this section and each accreditation organization's overall accreditation experience.

(2) The National Coordinator will review requests by accreditation organizations for ONC–AA status in the order they are received and will approve the first qualified accreditation organization consistent with the requirements of paragraph (b).

(d) *Reconsideration of a Decision.* Any accreditation organization seeking to become an ONC–AA may appeal a decision to deny its request in accordance with § 170.504, but only if no other accreditation organization has been granted ONC–AA status.

(e) *ONC–AA Ongoing Responsibilities.* An ONC–AA must:

(1) Maintain conformance with ISO/IEC 17011:2004;

(2) In accrediting certification bodies, verify conformance to, at a minimum, ISO/IEC Guide 65:1996;

(3) Verify that ONC–ACBs are performing surveillance in accordance with their respective annual plans; and

(4) Review ONC–ACB surveillance results to determine if the results indicate any substantive non-conformance with the terms set by the ONC–AA when it granted the ONC–ACB accreditation.

(f) *ONC–AA Status.*

(1) An ONC–AA's status will expire not later than 3 years from the date its status was granted by the National Coordinator.

(2) The National Coordinator will accept requests for ONC–AA status 120 days before the current ONC–AA's status is set to expire.

§ 170.504 Reconsideration process for requests for ONC–AA status.

(a) An accreditation organization may ask that the National Coordinator to reconsider a decision to deny its request for ONC–AA status only if the accreditation organization can demonstrate that clear, factual errors were made in the review of its request for ONC–AA status and that the errors' correction could lead to the accreditation organization obtaining ONC–AA status.

(b) *Submission requirement.* An accreditation organization is required to submit, within 15 days of receipt of a denial notice, a written statement to the National Coordinator contesting the decision to deny its request for ONC–AA status and explaining with sufficient documentation what factual error(s) it believes can account for the denial. If the National Coordinator does not receive the accreditation organization's submission within the specified timeframe its request may be rejected.

(c) *Reconsideration request review.* If the National Coordinator receives a timely reconsideration request, the National Coordinator will be permitted up to 15 days from the date of receipt to review the information submitted by the accreditation organization and issue a decision.

(d) *Decision.*

(1) If the National Coordinator determines that clear, factual errors were made during the review of the request, that correction of the errors would remove all identified deficiencies, and that during this review no other accreditation organization has been granted ONC–AA status, the accreditation organization will be notified by National Coordinator that its request for ONC–AA status has been approved.

(2) If, after reviewing an accreditation organization's reconsideration request, the National Coordinator determines that the accreditation organization did not identify the factual errors that were made during the review of its request for ONC–AA status, the National Coordinator may reject its reconsideration request.

(3) *Final Decision.* A reconsideration decision issued by the National Coordinator is final and not subject to further review.

§ 170.505 Correspondence.

(a) Correspondence and communication with the National Coordinator shall be conducted by e-mail, unless otherwise necessary. The official date of receipt of any e-mail between the National Coordinator and an applicant for ONC–ACB status or an ONC–ACB is the day the e-mail was sent.

(b) In circumstances where it is necessary for an applicant for ONC–ACB status to correspond or communicate with the National Coordinator by regular or express mail, the official date of receipt will be the date of the delivery confirmation.

§ 170.510 Types of certification.

Applicants may seek authorization from the National Coordinator to perform the following types of certification:

(a) Complete EHR certification; and/or

(b) EHR Module certification; and/or

(c) Other types of health information technology certification for which the Secretary has adopted certification criteria under subpart C of this part.

§ 170.520 Application.

Applicants must include the following information in an application for ONC–ACB status and submit it to the National Coordinator for the application to be considered complete.

(a) The type of authorization sought pursuant to § 170.510. For authorization to perform EHR Module certification, applicants must indicate the specific type(s) of EHR Module(s) they seek authorization to certify. If qualified, applicants will only be granted authorization to certify the types of EHR Modules for which they seek authorization.

(b) General identifying information including:

(1) Name, address, city, State, zip code, and Web site of applicant; and

(2) Designation of an authorized representative, including name, title, phone number and e-mail address of the person who will serve as the applicant's point of contact.

(c) Documentation that confirms that the applicant has been accredited by an ONC–AA.

(d) An agreement, properly executed by the applicant's authorized representative, that it will adhere to the Principles of Proper Conduct for ONC–ACBs.

§ 170.523 Principles of proper conduct for ONC–ACBs.

An ONC–ACB shall:

(a) Maintain its accreditation;

(b) Attend all mandatory ONC training and program update sessions;

(c) Maintain a training program that includes documented procedures and training requirements to ensure its personnel are competent to certify HIT;

(d) Report to ONC within 15 days any changes that materially affect its:

(1) Legal, commercial, organizational, or ownership status;

(2) Organization and management including key certification personnel;

(3) Policies or procedures;

(4) Location;

(5) Personnel, facilities, working environment or other resources;

(6) ONC authorized representative (point of contact); or

(7) Other such matters that may otherwise materially affect its ability to certify HIT.

(e) Allow ONC, or its authorized agents(s), to periodically observe on site (unannounced or scheduled) any certifications performed to demonstrate compliance with the requirements of the permanent certification program;

(f) Provide ONC, no less frequently than weekly, a current list of Complete EHRs and/or EHR Modules that have been certified, which includes, at a minimum, the vendor name (if applicable), the date certified, the product version, the unique certification number or other specific product identification, and where applicable, the certification criterion or certification criteria to which each EHR Module has been certified;

(g) Retain all records related to the certification of Complete EHRs and/or EHR Modules for a minimum of 5 years;

(h) Only certify HIT, including Complete EHRs and/or EHR Modules, that have been tested by a NVLAP-accredited testing laboratory;

(i) Submit an annual surveillance plan to the National Coordinator and annually report to the National Coordinator its surveillance results; and

(j) Promptly refund any and all fees received for certifications that will not be completed.

§ 170.525 Application submission.

(a) An applicant for ONC–ACB status must submit its application either electronically, via e-mail (or Web submission if available), or by regular or express mail.

(b) An application for ONC–ACB status may be submitted to the National Coordinator at any time during the existence of the permanent certification program.

§ 170.530 Review of application.

(a) *Method of review and review timeframe.*

(1) Applications will be reviewed in the order they are received.

(2) The National Coordinator is permitted up to 30 days from receipt to review an application (submitted for the first time).

(b) *Application deficiencies.*

(1) If the National Coordinator identifies an area in an application that requires the applicant to clarify a statement or correct an inadvertent error or minor omission, the National Coordinator may contact the applicant to make such clarification or correction without issuing a deficiency notice. If the National Coordinator has not received the requested information after five days, the applicant may be issued a deficiency notice specifying the error, omission, or deficient statement.

(2) If the National Coordinator determines that deficiencies in either part of the application exist, the National Coordinator will issue a deficiency notice to the applicant and return the application. The deficiency notice will identify the areas of the application that require additional information or correction.

(c) *Revised application.*

(1) An applicant is permitted to submit a revised application in response to a deficiency notice.

(2) In order to continue to be considered for ONC–ACB status, an applicant's revised application must be received by the National Coordinator within 15 days of the applicant's receipt of the deficiency notice.

(3) The National Coordinator is permitted 15 days to review a revised application once it has been received.

(4) If the National Coordinator determines that a revised application still contains deficiencies, the applicant will be issued a denial notice indicating that the applicant will no longer be considered for authorization under the permanent certification program. An applicant may request reconsideration of this decision in accordance with § 170.535.

(d) *Satisfactory application.*

(1) An application will be deemed satisfactory if it meets all the application requirements.

(2) The National Coordinator will notify the applicant's authorized representative of its satisfactory application and its successful achievement of ONC–ACB status.

(3) Once notified by the National Coordinator of its successful achievement of ONC–ACB status, the applicant may represent itself as an ONC–ACB and begin certifying health information technology consistent with its authorization.

§ 170.535 ONC–ACB application reconsideration.

(a) An applicant may request that the National Coordinator reconsider a denial notice only if the applicant can demonstrate that clear, factual errors were made in the review of its application and that the errors' correction could lead to the applicant obtaining ONC–ACB status.

(b) *Submission requirement.* An applicant is required to submit, within 15 days of receipt of a denial notice, a written statement to the National Coordinator contesting the decision to deny its application and explaining with sufficient documentation what factual errors it believes can account for the denial. If the National Coordinator does not receive the applicant's reconsideration request within the specified timeframe its reconsideration request may be rejected.

(c) *Reconsideration request review.* If the National Coordinator receives a timely reconsideration request, the National Coordinator is permitted up to 15 days from the date of receipt to review the information submitted by the applicant and issue a decision.

(d) *Decision.*

(1) If the National Coordinator determines that clear, factual errors were made during the review of the application and that correction of the errors would remove all identified deficiencies, the applicant's authorized representative will be notified of the National Coordinator's determination and the applicant's successful achievement of ONC–ACB status.

(2) If, after reviewing an applicant's reconsideration request, the National Coordinator determines that the applicant did not identify any factual errors or that correction of those factual errors would not remove all identified deficiencies in the application, the National Coordinator may reject the applicant's reconsideration request.

(3) *Final decision.* A reconsideration decision issued by the National Coordinator is final and not subject to further review.

§ 170.540 ONC–ACB Status.

(a) *Acknowledgement and publication.* The National Coordinator will acknowledge and make publicly available the names of ONC–ACBs, including the date each was authorized and the type(s) of certification each has been authorized to perform.

(b) *Representation.* Each ONC–ACB must prominently and unambiguously identify on its Web site and in all marketing and communications statements (written and oral) the scope of its authorization.

(c) *Renewal.* An ONC–ACB is required to renew its status every two years. An ONC–ACB is required to submit a renewal request to the National Coordinator 60 days prior to the expiration of its status.

(d) *Expiration.* An ONC–ACB's status will expire two years from the date it was granted by the National Coordinator unless it is renewed in accordance with paragraph (c) of this section.

§ 170.545 Complete EHR Certification.

(a) To be authorized to certify Complete EHRs under the permanent certification program, an ONC–ACB must be capable of certifying Complete EHRs to all applicable certification criteria adopted by the Secretary at subpart C of this part.

(b) An ONC–ACB that has been authorized to certify Complete EHRs is also authorized to certify all EHR Modules under the permanent certification program.

§ 170.550 EHR module certification.

(a) When certifying EHR Modules, an ONC–ACB must certify in accordance with the applicable certification criterion or certification criteria adopted by the Secretary at subpart C of this part.

(b) EHR Modules are required to be certified to at least one certification criterion.

(c) Privacy and security certification. EHR Modules shall be certified to all privacy and security certification criteria adopted by the Secretary unless the EHR Module(s) is/are presented for certification in one of the following manners:

(1) The EHR Module(s) are presented for certification as a pre-coordinated, integrated "bundle" of EHR Modules, which could otherwise constitute a Complete EHR. In such instances, the EHR Module(s) shall be certified in the same manner as a Complete EHR. Pre-coordinated bundles of EHR Module(s) which include EHR Module(s) that would not be part of a local system and under the end user's direct control are excluded from this exception. The constituent EHR Modules of such an integrated bundle must be separately certified to all privacy and security certification criteria.

(2) An EHR Module is presented for certification, and the presenter can

demonstrate to the ONC–ACB that it would be technically infeasible for the EHR Module to be certified in accordance with some or all of the privacy and security certification criteria; or

(3) An EHR Module is presented for certification, and the presenter can demonstrate to the ONC–ACB that the EHR Module is designed to perform a specific privacy and security capability. In such instances, the EHR Module may only be certified in accordance with the applicable privacy and security certification criterion/criteria.

(d) ONC–ACBs authorized to certify EHR Modules must clearly indicate the certification criterion or certification criteria to which an EHR Module has been certified in its certification documentation.

§ 170.553 Certification for health information technology other than complete EHRs and EHR modules.

An ONC–ACB authorized to certify health information technology other than Complete EHRs and/or EHR Modules must certify such health information technology in accordance with the applicable certification criterion or certification criteria adopted by the Secretary at subpart C of this part.

§ 170.555 Certification to newer versions of certain standards.

(a) ONC–ACBs may test and certify Complete EHRs and EHR Modules to a newer version of certain identified minimum standards specified at subpart B of this part if the Secretary has accepted a newer version of an adopted minimum standard.

(b) Applicability of an accepted new version of an adopted minimum standard.

(1) ONC–ACBs are not required to test and certify Complete EHRs and/or EHR Modules according to newer versions of an adopted minimum standard accepted by the Secretary until the incorporation by reference provision of the adopted version is updated in the **Federal Register** with a newer version.

(2) Certified EHR Technology may be upgraded to comply with newer versions of an adopted minimum standard accepted by the Secretary without adversely affecting the certification status of the Certified EHR Technology.

§ 170.557 Authorized certification methods.

(a) *Primary method.* An ONC–ACB must have the capacity to certify Complete EHRs and/or EHR Modules at their facility.

(b) *Secondary methods.* An ONC–ACB must also have the capacity to certify Complete EHRs and/or EHR Modules through one of the following methods:

(1) At the site where the Complete EHR or EHR Module has been developed; or

(2) At the site where the Complete EHR or EHR Module resides; or

(3) Remotely (*i.e.,* through other means, such as through secure electronic transmissions and automated Web-based tools, or at a location other than the ONC–ACB's facilities).

§ 170.560 Good standing as an ONC–ACB.

An ONC–ACB must maintain good standing by:

(a) Adhering to the Principles of Proper Conduct for ONC–ACBs;

(b) Refraining from engaging in other types of inappropriate behavior, including an ONC–ACB misrepresenting the scope of its authorization as well as an ONC–ACB testing and certifying Complete EHRs and/or EHR Modules for which it does not have authorization; and

(c) Following all other applicable Federal and State laws.

§ 170.565 Revocation of authorized certification body status.

(a) *Type-1 violations.* The National Coordinator may revoke an ONC–ACB's status for committing a Type-1 violation. Type-1 violations include violations of law or permanent certification program policies that threaten or significantly undermine the integrity of the permanent certification program. These violations include, but are not limited to: False, fraudulent, or abusive activities that affect the permanent certification program, a program administered by HHS or any program administered by the Federal government.

(b) *Type-2 violations.* The National Coordinator may revoke an ONC–ACB's status for failing to timely or adequately correct a Type-2 violation. Type-2 violations comprise noncompliance with § 170.560.

(1) *Noncompliance notification.* If the National Coordinator obtains reliable evidence that an ONC–ACB may no longer be in compliance with § 170.560, the National Coordinator will issue a noncompliance notification with reasons for the notification to the ONC–ACB requesting that the ONC–ACB respond to the alleged violation and correct the violation, if applicable.

(2) *Opportunity to become compliant.* After receipt of a noncompliance notification, an ONC–ACB is permitted to 30 days to submit a written response and accompanying documentation that demonstrates that no violation occurred or that the alleged violation has been corrected.

(i) If the ONC–ACB submits a response, the National Coordinator is permitted up to 30 days from the time the response is received to evaluate the response and reach a decision. The National Coordinator may, if necessary, request additional information from the ONC–ACB during this time period.

(ii) If the National Coordinator determines that no violation occurred or that the violation has been sufficiently corrected, the National Coordinator will issue a memo to the ONC–ACB confirming this determination.

(iii) If the National Coordinator determines that the ONC–ACB failed to demonstrate that no violation occurred or to correct the area(s) of non-compliance identified under paragraph (b)(1) of this section within 30 days of receipt of the noncompliance notification, then the National Coordinator may propose to revoke the ONC–ACB's status.

(c) *Proposed revocation.*

(1) The National Coordinator may propose to revoke an ONC–ACB's status if the ONC–ACB has committed a Type-1 violation; or

(2) The National Coordinator may propose to revoke an ONC–ACB's status if, after the ONC–ACB has been notified of a Type-2 violation, the ONC–ACB fails to:

(i) To rebut the finding of a violation with sufficient evidence showing that the violation did not occur or that the violation has been corrected; or

(ii) Submit to the National Coordinator a written response to the noncompliance notification within the specified timeframe under paragraph (b)(2).

(3) *ONC–ACB's operations.* An ONC–ACB may continue its operations under the permanent certification program during the time periods provided for an ONC–ACB to respond to a proposed revocation notice and the National Coordinator to review an ONC–ACB's response to a proposed revocation.

(d) *Opportunity to respond to a proposed revocation notice.*

(1) An ONC–ACB may respond to a proposed revocation notice, but must do so within 10 days of receiving the proposed revocation notice and include appropriate documentation explaining in writing why its status should not be revoked.

(2) Upon receipt of an ONC–ACB's response to a proposed revocation notice, the National Coordinator is permitted up to 30 days to review the information submitted by the ONC–ACB and reach a decision.

(e) *Good standing determination.* If the National Coordinator determines that an ONC–ACB's status should not be revoked, the National Coordinator will notify the ONC–ACB's authorized representative in writing of this determination.

(f) *Revocation.*

(1) The National Coordinator may revoke an ONC–ACB's status if:

(i) A determination is made that revocation is appropriate after considering the information provided by the ONC–ACB in response to the proposed revocation notice; or

(ii) The ONC–ACB does not respond to a proposed revocation notice within the specified timeframe in paragraph (d)(1) of this section.

(2) A decision to revoke an ONC–ACB's status is final and not subject to further review unless the National Coordinator chooses to reconsider the revocation.

(g) *Extent and duration of revocation.*

(1) The revocation of an ONC–ACB is effective as soon as the ONC–ACB receives the revocation notice.

(2) A certification body that has had its ONC–ACB status revoked is prohibited from accepting new requests for certification and must cease its current certification operations under the permanent certification program.

(3) A certification body that has had its ONC–ACB has its status revoked for a Type-1 violation, is not permitted to reapply for ONC–ACB status under the permanent certification program for a period of 1 year.

(4) The failure of a certification body that has had its ONC–ACB status revoked to promptly refund any and all fees for certifications of Complete EHRs and EHR Modules not completed will be considered a violation of the Principles of Proper Conduct for ONC–ACBs and will be taken into account by the National Coordinator if the certification body reapplies for ONC–ACB status under the permanent certification program.

§ 170.570 Effect of revocation on the certifications issued to complete EHRs and EHR modules.

(a) The certified status of Complete EHRs and/or EHR Modules certified by an ONC–ACB that had it status revoked will remain intact unless a Type-1 violation was committed that calls into question the legitimacy of the certifications issued by the former ONC–ACB.

(b) If the National Coordinator determines that a Type-1 violation occurred that called into question the legitimacy of certifications conducted by the former ONC–ACB, then the National Coordinator would:

(1) Review the facts surrounding the revocation of the ONC–ACB's status; and

(2) Publish a notice on ONC's Web site if the National Coordinator believes that Complete EHRs and/or EHR Modules were improperly certified by the former ONC–ACB.

(c) If the National Coordinator determines that Complete EHRs and/or EHR Modules were improperly certified, the certification status of affected Complete EHRs and/or EHR Modules would only remain intact for 120 days after the National Coordinator publishes the notice. The certification status of the Complete EHR and/or EHR Module can only be maintained thereafter by being re-certified by an ONC–ACB in good standing.

Kathleen Sebelius,

Secretary.

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Part IV

Nuclear Regulatory Commission

10 CFR Parts 170 and 171
Revision of Fee Schedules; Fee Recovery for FY 2010; Proposed Rule

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 170 and 171

[NRC–2009–0333]

RIN 3150–AI70

Revision of Fee Schedules; Fee Recovery for FY 2010

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend the licensing, inspection, and annual fees charged to its applicants and licensees. The proposed amendments are necessary to implement the Omnibus Budget Reconciliation Act of 1990 (OBRA–90), as amended, which requires the NRC to recover through fees approximately 90 percent of its budget authority in fiscal year (FY) 2010, not including amounts appropriated from the Nuclear Waste Fund (NWF), amounts appropriated for Waste Incidental to Reprocessing (WIR), and amounts appropriated for generic homeland security activities. Based on the Energy and Water Development and Related Agencies Appropriation Act, 2010, signed by the President on October 28, 2009, the NRC's required fee recovery amount for the FY 2010 budget is approximately $912.2 million. After accounting for billing adjustments, the total amount to be billed as fees is approximately $911.1 million.

DATES: The comment period expires April 9, 2010. Comments received after this date will be considered if it is practical to do so, but the NRC is able to ensure only that comments received on or before this date will be considered. Because OBRA–90 requires that the NRC collect the FY 2010 fees by September 30, 2010, requests for extensions of the comment period will not be granted.

ADDRESSES: Please include Docket ID NRC–2009–0333 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.

You may submit comments by any one of the following methods.

Federal e-Rulemaking Portal: Go to *http://www.regulations.gov* and search for documents filed under Docket ID NRC–2009–0333. Address questions about NRC dockets to Carol Gallagher 301–492–3668; e-mail *Carol.Gallagher@nrc.gov.*

Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attn:* Rulemakings and Adjudications Staff.

E-mail comments to: Rulemaking.Comments@nrc.gov. If you do not receive a reply e-mail confirming that we have received your comments, contact us directly at 301–415–1677.

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. Federal workdays. (Telephone 301–415–1677.)

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.

You can access publicly available documents related to this document 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, Room 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.*

Federal Rulemaking Web site: Public comments and supporting materials related to this proposed rule can be found at *http://www.regulations.gov* by searching on Docket ID: NRC–2009–0333.

To obtain additional information on the NRC's FY 2010 budget request, commenters and others may review NUREG–1100, Volume 25, "Performance Budget: Fiscal Year 2010" (May 2009), which describes the NRC's budget for FY 2010, including the activities to be performed in each program. This document is available on the NRC's public Web site at *http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1100/.* Note, however, that NUREG–1100, Volume 25, is based on the NRC's FY 2010 budget request to Congress, and that the fees in this rulemaking are based on the Energy and Water Development and Related Agencies Appropriation Act, 2010 (Pub. L. 111–85). The NRC's total appropriation of $1,066.9 million is approximately $4.2 million less than the agency's FY 2010 budget request to Congress. However, adjustments to NRC's budget request resulted in an approximately $25 million increase to NRC's total fee recovery amount from the FY 2010 budget request. The allocation of the Public Law 111–85 budget to planned activities within each program, and to each fee class and fee-relief category, is included in the publicly available work papers supporting this rulemaking.

FOR FURTHER INFORMATION CONTACT: Rebecca I. Erickson, Office of the Chief Financial Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone 301–415–7126, e-mail *Rebecca.Erickson@NRC.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The NRC is required each year, under OBRA–90 (42 U.S.C. 2214), as amended, to recover approximately 90 percent of its budget authority, not including amounts appropriated from the NWF, amounts appropriated for WIR, and amounts appropriated for generic homeland security activities (non-fee items), through fees to NRC licensees and applicants. The NRC receives 10 percent of its budget authority (not

including non-fee items) from the general fund each year to pay for the cost of agency activities that do not provide a direct benefit to NRC licensees, such as international assistance and Agreement State activities (as defined under section 274 of the Atomic Energy Act of 1954, as amended).

The NRC assesses two types of fees to meet the requirements of OBRA–90. First, user fees, presented in 10 CFR part 170 under the authority of the Independent Offices Appropriation Act of 1952 (IOAA) (31 U.S.C. 9701), recover the NRC's cost of providing special benefits to identifiable applicants and licensees. For example, the NRC assesses these fees to cover the cost of inspections, applications for new licenses and license renewals, and requests for license amendments. Second, annual fees, presented in 10 CFR part 171 under the authority of OBRA–90, recover generic regulatory costs not otherwise recovered through 10 CFR part 170 fees.

Based on Public Law 111–85, the NRC's required fee recovery amount for the FY 2010 budget is approximately $912.2 million, which is reduced by approximately $1.1 million to account for billing adjustments (i.e., expected unpaid invoices, payments for prior year invoices), resulting in a total of approximately $911.1 million to be billed as fees in FY 2010.

In accordance with OBRA–90, $22.2 million of the agency's budgeted resources for generic homeland security activities are excluded from the NRC's fee base in FY 2010. These funds cover generic activities such as rulemakings and the development of guidance documents that support entire license fee classes or classes of licensees. Under its IOAA authority, the NRC will continue to charge part 170 fees for all licensee-specific homeland security-related services provided, including security inspections and security plan reviews.

The amount of the NRC's required fee collections is set by law, and is, therefore, outside the scope of this rulemaking. In FY 2010, the NRC's total fee recovery amount has increased by $41.5 million from FY 2009, mostly in response to increased activities for reactor oversight, new reactor programs, information technology support, homeland security issues, and licensing reviews for fuel facilities, non-power reactors and spent fuel storage. The FY 2010 budget was allocated to the fee classes that the budgeted activities support. As such, the annual fees for power reactor, most fuel facility, uranium recovery, and small materials licensees have increased. Another factor affecting the amount of annual fees for each fee class is the estimated collection under part 170, discussed in Section II, "Proposed Action", of this document.

II. Proposed Action

The NRC is proposing to amend its licensing, inspection, and annual fees to recover approximately 90 percent of its FY 2010 budget authority less the appropriations for non-fee items. The NRC's total budget authority for FY 2010 is $1,066.9 million. The non-fee items include $29.0 million appropriated from the NWF, $2.1 million for WIR activities, and $22.2 million for generic homeland security activities. Based on the 90 percent fee-recovery requirement, the NRC will have to recover approximately $912.2 million in FY 2010 through part 170 licensing and inspection fees and part 171 annual fees. The amount required by law to be recovered through fees for FY 2010 would be $41.5 million more than the amount estimated for recovery in FY 2009, an increase of approximately 5 percent.

The FY 2010 fee recovery amount is reduced by $1.1 million to account for billing adjustments (*i.e.,* for FY 2010 invoices that the NRC estimates will not be paid during the fiscal year, less payments received in FY 2010 for prior year invoices). This leaves approximately $911.1 million to be billed as fees in FY 2010 through part 170 licensing and inspection fees and part 171 annual fees.

Table I summarizes the budget and fee recovery amounts for FY 2010. (Individual values may not sum to totals due to rounding.)

TABLE I—BUDGET AND FEE RECOVERY AMOUNTS FOR FY 2010

[Dollars in millions]

Total Budget Authority	$1,066.9
Less Non-Fee Items	−53.3
Balance	$1,013.6
Fee Recovery Rate for FY 2010	× 90.0%
Total Amount to be Recovered for FY 2010	$912.2
Less Part 171 Billing Adjustments:	
Unpaid FY 2010 Invoices (estimated)	2.1
Less Payments Received in FY 2010 for Prior Year Invoices (estimated)	−3.2
Subtotal	−1.1
Amount to be Recovered Through Parts 170 and 171 Fees	$911.1
Less Estimated Part 170 Fees	−364.0
Part 171 Fee Collections Required	$547.1

The NRC estimates that $364 million would be recovered from part 170 fees in FY 2010. This represents an increase of approximately 9 percent as compared to the actual part 170 collections of $332.6 million for FY 2009. The NRC derived the FY 2010 estimate of part 170 fee collections based on the previous four quarters of billing data for each license fee class, with adjustments to account for changes in the NRC's FY 2010 budget, as appropriate. The remaining $547.1 million would be recovered through the part 171 annual fees in FY 2010, which is an increase of approximately 4 percent compared to actual part 171 collections of $525.3 million for FY 2009.

The NRC plans to publish the final fee rule no later than June 2010. The FY 2010 final fee rule will be a "major rule" as defined by the Congressional Review Act of 1996 (5 U.S.C. 801–808). Therefore, the NRC's fee schedules for FY 2010 will become effective 60 days after publication of the final rule in the **Federal Register**. The NRC will send an

invoice for the amount of the annual fee to reactor licensees, 10 CFR part 72 licensees, major fuel cycle facilities, and other licensees with annual fees of $100,000 or more, upon publication of the FY 2010 final rule. For these licensees, payment is due on the effective date of the FY 2010 final rule. Because these licensees are billed quarterly, the payment due is the amount of the total FY 2010 annual fee, less payments made in the first three quarters of the fiscal year.

Materials licensees with annual fees of less than $100,000 are billed annually. Those materials licensees whose license anniversary date during FY 2010 falls before the effective date of the FY 2010 final rule will be billed for the annual fee during the anniversary month of the license at the FY 2009 annual fee rate. Those materials licensees whose license anniversary date falls on or after the effective date of the FY 2010 final rule will be billed for the annual fee at the FY 2010 annual fee rate during the anniversary month of the license, and payment will be due on the date of the invoice.

As a cost saving measure, the NRC will discontinue mailing the proposed fee rule to all licensees. Instead, the NRC will send licensees a short summary of the proposed rule and information on how to access the complete proposed rule on the Internet. The NRC currently does not mail the final fee rule to all licensees, but will send the final rule or the proposed rule to any licensee or other person upon specific request. To request a copy, contact the Accounts Receivable/Payable Branch, Division of the Controller, Office of the Chief Financial Officer, at 301–415–7554, or e-mail *fees.resource@nrc.gov.* In addition to publication in the **Federal Register**, both the proposed and final rules will be available on the Internet at *http://www.regulations.gov.*

The NRC plans to review its fee policies for power reactors. The NRC anticipates that it will receive applications to license small and medium sized commercial nuclear reactors. The NRC published an Advance Notice of Proposed Rulemaking (ANPR) on March 25, 2009 (74 FR 12735) to receive early input from the public on issues relevant to the establishment of an annual fee structure based on the size of the reactor. The NRC received sixteen comments in response to the ANPR. The general consensus from the commenters is that an adjustment to the current power reactor annual fee methodology is needed to account for small and medium sized power reactors. The NRC plans to analyze suggested methodologies for a variable annual fee structure for power reactors and present its findings in a future proposed rule.

The NRC also plans to change its current policy with regard to billing inspection costs. Currently, inspection costs are billed only after the inspection is completed (i.e., approximately 30 days after the inspection report is issued). As a result, in some cases inspection costs accumulate over several billing cycles, and the licensee receives one invoice for these accumulated costs rather than being billed as the costs are incurred. Therefore, the NRC plans to bill for accumulated inspection costs before issuance of the inspection report. Billing for incurred inspection costs will begin when the NRC's new accounting system is implemented, scheduled for early FY 2011. This policy change does not require a revision to part 170.

The NRC is proposing to amend 10 CFR parts 170 and 171, as discussed in Sections II.A and II.B of this document.

A. Amendments to 10 CFR Part 170: Fees for Facilities, Materials, Import and Export Licenses, and Other Regulatory Services Under the Atomic Energy Act of 1954, as Amended

In FY 2010, the NRC is proposing to increase the hourly rate to recover the full cost of activities under part 170 and is using this rate to calculate "flat" application fees.

The NRC is proposing the following changes:

1. Hourly Rate

The NRC's hourly rate is used in assessing full cost fees for specific services provided, as well as flat fees for certain application reviews. The NRC is proposing to change the FY 2010 hourly rate to $259. This rate would be applicable to all activities for which fees are assessed under §§ 170.21 and 170.31. The FY 2010 proposed hourly rate is higher than the hourly rate of $257 in the FY 2009 final fee rule. The increase is primarily due to the higher FY 2010 budget supporting increased infrastructure and support costs for the new reactors program, fuel facility reviews, reactor licensing renewal, international activities, and spent fuel storage and transportation activities. The hourly rate calculation is described in further detail in the following paragraphs.

The NRC's hourly rate is derived by dividing the sum of recoverable budgeted resources for (1) Mission direct program salaries and benefits; (2) mission indirect salaries and benefits and contract activity; and (3) agency management and support and the Inspector General (IG), by mission direct full-time equivalent (FTE) hours. The mission direct FTE hours are the product of the mission direct FTE times the hours per direct FTE. The only budgeted resources excluded from the hourly rate are those for mission direct contract activities.

In FY 2010, the NRC is proposing to use 1,371 hours per direct FTE, the same amount as FY 2009, to calculate the hourly fees. The NRC has reviewed data from its time and labor system to determine if the annual direct hours worked per direct FTE estimate requires updating for the FY 2010 fee rule. Based on this review of the most recent data available, the NRC determined that 1,371 hours is the best estimate of direct hours worked annually per direct FTE. This estimate excludes all indirect activities such as training, general administration, and leave.

Table II shows the results of the hourly rate calculation methodology. (Individual values may not sum to totals due to rounding.)

TABLE II—FY 2010 HOURLY RATE CALCULATION

Mission Direct Program Salaries & Benefits	$343.8M
Mission Indirect Salaries & Benefits, and Contract Activity	135.6M
Agency Management and Support, and the IG	330.4M
Subtotal	$809.8M
Less Offsetting Receipts	−0.0M
Total Budget Included in Hourly Rate	$809.8M
Mission Direct FTEs	2,276

TABLE II—FY 2010 HOURLY RATE CALCULATION—Continued

Professional Hourly Rate (Total Budget Included in Hourly Rate divided by Mission Direct FTE Hours)	$259

As shown in Table II, dividing the $809.8 million budgeted amount (rounded) included in the hourly rate by total mission direct FTE hours (2,276 FTE times 1,371 hours) results in an hourly rate of $259. The hourly rate is rounded to the nearest whole dollar.

2. "Flat" Application Fee Changes

The NRC is proposing to adjust the current flat application fees in §§ 170.21 and 170.31 to reflect the revised hourly rate of $259. These flat fees are calculated by multiplying the average professional staff hours needed to process the licensing actions by the proposed professional hourly rate for FY 2010. The agency estimates the average professional staff hours needed to process licensing actions every other year as part of its biennial review of fees performed in compliance with the Chief Financial Officers Act of 1990. This review was last performed as part of the FY 2009 fee rulemaking. The higher hourly rate of $259 is the main reason for the increase in application fees.

The amounts of the materials licensing flat fees are rounded so that the fees would be convenient to the user and the effects of rounding would be minimal. Fees under $1,000 are rounded to the nearest $10, fees that are greater than $1,000 but less than $100,000 are rounded to the nearest $100, and fees that are greater than $100,000 are rounded to the nearest $1,000.

The proposed licensing flat fees are applicable for fee categories K.1. through K.5. of § 170.21, and fee categories 1.C., 1.D., 2.B., 2.C., 3.A. through 3.S., 4.B. through 9.D., 10.B., 15.A. through 15.R., 16, and 17 of § 170.31. Applications filed on or after the effective date of the FY 2010 final fee rule would be subject to the revised fees in the final rule.

3. Administrative Amendments

In the FY 2009 final rule, § 170.11, regarding fee exemptions for special projects, was changed to simplify the language. The NRC is proposing to modify the introductory text of paragraph (a)(1) to clarify that this paragraph applies to special projects. There is no change to the NRC's fee exemption policy.

In addition, the NRC is updating some of the program codes found next to the materials users fee categories in § 170.31. The program codes were added in the FY 2008 final rule, and the NRC plans to update the program codes as needed.

In summary, the NRC is proposing to make the following changes to 10 CFR part 170:

1. Establish a revised professional hourly rate to use in assessing fees for specific services;

2. Revise the license application fees to reflect the proposed FY 2010 hourly rate; and

3. Make certain administrative changes for purposes of updating some program codes and improving the clarity of the rule.

B. Amendments to 10 CFR Part 171: Annual Fees for Reactor Licenses and Fuel Cycle Licenses and Materials Licenses, Including Holders of Certificates of Compliance, Registrations, and Quality Assurance Program Approvals and Government Agencies Licensed by the NRC

The NRC proposes to recover its fee-relief shortfall by increasing all licensees' annual fees. This rulemaking also proposes to make changes to the number of NRC licensees and to establish rebaselined annual fees based on Public Law 111–85. The proposed amendments are described as follows:

1. Application of Fee-Relief and Low-Level Waste Surcharge

The NRC is proposing to recover its fee-relief shortfall by increasing all licensees' annual fees, based on their percent of the budget.

The NRC applies the 10 percent of its budget that is excluded from fee recovery under OBRA–90, as amended (fee relief), to offset the total budget allocated for activities which do not directly benefit current NRC licensees. The budget for these fee-relief activities is totaled and then reduced by the amount of the NRC's fee relief. Any difference between the fee relief and the budgeted amount of these activities results in a fee-relief adjustment (increase or decrease) to all licensees' annual fees, based on their percent of the budget (*i.e.,* over 80 percent is allocated to power reactors each year).

In FY 2010, the NRC's 10 percent fee relief is less than the total budget for fee-relief activities by $7.1 million. In FY 2009, the 10 percent fee relief exceeded the total budget by $3.2 million. The FY 2010 budget for fee-relief activities is higher than FY 2009, primarily due to an increase in small entity subsidies, non-profit educational exemptions, and regulatory support to Agreement States.

The NRC is increasing all licensees' annual fees to recover the shortfall amount of $7.1 million, based on their percent of the fee recoverable budget authority. This is consistent with the existing fee methodology, in that the fee-relief shortfall amount is allocated to licensees in the same manner as benefits are allocated as a reduction when the NRC receives enough fee relief to pay for fee-relief activities. In FY 2010, the power reactors class of licensees will be allocated approximately 88 percent of the fee-relief shortfall based on their share of the NRC fee recoverable budget authority.

The FY 2010 budgeted resources for NRC's fee-relief activities are $108.5 million. The NRC's total fee relief in FY 2010 is $101.4 million, leaving a $7.1 million fee-relief shortfall to be recovered by increasing all licensees' annual fees. These values are shown in Table III. (Individual values may not sum to totals due to rounding.)

TABLE III—FEE-RELIEF ACTIVITIES

[Dollars in millions]

	FY 2010 budgeted costs
1. Activities not attributable to an existing NRC licensee or class of licensee:	
a. International activities	$18.2
b. Agreement State oversight	11.2
c. Scholarships and Fellowships	15.0

TABLE III—FEE-RELIEF ACTIVITIES—Continued

[Dollars in millions]

	FY 2010 budgeted costs
2. Activities not assessed part 170 licensing and inspection fees or part 171 annual fees based on existing law or Commission policy:	
a. Fee exemption for nonprofit educational institutions	17.4
b. Costs not recovered from small entities under 10 CFR 171.16(c)	6.1
c. Regulatory support to Agreement States	23.1
d. Generic decommissioning/reclamation (not related to the power reactor and spent fuel storage fee classes)	15.1
e. In situ leach rulemaking and unregistered general licensees	2.4
Total fee-relief activities	$108.5
Less 10 percent of NRC's FY 2010 total budget (less non-fee items)	−101.4
Fee-Relief Adjustment to be Allocated to All Licensees' Annual Fees	$7.1

Table IV shows how the NRC is allocating the $7.1 million fee-relief adjustment to each license fee class. As explained previously, the NRC is allocating this fee-relief adjustment to each license fee class based on the percent of the budget for that fee class compared to the NRC's total budget. The fee-relief adjustment is added to the required annual fee recovery from each fee class.

Separately, the NRC has continued to allocate the low-level waste (LLW) surcharge based on the volume of LLW disposal of three classes of licenses: operating reactors, fuel facilities, and materials users. Table IV also shows the allocation of the LLW surcharge activity. Because LLW activities support NRC licensees, the costs of these activities are recovered through annual fees. For FY 2010, the total budget allocated for LLW activity is $2.3 million. (Individual values may not sum to totals due to rounding.)

TABLE IV—ALLOCATION OF FEE-RELIEF ADJUSTMENT AND LLW SURCHARGE

	LLW surcharge		Fee-relief adjustment		Total
	Percent	$M	Percent	$M	$M
Operating Power Reactors	54.0	1.3	87.8	6.3	7.5
Spent Fuel Storage/Reactor Decommissioning	.....	.....	2.7	0.2	0.2
Test and Research Reactors	.....	.....	0.2	0.0	0.0
Fuel Facilities	15.0	0.3	5.5	0.4	0.7
Materials Users	31.0	0.7	2.6	0.2	0.9
Transportation	.....	.....	0.5	0.0	0.0
Uranium Recovery	.....	.....	0.7	0.1	0.1
Total	100.0	2.3	100.0	7.1	9.5

2. Agreement State Activities

New Jersey became the 37th Agreement State, effective September 30, 2009. Materials licenses transferred to a new Agreement State are terminated by the NRC. New Jersey assumed regulatory authority for approximately 500 former NRC licensees. To mitigate the impact on the annual fee for the remaining small materials NRC licensees a larger share of the generic budget resources for small materials licensees will be allocated to the Regulatory Support to Agreement States fee-relief category, as seen in Table III.

Note that the continuing costs of oversight and regulatory support for the State of New Jersey, as for any other Agreement State, are recovered as fee-relief activities, consistent with existing policy. The budgeted resources for the regulatory support of Agreement State licensees are prorated to the fee-relief activity, based on the percent of total licensees in Agreement States. The NRC has updated the proration percentage in its fee calculation to make sure that resources are allocated equitably between the NRC materials users fee class and the regulatory support to Agreement States fee-relief category. Accordingly, as a result of the State of New Jersey becoming an Agreement State, the NRC has increased the percentage of materials users regulatory support costs prorated to the fee-relief activity from 85 percent in FY 2009 to 87 percent in FY 2010. The resources for licensing and inspection activities supporting NRC licensees in the materials users fee class are not prorated to the fee-relief activity.

3. Revised Annual Fees

The NRC is proposing to revise its annual fees in " 171.15 and 171.16 for FY 2010 to recover approximately 90 percent of the NRC's FY 2010 budget authority, after subtracting the non-fee amounts and the estimated amount to be recovered through part 170 fees. The part 170 estimate for this proposed rule increased by $30.1 million from the FY 2009 fee rule, based on the latest invoice data available. The total amount to be recovered through annual fees for FY 2010 is $547.1 million. The required annual fee collection in FY 2009 was $532.6 million.

The Commission has determined (71 FR 30721; May 30, 2006) that the agency should proceed with a presumption in favor of rebaselining when calculating annual fees each year. Under this method, the NRC's budget is analyzed in detail and budgeted resources are allocated to fee classes and categories of licensees. The Commission expects that most years there will be budgetary and

other changes that warrant the use of the rebaselining method.

As compared with FY 2009 annual fees, rebaselined fees are higher for five classes of licensees (power reactors, spent fuel storage/reactor decommissioning, transportation, uranium recovery and materials users), and lower for one class of licensees (non-power reactors). Within the fuel facilities fee class, annual fees for most licensees increase, while the annual fee for one fee category decreases.

The NRC's total fee recoverable budget, as mandated by law, is approximately $41.5 million larger in FY 2010 as compared with FY 2009. Much of this increase is in response to increased activities for reactor oversight, new reactor programs, information technology support, homeland security issues, and licensing reviews for fuel facilities, non-power reactors, and spent fuel storage. The FY 2010 budget was allocated to the fee classes that the budgeted activities support. As in FY 2009, generic NRC resources supporting new uranium recovery applications are included in the budget allocated to operating power reactors and fuel facility fee classes, because these licensees will potentially benefit from increased production of uranium milled by new uranium recovery facilities. The impact of this allocation on the operating reactors and fuel facilities annual fees is less than one percent.

The factors affecting all annual fees include the distribution of budgeted costs to the different classes of licenses (based on the specific activities the NRC will perform in FY 2010), the estimated part 170 collections for the various classes of licenses, and allocation of the fee-relief adjustment to all fee classes. The percentage of the NRC's budget not subject to fee recovery remained at 10 percent from FY 2009 to FY 2010.

Table V shows the rebaselined annual fees for FY 2010 for a representative list of categories of licenses. The FY 2009 fee is also shown for comparative purposes.

TABLE V—REBASELINED ANNUAL FEES FOR FY 2010

Class/Category of licenses	FY 2009 annual fee	FY 2010 proposed annual fee
Operating Power Reactors (Including Spent Fuel Storage/Reactor Decommissioning Annual Fee)	$4,625,000	$4,719,000
Spent Fuel Storage/Reactor Decommissioning	122,000	143,000
Test and Research Reactors (Non-power Reactors)	87,600	81,800
High Enriched Uranium Fuel Facility	4,691,000	5,442,000
Low Enriched Uranium Fuel Facility	1,649,000	2,048,000
UF_6 Conversion Facility	969,000	1,112,000
Conventional Mills	31,200	38,300
Typical Materials Users:		
Radiographers (Category 3O)	22,700	28,200
Well Loggers (Category 5A)	9,700	12,000
Gauge Users (Category 3P)	3,700	4,500
Broad Scope Medical (Category 7B)	36,300	45,100

The work papers which support this proposed rule show in detail the allocation of NRC's budgeted resources for each class of licenses and how the fees are calculated. The reports included in these work papers summarize the FY 2010 budgeted FTE and contract dollars allocated to each fee class and fee-relief category at the planned activity and program level and compare these allocations to those used to develop the final FY 2009 fees. The work papers are available electronically at *http://www.regulations.gov* by searching on Docket ID: NRC–2009–0333 and at the NRC's Electronic Reading Room on the Internet at Web site address *http://www.nrc.gov/reading-rm/adams.html.* The work papers may also be examined at the NRC PDR located at One White Flint North, Room O–1F22, 11555 Rockville Pike, Rockville, Maryland.

The budgeted costs allocated to each class of licenses and the calculations of the rebaselined fees are described in paragraphs a. through h. of this section. Individual values in the Tables presented in this section may not sum to totals due to rounding.

a. Fuel Facilities

The FY 2010 budgeted cost to be recovered in the annual fees assessment to the fuel facility class of licenses [which includes licensees in fee categories 1.A.(1)(a), 1.A.(1)(b), 1.A.(2)(a), 1.A.(2)(b), 1.A.(2)(c), 1.E., and 2.A.(1), under § 171.16] is approximately $28.8 million. This value is based on the full cost of budgeted resources associated with all activities that support this fee class, which is reduced by estimated part 170 collections and adjusted for allocated generic transportation resources and fee-relief. In FY 2010, the LLW surcharge for fuel facilities is added to the allocated fee-relief adjustment (*see* Table IV in Section II.B.1., "Application of Fee-Relief and Low-Level Waste Surcharge" of this document). The summary calculations used to derive this value are presented in Table VI for FY 2010, with FY 2009 values shown for comparison.

TABLE VI—ANNUAL FEE SUMMARY CALCULATIONS FOR FUEL FACILITIES

[Dollars in millions]

Summary fee calculations	FY 2009 final	FY 2010 proposed
Total budgeted resources	$44.6	$48.8
Less estimated part 170 receipts	−22.0	−21.2
Net part 171 resources	$22.6	$27.6
Allocated generic transportation	+ 0.4	+ 0.5
Fee-relief adjustment/LLW surcharge	+ 0.2	+ 0.7

TABLE VI—ANNUAL FEE SUMMARY CALCULATIONS FOR FUEL FACILITIES—Continued

[Dollars in millions]

Summary fee calculations	FY 2009 final	FY 2010 proposed
Billing adjustments	−0.2	−0.1
Total required annual fee recovery	$23.0	$28.8

The increase in total budgeted resources allocated to this fee class from FY 2009 to FY 2010 is primarily due to increased support for environmental reviews and for licensing amendments and renewals for existing fuel fabrication facilities. This is partially offset by reductions in fuel facility inspections and licensing and inspection activities for enrichment facilities.

The total required annual fee recovery amount is allocated to the individual fuel facility licensees, based on the effort/fee determination matrix developed for the FY 1999 final fee rule (64 FR 31447; June 10, 1999). In the matrix included in the publicly available NRC work papers, licensees are grouped into categories according to their licensed activities (i.e., nuclear material enrichment, processing operations, and material form) and the level, scope, depth of coverage, and rigor of generic regulatory programmatic effort applicable to each category from a safety and safeguards perspective. This methodology can be applied to determine fees for new licensees, current licensees, licensees in unique license situations, and certificate holders.

This methodology is adaptable to changes in the number of licensees or certificate holders, licensed or certified material and/or activities, and total programmatic resources to be recovered through annual fees. When a license or certificate is modified, it may result in a change of category for a particular fuel facility licensee, as a result of the methodology used in the fuel facility effort/fee matrix. Consequently, this change may also have an effect on the fees assessed to other fuel facility licensees and certificate holders. For example, if a fuel facility licensee amends its license/certificate (e.g., decommissioning or license termination) that results in it not being subject to part 171 costs applicable to the fee class, then the budgeted costs for the safety and/or safeguards components will be spread among the remaining fuel facility licensees/certificate holders.

The methodology is applied as follows. First, a fee category is assigned, based on the nuclear material and activity authorized by license or certificate. Although a licensee/certificate holder may elect not to fully use a license/certificate, the license/certificate is still used as the source for determining authorized nuclear material possession and use/activity. Second, the category and license/certificate information are used to determine where the licensee/certificate holder fits into the matrix. The matrix depicts the categorization of licensees/certificate holders by authorized material types and use/activities.

Each year, the NRC's fuel facility project managers and regulatory analysts determine the level of effort associated with regulating each of these facilities. This is done by assigning, for each fuel facility, separate effort factors for the safety and safeguards activities associated with each type of regulatory activity. The matrix includes ten types of regulatory activities, including enrichment and scrap/waste-related activities (see the work papers for the complete list). Effort factors are assigned as follows: one (low regulatory effort), five (moderate regulatory effort), and ten (high regulatory effort). These effort factors are then totaled for each fee category, so that each fee category has a total effort factor for safety activities and a total effort factor for safeguards activities.

The effort factors for the various fuel facility fee categories are summarized in Table VII. The value of the effort factors shown, as well as the percent of the total effort factor for all fuel facilities, reflects the total regulatory effort for each fee category (not per facility). Note that the total effort factors for the High Enriched Uranium Fuel (HEU), Low Enriched Uranium Fuel (LEU), Hot Cell and Uranium Enrichment fee categories have increased from FY 2009, while the Limited Operations fee category decreased from FY 2009. The safety and safeguards factors increased in FY 2010 to reflect process changes, such as emphasis on emergency planning, ongoing uranium enrichment activities, and a new facility in the Uranium Enrichment fee category. The safety factor decreases for Low Enriched Uranium Fuel and Limited Operations fee categories in FY 2010 reflect the lower level of safety issues at two facilities. Taking into account the addition of a new facility, the total safety and safeguards effort factor change is relatively small.

TABLE VII—EFFORT FACTORS FOR FUEL FACILITIES

Facility type (fee category)	Number of facilities	Effort factors (percent of total)	
		Safety	Safeguards
High Enriched Uranium Fuel (1.A.(1)(a))	2	89 (32.5)	97 (44.3)
Low Enriched Uranium Fuel (1.A.(1)(b))	3	70 (25.5)	35 (16.0)
Limited Operations (1.A.(2)(a))	1	8 (2.9)	4 (1.8)
Gas Centrifuge Enrichment Demonstration (1.A.(2)(b))	1	3 (1.1)	15 (6.8)
Hot Cell (1.A.(2)(c))	1	6 (2.2)	3 (1.4)
Uranium Enrichment (1.E)	3	86 (31.4)	58 (26.5)
UF_6 Conversion (2.A.(1))	1	12 (4.4)	7 (3.2)

For FY 2010, the total budgeted resources for safety activities, before the fee-relief adjustment is made, is $15,621,739. This amount is allocated to each fee category based on its percent of the total regulatory effort for safety activities. For example, if the total effort factor for safety activities for all fuel facilities is 100, and the total effort factor for safety activities for a given fee category is 10, that fee category will be allocated 10 percent of the total budgeted resources for safety activities. Similarly, the budgeted resources amount of $12,485,988 for safeguards activities is allocated to each fee category based on its percent of the total regulatory effort for safeguards activities. The fuel facility fee class' portion of the fee-relief adjustment ($740,427) is allocated to each fee category based on its percent of the total regulatory effort for both safety and safeguards activities. The annual fee per licensee is then calculated by dividing the total allocated budgeted resources for the fee category by the number of licensees in that fee category as summarized in Table VIII.

TABLE VIII—ANNUAL FEES FOR FUEL FACILITIES

Facility type (fee category)	FY 2010 annual fee
High Enriched Uranium Fuel (1.A.(1)(a))	$5,442,000
Low Enriched Uranium Fuel (1.A.(1)(b))	2,048,000
Limited Operations Facility (1.A.(2)(a))	702,000
Gas Centrifuge Enrichment Demonstration (1.A.(2)(b))	1,053,000
Hot Cell (and others) (1.A.(2)(c))	527,000
Uranium Enrichment (1.E.)	2,809,000
UF_6 Conversion (2.A.(1))	1,112,000

The NRC expects to authorize operation of one new uranium enrichment facility in FY 2010. The annual fee applicable to any type of new uranium enrichment facility is the annual fee in § 171.16, fee category 1.E., Uranium Enrichment, unless the NRC establishes a new fee category for the facility in a subsequent rulemaking. The applicable annual fee for a facility that is authorized to operate during the FY will be prorated in accordance with the provisions of § 171.17.

b. Uranium Recovery Facilities

The total FY 2010 budgeted costs to be recovered through annual fees assessed to the uranium recovery class [which includes licensees in fee categories 2.A.(2)(a), 2.A.(2)(b), 2.A.(2)(c), 2.A.(2)(d), 2.A.(2)(e), 2.A.(3), 2.A.(4), 2.A.(5) and 18.B., under § 171.16], is approximately $0.91 million. The derivation of this value is shown in Table IX, with FY 2009 values shown for comparison purposes.

TABLE IX—ANNUAL FEE SUMMARY CALCULATIONS FOR URANIUM RECOVERY FACILITIES

[Dollars in millions]

Summary fee calculations	FY 2009 final	FY 2010 proposed
Total budgeted resources	$7.21	$6.69
Less estimated part 170 receipts	−6.64	−5.83
Net part 171 resources	$0.57	$0.86
Allocated generic transportation	N/A	N/A
Fee-relief adjustment	−0.03	+0.05
Billing adjustments	−0.03	−0.01
Total required annual fee recovery	$0.51	$0.91

The increase in the total required annual fee recovery is mainly due to increased support for uranium recovery legal and program infrastructure and the increased fee-relief adjustment, which was a reduction in FY 2009. As in FY 2009, the NRC is proposing to exclude the generic budgeted resources supporting applications for new uranium recovery facilities from the FY 2010 annual fee charged to current uranium recovery licensees. Because operating reactors and fuel facility licensees would potentially benefit from increased production of the uranium milled by the new facilities, the budgeted resources would be allocated to these fee classes. The generic resources supporting the new uranium recovery facilities do not benefit the existing uranium recovery licensees.

Since FY 2002, the NRC has computed the annual fee for the uranium recovery fee class by allocating the total annual fee amount for this fee class between the Department of Energy (DOE) and the other licensees in this fee class. The NRC regulates DOE's Title I and Title II activities under the Uranium Mill Tailings Radiation Control Act (UMTRCA). The Congress established the two programs, Title I and Title II under UMTRCA, to protect the public and the environment from uranium milling. The UMTRCA Title I program is for remedial action at abandoned mill tailings sites where tailings resulted largely from production of uranium for the weapons program. The NRC also regulates DOE's UMTRCA Title II program which is directed toward uranium mill sites licensed by the NRC or Agreement States in or after 1978.

In FY 2010, 35 percent of the total annual fee amount, less $419,769 specifically budgeted for Title I activities, is allocated to DOE's UMTRCA facilities. The budgeted resources for Title I activities increased in FY 2010 primarily due to additional Title I sites. The remaining 65 percent of the total annual fee (less the amounts specifically budgeted for Title I activities) is allocated to other licensees. This is the same as in FY 2009. The remaining $317,000 (rounded) would be recovered through annual fees assessed to the other licensees in this fee class (*i.e.,* conventional uranium mills and heap leach facilities, uranium solution mining and resin in-situ recovery (ISR) facilities, mill tailings disposal facilities (11e.(2) disposal facilities), and uranium water treatment facilities).

The annual fee being assessed to DOE includes recovery of the costs specifically budgeted for NRC's Title I activities, plus 35 percent of the remaining annual fee amount, including the fee-relief and generic/other costs, for the uranium recovery class. The remaining 65 percent of the fee-relief and generic/other costs are assessed to the other NRC licensees in this fee class that are subject to annual fees. The costs to be recovered through annual fees assessed to the uranium recovery class are shown in Table X.

TABLE X—COSTS RECOVERED THROUGH ANNUAL FEES; URANIUM RECOVERY FEE CLASS

DOE Annual Fee Amount (UMTRCA Title I and Title II) general licenses:	
UMTRCA Title I budgeted costs	$419,769
35 percent of generic/other uranium recovery budgeted costs	151,950
35 percent of uranium recovery fee-relief adjustment	+18,533
Total Annual Fee Amount for DOE (rounded)	590,000
Annual Fee Amount for Other Uranium Recovery Licenses:	
65 percent of generic/other uranium recovery budgeted costs less the amounts specifically budgeted for Title I activities	282,193
65 percent of uranium recovery fee-relief adjustment	+34,419
Total Annual Fee Amount for Other Uranium Recovery Licenses	$316,612

The NRC will continue to use a matrix (which is included in the supporting work papers) to determine the level of effort associated with conducting the generic regulatory actions for the different (non-DOE) licensees in this fee class. The weights derived in this matrix are used to allocate the approximately $317,000 annual fee amount to these licensees. The use of this uranium recovery annual fee matrix was established in the FY 1995 final fee rule (60 FR 32217; June 20, 1995). The FY 2010 matrix is described as follows.

First, the methodology identifies the categories of licenses included in this fee class (besides DOE). In FY 2010, these categories are conventional uranium mills and heap leach facilities, uranium solution mining and resin ISR facilities, mill tailings disposal facilities (11e.(2) disposal facilities), and uranium water treatment facilities.

Second, the matrix identifies the types of operating activities that support and benefit these licensees. In FY 2010, the activities related to generic decommissioning/reclamation are not included in the matrix, because they are included in the fee-relief activities. Therefore, they are not a factor in determining annual fees. The activities included in the FY 2010 matrix are operations, waste operations, and groundwater protection. The relative weight of each type of activity is then determined, based on the regulatory resources associated with each activity. The operations, waste operations, and groundwater protection activities have weights of 0, 5, and 10, respectively, in the FY 2010 matrix.

Each year, the NRC determines the level of benefit to each licensee for generic uranium recovery program activities for each type of generic activity in the matrix. This is done by assigning, for each fee category, separate benefit factors for each type of regulatory activity in the matrix. Benefit factors are assigned on a scale of 0 to 10 as follows: Zero (no regulatory benefit), five (moderate regulatory benefit), and ten (high regulatory benefit). These benefit factors are first multiplied by the relative weight assigned to each activity (described previously). Total benefit factors by fee category, and per licensee in each fee category, are then calculated. These benefit factors thus reflect the relative regulatory benefit associated with each licensee and fee category. The NRC expects to license an In Situ Recovery Resin Facility in FY 2010. Therefore, the benefit factors for fee category 2.A.(2)(d) have been included in the FY 2010 matrix, and an annual fee has been established.

The benefit factors per licensee and per fee category, for each of the non-DOE fee categories included in the uranium recovery fee class, are as follows:

TABLE XI—BENEFIT FACTORS FOR URANIUM RECOVERY LICENSES

Fee category	Number of licensees	Benefit factor per licensee	Total value	Benefit factor percent total
Conventional and Heap Leach mills	1	200	200	12
Basic In Situ Recovery facilities	5	190	950	57
Expanded In Situ Recovery facilities	1	215	215	13
In Situ Recovery Resin Facilities	1	180	180	11
11e.(2) disposal incidental to existing tailings sites	1	65	65	4
Uranium water treatment	1	45	45	3

The annual fee per licensee is calculated by dividing the total allocated budgeted resources for the fee category by the number of licensees in that fee category, as summarized in Table XII. Applying these factors to the approximately $317,000 in budgeted costs to be recovered from non-DOE uranium recovery licensees results in the following annual fees for FY 2010:

TABLE XII—ANNUAL FEES FOR URANIUM RECOVERY LICENSEES

[Other than DOE]

Facility type (fee category)	FY 2010 annual fee
Conventional and Heap Leach mills (2.A.(2)(a))	$38,300
Basic In Situ Recovery facilities (2.A.(2)(b))	36,300
Expanded In Situ Recovery facilities (2.A.(2)(c))	41,100
In Situ Recovery Resin facilities (2.A.(2)(d))	34,400
11e.(2) disposal incidental to existing tailings sites (2.A.(4))	12,400

TABLE XII—ANNUAL FEES FOR URANIUM RECOVERY LICENSEES—Continued

[Other than DOE]

Facility type (fee category)	FY 2010 annual fee
Uranium water treatment (2.A.(5))	8,600

c. Operating Power Reactors

The $475.9 million in budgeted costs to be recovered through FY 2010 annual fees assessed to the power reactor class was calculated as shown in Table XIII. FY 2009 values are shown for comparison.

TABLE XIII—ANNUAL FEE SUMMARY CALCULATIONS FOR OPERATING POWER REACTORS

[Dollars in millions]

Summary fee calculations	FY 2009 final	FY 2010 proposed
Total budgeted resources	$761.5	$787.3
Less estimated part 170 receipts	−288.8	−318.7
Net part 171 resources	$472.7	$468.6
Allocated generic transportation	+0.9	+0.8
Fee-relief adjustment/LLW surcharge	−1.6	+7.5
Billing adjustments	−3.6	−1.0
Total required annual fee recovery	$468.3	$475.9

The budgeted costs to be recovered through annual fees to power reactors are divided equally among the 104 power reactors licensed to operate. This results in a FY 2010 annual fee of $4,576,000 per reactor, of which approximately $72,300 is the fee-relief adjustment/LLW surcharge. Additionally, each power reactor licensed to operate would be assessed the FY 2010 spent fuel storage/reactor decommissioning annual fee of $143,000. This results in a total FY 2010 annual fee of $4,719,000 for each power reactor licensed to operate.

The annual fee for power reactors is higher in FY 2010 than in FY 2009, primarily due to increased budgeted resources for licensing, international, oversight, and new reactor activities, and the increased fee-relief adjustment, which was a reduction in FY 2009. This increase is partially offset by a decrease in budgeted resources for incident response activities and higher estimated part 170 collections. The annual fees for power reactors are presented in § 171.15.

d. Spent Fuel Storage/Reactor Decommissioning

For FY 2010, budgeted costs of approximately $17.6 million for spent fuel storage/reactor decommissioning are to be recovered through annual fees assessed to 10 CFR part 50 power reactors, and to part 72 licensees who do not hold a part 50 license. Those reactor licensees that have ceased operations and have no fuel onsite are not subject to these annual fees. Table XIV shows the calculation of this annual fee amount. FY 2009 values are shown for comparison.

TABLE XIV—ANNUAL FEE SUMMARY CALCULATIONS FOR THE SPENT FUEL STORAGE/REACTOR DECOMMISSIONING FEE CLASS

[Dollars in millions]

Summary fee calculations	FY 2009 Final	FY 2010 Proposed
Total budgeted resources	$21.1	$24.1
Less estimated part 170 receipts	−6.1	−7.0
Net part 171 resources	$15.0	$17.1
Allocated generic transportation	+0.2	+0.4
Fee-relief adjustment	−0.1	+0.2
Billing adjustments	−0.1	0.0
Total required annual fee recovery	$15.1	$17.6

The required annual fee recovery amount is divided equally among 123 licensees, resulting in a FY 2010 annual fee of $143,000 per licensee. The value of total budgeted resources for this fee class is higher in FY 2010 than in FY 2009, due to increased budgeted resources for information technology and legal support and for spent fuel storage licensing and certification activities. This increase is partially offset by a decrease in reactor decommissioning inspection and licensing activities.

e. Test and Research Reactors (Non-power Reactors)

Approximately $330,000 in budgeted costs is to be recovered through annual fees assessed to the test and research reactor class of licenses for FY 2010. Table XV summarizes the annual fee calculation for test and research reactors for FY 2010. FY 2009 values are shown for comparison.

TABLE XV—ANNUAL FEE SUMMARY CALCULATIONS FOR TEST AND RESEARCH REACTORS

[Dollars in millions]

Summary fee calculations	FY 2009 Final	FY 2010 Proposed
Total budgeted resources	$1.22	$1.31
Less estimated part 170 receipts	−0.87	−1.01
Net part 171 resources	$0.35	$0.30
Allocated generic transportation	+0.01	+0.02
Fee-relief adjustment	−0.00	+0.01
Billing adjustments	−0.01	−0.00
Total required annual fee recovery	$0.35	$0.33

This required annual fee recovery amount is divided equally among the four test and research reactors subject to annual fees and results in a FY 2010 annual fee of $81,800 for each licensee. The decrease in annual fees from FY 2009 to FY 2010 is due to a higher part 170 revenue estimate for license renewal activity.

f. Rare Earth Facilities

The agency does not anticipate receiving an application for a rare earth facility this fiscal year, so no budget resources are allocated to this fee class, and no annual fee will be published in FY 2010.

g. Materials Users

Table XVI shows the calculation of the FY 2010 annual fee amount for materials users licensees. FY 2009 values are shown for comparison. Note the following fee categories under § 171.16 are included in this fee class: 1.C., 1.D., 2.B., 2.C., 3.A. through 3.S., 4.A. through 4.C., 5.A., 5.B., 6.A., 7.A. through 7.C., 8.A., 9.A. through 9.D., 16, and 17.

TABLE XVI—ANNUAL FEE SUMMARY CALCULATIONS FOR MATERIALS USERS

[Dollars in millions]

Summary fee calculations	FY 2009 Final	FY 2010 Proposed
Total budgeted resources	$28.7	$ 28.8
Less estimated part 170 receipts	−1.7	−1.8
Net part 171 resources	$27.0	$27.0
Allocated generic transportation	+0.8	+0.8
Fee-relief adjustment/LLW surcharge	+0.6	+0.9
Billing adjustments	−0.1	−0.0
Total required annual fee recovery	$28.4	$28.7

The total required annual fees to be recovered from materials licensees increases in FY 2010, mainly because of increases in the budgeted resources allocated to this fee class for legal support, information technology support, and enforcement activities. This is partially offset by a decrease in budgeted resources for licensing activities and higher estimated part 170 revenue resulting from the higher FY 2009 fees. Annual fees for all fee categories within the materials users fee class increase. The number of licensees decreased because of the transfer of licensees to the State of New Jersey, which became an Agreement State on September 30, 2009.

To equitably and fairly allocate the $28.7 million in FY 2010 budgeted costs to be recovered in annual fees assessed to the approximately 3,150 diverse materials users licensees, the NRC will continue to base the annual fees for each fee category within this class on the part 170 application fees and estimated inspection costs for each fee category. Because the application fees and inspection costs are indicative of the complexity of the license, this approach continues to provide a proxy for allocating the generic and other regulatory costs to the diverse categories of licenses based on the NRC's cost to regulate each category. This fee calculation also continues to consider the inspection frequency (priority), which is indicative of the safety risk and resulting regulatory costs associated with the categories of licenses.

The annual fee for these categories of materials users licenses is developed as follows:

Annual fee = Constant × [Application Fee + (Average Inspection Cost divided by Inspection Priority)] + Inspection Multiplier × (Average Inspection Cost divided by Inspection Priority) + Unique Category Costs.

The constant is the multiple necessary to recover approximately $20 million in general costs (including allocated generic transportation costs) and is 1.5 for FY 2010. The average inspection cost is the average inspection hours for each fee category multiplied by the hourly rate of $259. The inspection priority is

the interval between routine inspections, expressed in years. The inspection multiplier is the multiple necessary to recover approximately $7.6 million in inspection costs, and is 2.2 for FY 2010. The unique category costs are any special costs that the NRC has budgeted for a specific category of licenses. For FY 2010, approximately $107,500 in budgeted costs for the implementation of revised 10 CFR part 35, Medical Use of Byproduct Material (unique costs) has been allocated to holders of NRC human use licenses.

The annual fee to be assessed to each licensee also includes a share of the fee-relief adjustment of approximately $187,000 allocated to the materials users fee class (*see* Section II.B.1., "Application of Fee-Relief and Low-Level Waste Surcharge," of this document), and for certain categories of these licensees, a share of the approximately $719,000 in LLW surcharge costs allocated to the fee class. The annual fee for each fee category is shown in § 171.16(d).

h. Transportation

Table XVII shows the calculation of the FY 2010 generic transportation budgeted resources to be recovered through annual fees. FY 2009 values are shown for comparison.

TABLE XVII—ANNUAL FEE SUMMARY CALCULATIONS FOR TRANSPORTATION

[Dollars in millions]

Summary fee calculations	FY 2009 Final	FY 2010 Proposed
Total budgeted resources	$6.1	$6.6
Less estimated part 170 receipts	−2.9	−3.2
Net part 171 resources	$3.1	$3.4

The NRC must approve any package used for shipping nuclear material before shipment. If the package meets NRC requirements, the NRC issues a Radioactive Material Package Certificate of Compliance (CoC) to the organization requesting approval of a package. Organizations are authorized to ship radioactive material in a package approved for use under the general licensing provisions of 10 CFR part 71. The resources associated with generic transportation activities are distributed to the license fee classes based on the number of CoCs benefitting (used by) that fee class, as a proxy for the generic transportation resources expended for each fee class.

The total FY 2010 budgeted resources for generic transportation activities, including those to support DOE CoCs, are $3.4 million. The budgeted resources for these activities are higher in FY 2010 than in FY 2009, mostly due to an increase in budgeted resources for homeland security safeguards, licensing, and certification activities. Generic transportation resources associated with fee-exempt entities are not included in this total. These costs are included in the appropriate fee-relief category (*e.g.,* the fee-relief category for nonprofit educational institutions).

Consistent with the policy established in the NRC's FY 2006 final fee rule (71 FR 30721; May 30, 2006), the NRC will recover generic transportation costs unrelated to DOE as part of existing annual fees for license fee classes. The NRC will continue to assess a separate annual fee under § 171.16, fee category 18.A., for DOE transportation activities. The amount of the allocated generic resources is calculated by multiplying the percentage of total CoCs used by each fee class (and DOE) by the total generic transportation resources to be recovered. In FY 2010, the generic transportation cost allocated to most fee classes is higher than the FY 2009 cost, due to the increase in total budgeted resources allocated for transportation.

The distribution of these resources to the license fee classes and DOE is shown in Table XVIII. The distribution is adjusted to account for the licensees in each fee class that are fee-exempt. For example, if 3 CoCs benefit the entire test and research reactor class, but only 4 of 32 test and research reactors are subject to annual fees, the number of CoCs used to determine the proportion of generic transportation resources allocated to test and research reactor annual fees equals ((4/32)*3), or 0.4 CoCs.

TABLE XVIII—DISTRIBUTION OF GENERIC TRANSPORTATION RESOURCES, FY 2010

[Dollars in millions]

License fee class/DOE	Number CoCs benefiting fee class or DOE	Percentage of total CoCs	Allocated generic transportation resources
Total	82.7	100.0	$3.38
DOE	21.0	25.4	0.86
Operating Power Reactors	19.0	23.0	0.78
Spent Fuel Storage/Reactor Decommissioning	9.0	10.9	0.37
Test and Research Reactors	0.4	0.5	0.02
Fuel Facilities	13.0	15.7	0.53
Materials Users	20.3	24.5	0.83

The NRC is proposing to continue to assess an annual fee to DOE based on the part 71 CoCs it holds and not allocate these DOE-related resources to other licensees' annual fees, because these resources specifically support DOE. Note that DOE's proposed annual fee includes an increase for the fee-relief adjustment (*see* Section II.B.1, "Application of Fee-Relief and Low-Level Waste Surcharge," of this document), resulting in a total annual fee of $886,000 for FY 2010. This fee increase from last year is primarily due to an increase in budgeted resources for

transportation activities and a higher percentage of the total number of CoCs.

4. Administrative Amendments

The NRC is updating some of the program codes found next to the materials users fee categories in § 171.16. The program codes were added in the FY 2008 final rule and the NRC plans to update the program codes as needed.

In addition, the NRC is editing footnote 4 in § 171.16 to use the same descriptive language that is used for fee category 2.A(f) "Other facilities" that footnote 4 references. This does not change the meaning of footnote 4 but provides consistency.

In summary, the NRC is proposing to—

1. Recover the NRC's fee-relief shortfall by increasing all licensees' annual fees, based on their percent of the NRC budget;

2. Revise the number of NRC licensees to reflect that the State of New Jersey became an Agreement State effective September 30, 2009;

3. Establish rebaselined annual fees for FY 2010; and

4. Make certain administrative changes for purposes of updating some program codes and providing rule consistency.

III. Plain Language

The Presidential Memorandum dated June 1, 1998, entitled "Plain Language in Government Writing," directed that the Government's writing be in plain language. This memorandum was published on June 10, 1998 (63 FR 31883). The NRC requests specific comments on the clarity and effectiveness of the language in the proposed rule. Comments should be sent to the address listed under the **ADDRESSES** heading.

IV. Voluntary Consensus Standards

The National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 3701) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies, unless using these standards is inconsistent with applicable law or is otherwise impractical. The NRC is proposing to amend the licensing, inspection, and annual fees charged to its licensees and applicants as necessary to recover approximately 90 percent of its budget authority in FY 2010, as required by the Omnibus Budget Reconciliation Act of 1990, as amended. This action does not constitute the establishment of a standard that contains generally applicable requirements.

V. Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental assessment nor an environmental impact statement has been prepared for the proposed rule. By its very nature, this regulatory action does not affect the environment and, therefore, no environmental justice issues are raised.

VI. Paperwork Reduction Act Statement

This proposed rule does not contain information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement, unless the requesting document displays a currently valid OMB control number.

VII. Regulatory Analysis

With respect to 10 CFR part 170, this proposed rule was developed under Title V of the IOAA (31 U.S.C. 9701) and the Commission's fee guidelines. When developing these guidelines, the Commission took into account guidance provided by the U.S. Supreme Court on March 4, 1974, in *National Cable Television Association, Inc.* v. *United States,* 415 U.S. 36 (1974) and *Federal Power Commission* v. *New England Power Company,* 415 U.S. 345 (1974). In these decisions, the Court held that the IOAA authorizes an agency to charge fees for special benefits rendered to identifiable persons measured by the "value to the recipient" of the agency service. The meaning of the IOAA was further clarified on December 16, 1976 by four decisions of the U.S. Court of Appeals for the District of Columbia: *National Cable Television Association* v. *Federal Communications Commission,* 554 F.2d 1094 (DC Cir. 1976); *National Association of Broadcasters* v. *Federal Communications Commission,* 554 F.2d 1118 (DC Cir. 1976); *Electronic Industries Association* v. *Federal Communications Commission,* 554 F.2d 1109 (DC Cir. 1976); and *Capital Cities Communication, Inc.* v. *Federal Communications Commission,* 554 F.2d 1135 (DC Cir. 1976). The Commission's fee guidelines were developed based on these legal decisions.

The Commission's fee guidelines were upheld on August 24, 1979, by the U.S. Court of Appeals for the Fifth Circuit in *Mississippi Power and Light Co.* v. *U.S. Nuclear Regulatory Commission,* 601 F.2d 223 (5th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980). This court held that—

(1) The NRC had the authority to recover the full cost of providing services to identifiable beneficiaries;

(2) The NRC could properly assess a fee for the costs of providing routine inspections necessary to ensure a licensee's compliance with the Atomic Energy Act of 1954, as amended, and with applicable regulations;

(3) The NRC could charge for costs incurred in conducting environmental reviews required by the National Environmental Policy Act (42 U.S.C. 4321);

(4) The NRC properly included the costs of uncontested hearings and of administrative and technical support services in the fee schedule;

(5) The NRC could assess a fee for renewing a license to operate a low-level radioactive waste burial site; and

(6) The NRC's fees were not arbitrary or capricious.

With respect to 10 CFR part 171, on November 5, 1990, the Congress passed OBRA–90, which required that, for FYs 1991 through 1995, approximately 100 percent of the NRC budget authority, less appropriations from the NWF, be recovered through the assessment of fees. OBRA–90 was subsequently amended to extend the 100 percent fee recovery requirement through FY 2000. The FY 2001 Energy and Water Development Appropriation Act (EWDAA) amended OBRA–90 to decrease the NRC's fee recovery amount by 2 percent per year beginning in FY 2001, until the fee recovery amount was 90 percent in FY 2005. The FY 2006 EWDAA extended this 90 percent fee recovery requirement for FY 2006. Section 637 of the Energy Policy Act of 2005 made the 90 percent fee recovery requirement permanent in FY 2007. As a result, the NRC is required to recover approximately 90 percent of its FY 2010 budget authority, less the amounts appropriated from the NWF, WIR, and generic homeland security activities through fees. To comply with this statutory requirement and in accordance with § 171.13, the NRC is publishing the amount of the FY 2010 annual fees for reactor licensees, fuel cycle licensees, materials licensees, and holders of CoCs, registrations of sealed source and devices, and Government agencies. OBRA–90, consistent with the accompanying Conference Committee

Report, and the amendments to OBRA–90, provides that—

(1) The annual fees will be based on approximately 90 percent of the Commission's FY 2010 budget of $1,066.9 million less the funds directly appropriated from the NWF to cover the NRC's high-level waste program, and for WIR, generic homeland security activities, and less the amount of funds collected from part 170 fees;

(2) The annual fees shall, to the maximum extent practicable, have a reasonable relationship to the cost of regulatory services provided by the Commission; and

(3) The annual fees be assessed to those licensees the Commission, in its discretion, determines can fairly, equitably, and practicably contribute to their payment.

Part 171, which established annual fees for operating power reactors, effective October 20, 1986 (51 FR 33224; September 18, 1986), was challenged and upheld in its entirety in *Florida Power and Light Company* v. *United States,* 846 F.2d 765 (DC Cir. 1988), *cert. denied,* 490 U.S. 1045 (1989). Further, the NRC's FY 1991 annual fee rule methodology was upheld by the DC Circuit Court of Appeals in *Allied Signal* v. *NRC,* 988 F.2d 146 (DC Cir. 1993).

VIII. Regulatory Flexibility Analysis

The NRC is required by the OBRA–90, as amended, to recover approximately 90 percent of its FY 2010 budget authority through the assessment of user fees. This Act further requires that the NRC establish a schedule of charges that fairly and equitably allocates the aggregate amount of these charges among licensees.

This proposed rule would establish the schedules of fees that are necessary to implement the Congressional mandate for FY 2010. This rule would result in increases in the annual fees charged to certain licensees and holders of certificates, registrations, and approvals, and in decreases in annual fees charged to others. Licensees affected by the annual fee increases and decreases include those that qualify as a small entity under NRC's size standards in 10 CFR 2.810. The Regulatory Flexibility Analysis, prepared in accordance with 5 U.S.C. 604, is included as Appendix A to this proposed rule.

The Small Business Regulatory Enforcement Fairness Act (SBREFA) requires all Federal agencies to prepare a written compliance guide for each rule for which the agency is required by 5 U.S.C. 604 to prepare a regulatory flexibility analysis. Therefore, in compliance with the law, Attachment 1 to the Regulatory Flexibility Analysis is the small entity compliance guide for FY 2010.

IX. Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this proposed rule and that a backfit analysis is not required for this proposed rule. The backfit analysis is not required because these amendments do not require the modification of, or additions to, systems, structures, components, or the design of a facility, or the design approval or manufacturing license for a facility, or the procedures or organization required to design, construct, or operate a facility.

List of Subjects

10 CFR Part 170

Byproduct material, Import and export licenses, Intergovernmental relations, Non-payment penalties, Nuclear materials, Nuclear power plants and reactors, Source material, Special nuclear material.

10 CFR Part 171

Annual charges, Byproduct material, Holders of certificates, Registrations, Approvals, Intergovernmental relations, Non-payment penalties, Nuclear materials, Nuclear power plants and reactors, Source material, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552, the NRC is proposing to adopt the following amendments to 10 CFR parts 170 and 171.

PART 170—FEES FOR FACILITIES, MATERIALS, IMPORT AND EXPORT LICENSES, AND OTHER REGULATORY SERVICES UNDER THE ATOMIC ENERGY ACT OF 1954, AS AMENDED

1. The authority citation for part 170 continues to read as follows:

Authority: Section 9701, Pub. L. 97–258, 96 Stat. 1051 (31 U.S.C. 9701); sec. 301, Pub. L. 92–314, 86 Stat. 227 (42 U.S.C. 2201w); sec. 201, Pub. L. 93–438, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 205a, Pub. L. 101–576, 104 Stat. 2842, as amended (31 U.S.C. 901, 902); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note), sec. 623, Pub. L. 109–58, 119 Stat. 783 (42 U.S.C. 2201(w)); sec. 651(e), Pub. L.109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111).

2. In § 170.11, the introductory text of paragraph (a)(1), is revised to read as follows:

§ 170.11 Exemptions.

(a) * * *

(1) A special project that is a request/report submitted to the NRC—

* * * * *

3. Section 170.20 is revised to read as follows:

§ 170.20 Average cost per professional staff-hour.

Fees for permits, licenses, amendments, renewals, special projects, 10 CFR part 55 re-qualification and replacement examinations and tests, other required reviews, approvals, and inspections under " 170.21 and 170.31 will be calculated using the professional staff-hour rate of $259 per hour.

4. In § 170.21, in the table, fee category K is revised to read as follows:

§ 170.21 Schedule of fees for production and utilization facilities, review of standard referenced design approvals, special projects, inspections, and import and export licenses.

* * * * *

SCHEDULE OF FACILITY FEES

[See footnotes at end of table]

Facility categories and type of fees	Fees [1] [2]
* * * * * * *	
K. Import and export licenses:	
Licenses for the import and export only of production and utilization facilities or the export only of components for production and utilization facilities issued under 10 CFR part 110.	
1. Application for import or export of production and utilization facilities [4] (including reactors and other facilities) and exports of components requiring Commission and Executive Branch review, for example, actions under 10 CFR 110.40(b).	
Application—new license, or amendment; or license exemption request	$16,900

SCHEDULE OF FACILITY FEES—Continued

[See footnotes at end of table]

Facility categories and type of fees	Fees [1] [2]
2. Application for export of reactor and other components requiring Executive Branch review only, for example, those actions under 10 CFR 110.41(a)(1)–(8).	
Application—new license, or amendment; or license exemption request	9,900
3. Application for export of components requiring the assistance of the Executive Branch to obtain foreign government assurances.	
Application—new license, or amendment; or license exemption request	4,200
4. Application for export of facility components and equipment (examples provided in 10 CFR part 110, Appendix A, Items (5) through (9)) not requiring Commission or Executive Branch review, or obtaining foreign government assurances.	
Application—new license, or amendment; or license exemption request	2,600
5. Minor amendment of any active export or import license, for example, to extend the expiration date, change domestic information, or make other revisions which do not involve any substantive changes to license terms or conditions or to the type of facility or component authorized for export and therefore, do not require in-depth analysis or review or consultation with the Executive Branch, U.S. host state, or foreign government authorities.	
Minor amendment to license	780

[1] Fees will not be charged for orders related to civil penalties or other civil sanctions issued by the Commission under § 2.202 of this chapter or for amendments resulting specifically from the requirements of these orders. For orders unrelated to civil penalties or other civil sanctions, fees will be charged for any resulting licensee-specific activities not otherwise exempted from fees under this chapter. Fees will be charged for approvals issued under a specific exemption provision of the Commission's regulations under Title 10 of the Code of Federal Regulations (*e.g.,* 10 CFR 50.12, 10 CFR 73.5) and any other sections in effect now or in the future, regardless of whether the approval is in the form of a license amendment, letter of approval, safety evaluation report, or other form.

[2] Full cost fees will be determined based on the professional staff time and appropriate contractual support services expended. For applications currently on file and for which fees are determined based on the full cost expended for the review, the professional staff hours expended for the review of the application up to the effective date of the final rule will be determined at the professional rates in effect when the service was provided. For those applications currently on file for which review costs have reached an applicable fee ceiling established by the June 20, 1984 and July 2, 1990 rules, but are still pending completion of the review, the cost incurred after any applicable ceiling was reached through January 29, 1989 will not be billed to the applicant. Any professional staff-hours expended above those ceilings on or after January 30, 1989 will be assessed at the applicable rates established by § 170.20, as appropriate, except for topical reports whose costs exceed $50,000. Costs which exceed $50,000 for any topical report, amendment, revision or supplement to a topical report completed or under review from January 30, 1989 through August 8, 1991 will not be billed to the applicant. Any professional hours expended on or after August 9, 1991 will be assessed at the applicable rate established in § 170.20.

* * * * * * *

[4] Imports only of major components for end-use at NRC-licensed reactors are now authorized under NRC general import license.

5. In § 170.31, the table is revised to read as follows:

§ 170.31 Schedule of fees for materials licenses and other regulatory services, including inspections and import and export licenses.

* * * * *

SCHEDULE OF MATERIALS FEES

[See footnotes at end of table]

Category of materials licenses and type of fees [1]	Fee [2] [3]
1. Special nuclear material:	
A. (1) Licenses for possession and use of U–235 or plutonium for fuel fabrication activities.	
(a) Strategic Special Nuclear Material (High Enriched Uranium) [Program Code(s): 21130]	Full Cost.
(b) Low Enriched Uranium in Dispersible Form Used for Fabrication of Power Reactor Fuel [Program Code(s): 21210]	Full Cost.
(2) All other special nuclear materials licenses not included in Category 1.A.(1) which are licensed for fuel cycle activities.	
(a) Facilities with limited operations [Program Code(s): 21310, 21320]	Full Cost.
(b) Gas centrifuge enrichment demonstration facilities	Full Cost.
(c) Others, including hot cell facilities	Full Cost.
B. Licenses for receipt and storage of spent fuel and reactor-related Greater than Class C (GTCC) waste at an independent spent fuel storage installation (ISFSI) [Program Code(s): 23200].	Full Cost.
C. Licenses for possession and use of special nuclear material in sealed sources contained in devices used in industrial measuring systems, including x-ray fluorescence analyzers.[4]	
Application [Program Code(s): 22140]	$1,200.
D. All other special nuclear material licenses, except licenses authorizing special nuclear material in unsealed form in combination that would constitute a critical quantity, as defined in § 150.11 of this chapter, for which the licensee shall pay the same fees as those under Category 1.A.[4]	
Application [Program Code(s): 22110, 22111, 22120, 22131, 22136, 22150, 22151, 22161, 22163, 22170, 23100, 23300, 23310].	$2,400.
E. Licenses or certificates for construction and operation of a uranium enrichment facility [Program Code(s): 21200]	Full Cost.
2. Source material:	
A. (1) Licenses for possession and use of source material for refining uranium mill concentrates to uranium hexafluoride [Program Code(s): 11400].	Full Cost.

SCHEDULE OF MATERIALS FEES—Continued

[See footnotes at end of table]

Category of materials licenses and type of fees [1]	Fee [2 3]
(2) Licenses for possession and use of source material in recovery operations such as milling, in-situ recovery, heap-leaching, ore buying stations, ion-exchange facilities, and in processing of ores containing source material for extraction of metals other than uranium or thorium, including licenses authorizing the possession of byproduct waste material (tailings) from source material recovery operations, as well as licenses authorizing the possession and maintenance of a facility in a standby mode.	
(a) Conventional and Heap Leach facilities [Program Code(s): 11100]	Full Cost.
(b) Basic In Situ Recovery facilities [Program Code(s): 11500]	Full Cost.
(c) Expanded In Situ Recovery facilities [Program Code(s): 11510]	Full Cost.
(d) In Situ Recovery Resin facilities [Program Code(s): 11550]	Full Cost.
(e) Resin Toll Milling facilities [Program Code(s): 11555]	Full Cost.
(f) Other facilities [Program Code(s): 11700]	Full Cost.
(3) Licenses that authorize the receipt of byproduct material, as defined in Section 11e.(2) of the Atomic Energy Act, from other persons for possession and disposal, except those licenses subject to the fees in Category 2.A.(2) or Category 2.A.(4) [Program Code(s): 11600, 12000].	Full Cost.
(4) Licenses that authorize the receipt of byproduct material, as defined in Section 11e.(2) of the Atomic Energy Act, from other persons for possession and disposal incidental to the disposal of the uranium waste tailings generated by the licensee's milling operations, except those licenses subject to the fees in Category 2.A.(2) [Program Code(s): 12010].	Full Cost.
(5) Licenses that authorize the possession of source material related to removal of contaminants (source material) from drinking water [Program Code(s): 11820].	Full Cost.
B. Licenses which authorize the possession, use, and/or installation of source material for shielding.	
Application [Program Code(s): 11210]	$570.
C. All other source material licenses.	
Application [Program Code(s): 11200, 11220, 11221, 11230, 11300, 11800, 11810]	$10,200.
3. Byproduct material:	
A. Licenses of broad scope for the possession and use of byproduct material issued under parts 30 and 33 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution.	
Application [Program Code(s): 03211, 03212, 03213]	$12,100.
B. Other licenses for possession and use of byproduct material issued under part 30 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution.	
Application [Program Code(s): 03214, 03215, 22135, 22162]	$4,600.
C. Licenses issued under §§ 32.72 and/or 32.74 of this chapter that authorize the processing or manufacturing and distribution or redistribution of radiopharmaceuticals, generators, reagent kits, and/or sources and devices containing byproduct material. This category does not apply to licenses issued to nonprofit educational institutions whose processing or manufacturing is exempt under § 170.11(a)(4). These licenses are covered by fee Category 3.D.	
Application [Program Code(s): 02500, 02511, 02513]	$6,600.
D. Licenses and approvals issued under §§ 32.72 and/or 32.74 of this chapter authorizing distribution or redistribution of radiopharmaceuticals, generators, reagent kits, and/or sources or devices not involving processing of byproduct material. This category includes licenses issued under §§ 32.72 and/or 32.74 of this chapter to nonprofit educational institutions whose processing or manufacturing is exempt under § 170.11(a)(4).	
Application [Program Code(s): 02512, 02514]	$4,400.
E. Licenses for possession and use of byproduct material in sealed sources for irradiation of materials in which the source is not removed from its shield (self-shielded units).	
Application [Program Code(s): 03510, 03520]	$3,000.
F. Licenses for possession and use of less than 10,000 curies of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes. This category also includes underwater irradiators for irradiation of materials where the source is not exposed for irradiation purposes.	
Application [Program Code(s): 03511]	$6,100.
G. Licenses for possession and use of 10,000 curies or more of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes. This category also includes underwater irradiators for irradiation of materials where the source is not exposed for irradiation purposes.	
Application [Program Code(s): 03521]	$29,000.
H. Licenses issued under Subpart A of part 32 of this chapter to distribute items containing byproduct material that require device review to persons exempt from the licensing requirements of part 30 of this chapter. The category does not include specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of part 30 of this chapter.	
Application [Program Code(s): 03254, 03255]	$5,500.
I. Licenses issued under Subpart A of part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require device evaluation to persons exempt from the licensing requirements of part 30 of this chapter. This category does not include specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of part 30 of this chapter.	
Application [Program Code(s): 03250, 03251, 03252, 03253, 03256]	$10,100.
J. Licenses issued under Subpart B of part 32 of this chapter to distribute items containing byproduct material that require sealed source and/or device review to persons generally licensed under part 31 of this chapter. This category does not include specific licenses authorizing redistribution of items that have been authorized for distribution to persons generally licensed under part 31 of this chapter.	
Application [Program Code(s): 03240, 03241, 03243]	$1,900.
K. Licenses issued under Subpart B of part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require sealed source and/or device review to persons generally licensed under part 31 of this chapter. This category does not include specific licenses authorizing redistribution of items that have been authorized for distribution to persons generally licensed under part 31 of this chapter.	

SCHEDULE OF MATERIALS FEES—Continued

[See footnotes at end of table]

Category of materials licenses and type of fees [1]	Fee [2 3]
Application [Program Code(s): 03242, 03244]	$1,100.
L. Licenses of broad scope for possession and use of byproduct material issued under parts 30 and 33 of this chapter for research and development that do not authorize commercial distribution.	
Application [Program Code(s): 01100, 01110, 01120, 03610, 03611, 03612, 03613]	$10,200.
M. Other licenses for possession and use of byproduct material issued under part 30 of this chapter for research and development that do not authorize commercial distribution.	
Application [Program Code(s): 03620]	$3,500.
N. Licenses that authorize services for other licensees, except:	
(1) Licenses that authorize only calibration and/or leak testing services are subject to the fees specified in fee Category 3.P.; and	
(2) Licenses that authorize waste disposal services are subject to the fees specified in fee Categories 4.A., 4.B., and 4.C.	
Application [Program Code(s): 03219, 03225, 03226]	$6,100.
O. Licenses for possession and use of byproduct material issued under part 34 of this chapter for industrial radiography operations.	
Application [Program Code(s): 03310, 03320]	$5,800.
P. All other specific byproduct material licenses, except those in Categories 4.A. through 9.D.	
Application [Program Code(s): 02400, 02410, 03120, 03121, 03122, 03123, 03124, 03220, 03221, 03222, 03800, 03810, 22130].	$1,400.
Q. Registration of a device(s) generally licensed under part 31 of this chapter.	
Registration	$320.
R. Possession of items or products containing radium-226 identified in 10 CFR 31.12 which exceed the number of items or limits specified in that section.[6]	
1. Possession of quantities exceeding the number of items or limits in 10 CFR 31.12(a)(4), or (5) but less than or equal to 10 times the number of items or limits specified.	
Application [Program Code(s): 02700]	$1,190.
2. Possession of quantities exceeding 10 times the number of items or limits specified in 10 CFR 31.12(a)(4), or (5).	
Application [Program Code(s): 02710]	$1,400.
S. Licenses for production of accelerator-produced radionuclides.	
Application [Program Code(s): 03210]	$6,600.
4. Waste disposal and processing:	
A. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of contingency storage or commercial land disposal by the licensee; or licenses authorizing contingency storage of low-level radioactive waste at the site of nuclear power reactors; or licenses for receipt of waste from other persons for incineration or other treatment, packaging of resulting waste and residues, and transfer of packages to another person authorized to receive or dispose of waste material. [Program Code(s): 03231, 03233, 03235, 03236, 06100, 06101].	Full Cost.
B. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of packaging or repackaging the material. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material.	
Application [Program Code(s): 03234]	$4,500.
C. Licenses specifically authorizing the receipt of prepackaged waste byproduct material, source material, or special nuclear material from other persons. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material.	
Application [Program Code(s): 03232]	$4,700.
5. Well logging:	
A. Licenses for possession and use of byproduct material, source material, and/or special nuclear material for well logging, well surveys, and tracer studies other than field flooding tracer studies.	
Application [Program Code(s): 03110, 03111, 03112]	$3,400.
B. Licenses for possession and use of byproduct material for field flooding tracer studies.	
Licensing [Program Code(s): 03113]	Full Cost.
6. Nuclear laundries:	
A. Licenses for commercial collection and laundry of items contaminated with byproduct material, source material, or special nuclear material.	
Application [Program Code(s): 03218]	$20,700.
7. Medical licenses:	
A. Licenses issued under parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material, or special nuclear material in sealed sources contained in gamma stereotactic radiosurgery units, teletherapy devices, or similar beam therapy devices.	
Application [Program Code(s): 02300, 02310]	$11,300.
B. Licenses of broad scope issued to medical institutions or two or more physicians under parts 30, 33, 35, 40, and 70 of this chapter authorizing research and development, including human use of byproduct material, except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices. This category also includes the possession and use of source material for shielding when authorized on the same license.	
Application [Program Code(s): 02110]	$8,100.
C. Other licenses issued under parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material, and/or special nuclear material, except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices.	
Application [Program Code(s): 02120, 02121, 02200, 02201, 02210, 02220, 02230, 02231, 02240, 22160]	$2,300.
8. Civil defense:	

SCHEDULE OF MATERIALS FEES—Continued

[See footnotes at end of table]

Category of materials licenses and type of fees [1]	Fee [2 3]
A. Licenses for possession and use of byproduct material, source material, or special nuclear material for civil defense activities.	
Application [Program Code(s): 03710]	$1,190.
9. Device, product, or sealed source safety evaluation:	
A. Safety evaluation of devices or products containing byproduct material, source material, or special nuclear material, except reactor fuel devices, for commercial distribution.	
Application—each device	$8,400.
B. Safety evaluation of devices or products containing byproduct material, source material, or special nuclear material manufactured in accordance with the unique specifications of, and for use by, a single applicant, except reactor fuel devices.	
Application—each device	$8,400.
C. Safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, except reactor fuel, for commercial distribution.	
Application—each source	$5,900.
D. Safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, manufactured in accordance with the unique specifications of, and for use by, a single applicant, except reactor fuel.	
Application—each source	$990.
10. Transportation of radioactive material:	
A. Evaluation of casks, packages, and shipping containers.	
1. Spent Fuel, High-Level Waste, and plutonium air packages	Full Cost.
2. Other Casks	Full Cost.
B. Quality assurance program approvals issued under part 71 of this chapter.	
1. Users and Fabricators.	
Application	$3,200.
Inspections	Full Cost.
2. Users.	
Application	$3,200.
Inspections	Full Cost.
C. Evaluation of security plans, route approvals, route surveys, and transportation security devices (including immobilization devices).	Full Cost.
11. Review of standardized spent fuel facilities	Full Cost.
12. Special projects:	
Including approvals, preapplication/licensing activities, and inspections	Full Cost.
13. A. Spent fuel storage cask Certificate of Compliance	Full Cost.
B. Inspections related to storage of spent fuel under § 72.210 of this chapter	Full Cost.
14. A. Byproduct, source, or special nuclear material licenses and other approvals authorizing decommissioning, decontamination, reclamation, or site restoration activities under parts 30, 40, 70, 72, and 76 of this chapter.	Full Cost.
B. Site-specific decommissioning activities associated with unlicensed sites, regardless of whether or not the sites have been previously licensed.	Full Cost.
15. Import and Export licenses:	
Licenses issued under part 110 of this chapter for the import and export only of special nuclear material, source material, tritium and other byproduct material, and the export only of heavy water, or nuclear grade graphite (fee categories 15.A. through 15.E.).	
A. Application for export or import of nuclear materials, including radioactive waste requiring Commission and Executive Branch review, for example, those actions under 10 CFR 110.40(b).	
Application—new license, or amendment; or license exemption request	$16,900.
B. Application for export or import of nuclear material, including radioactive waste, requiring Executive Branch review, but not Commission review. This category includes applications for the export and import of radioactive waste and requires NRC to consult with domestic host state authorities (i.e.,Low-Level Radioactive Waste Compact Commission, the U.S. Environmental Protection Agency, etc.).	
Application—new license, or amendment; or license exemption request	$9,900.
C. Application for export of nuclear material, for example, routine reloads of low enriched uranium reactor fuel and/or natural uranium source material requiring the assistance of the Executive Branch to obtain foreign government assurances.	
Application—new license, or amendment; or license exemption request	$4,200.
D. Application for export or import of nuclear material, including radioactive waste, not requiring Commission or Executive Branch review, or obtaining foreign government assurances. This category includes applications for export or import of radioactive waste where the NRC has previously authorized the export or import of the same form of waste to or from the same or similar parties located in the same country, requiring only confirmation from the receiving facility and licensing authorities that the shipments may proceed according to previously agreed understandings and procedures.	
Application—new license, or amendment; or license exemption request	$2,600.
E. Minor amendment of any active export or import license, for example, to extend the expiration date, change domestic information, or make other revisions which do not involve any substantive changes to license terms and conditions or to the type/quantity/chemical composition of the material authorized for export and, therefore, do not require in-depth analysis, review, or consultations with other Executive Branch, U.S. host state, or foreign government authorities.	
Minor amendment	$780.
Licenses issued under part 110 of this chapter for the import and export only of Category 1 and Category 2 quantities of radioactive material listed in Appendix P to part 110 of this chapter (fee categories 15.F. through 15.R.).[5]	
Category 1 Exports:	
F. Application for export of Category 1 materials involving an exceptional circumstances review under 10 CFR 110.42(e)(4).	

SCHEDULE OF MATERIALS FEES—Continued

[See footnotes at end of table]

Category of materials licenses and type of fees [1]	Fee [2 3]
Application—new license, or amendment; or license exemption request	$16,900.
G. Application for export of Category 1 materials requiring Executive Branch review, Commission review, and/or government-to-government consent.	
Application—new license, or amendment; or license exemption request	$9,900.
H. Application for export of Category 1 materials requiring Commission review and government-to-government consent.	
Application—new license, or amendment; or license exemption request	$6,200.
I. Application for export of Category 1 material requiring government-to-government consent.	
Application—new license, or amendment; or license exemption request	$5,200.
Category 2 Exports:	
J. Application for export of Category 2 materials involving an exceptional circumstances review under 10 CFR 110.42(e)(4).	
Application—new license, or amendment; or license exemption request	$16,900.
K. Applications for export of Category 2 materials requiring Executive Branch review and/or Commission review.	
Application—new license, or amendment; or license exemption request	$9,900.
L. Application for the export of Category 2 materials.	
Application—new license, or amendment; or license exemption request	$4,700.
Category 1 Imports:	
M. Application for the import of Category 1 material requiring Commission review.	
Application—new license, or amendment; or license exemption request	$4,900.
N. Application for the import of Category 1 material.	
Application—new license, or amendment; or license exemption request	$4,200.
Category 2 Imports:	
O. Application for the import of Category 2 material.	
Application—new license, or amendment; or license exemption request	$3,600.
Category 1 Imports with Agent and Multiple Licensees:	
P. Application for the import of Category 1 material with agent and multiple licensees requiring Commission review.	
Application—new license, or amendment; or license exemption request	$5,700.
Q. Application for the import of Category 1 material with agent and multiple licensees.	
Application—new license, or amendment; or license exemption request	$4,700.
Minor Amendments (Category 1 and 2 Export and Imports):	
R. Minor amendment of any active export or import license, for example, to extend the expiration date, change domestic information, or make other revisions which do not involve any substantive changes to license terms and conditions or to the type/quantity/chemical composition of the material authorized for export and, therefore, do not require in-depth analysis, review, or consultations with other Executive Branch, U.S. host state, or foreign authorities.	
Minor amendment	$780.
16. Reciprocity:	
Agreement State licensees who conduct activities under the reciprocity provisions of 10 CFR 150.20.	
Application	$1,900.
17. Master materials licenses of broad scope issued to Government agencies.	
Application	$73,800.
18. Department of Energy:	
A. Certificates of Compliance. Evaluation of casks, packages, and shipping containers (including spent fuel, high-level waste, and other casks, and plutonium air packages)	Full Cost.
B. Uranium Mill Tailings Radiation Control Act (UMTRCA) activities	Full Cost.

[1] *Types of fees*—Separate charges, as shown in the schedule, will be assessed for pre-application consultations and reviews; applications for new licenses, approvals, or license terminations; possession-only licenses; issuances of new licenses and approvals; certain amendments and renewals to existing licenses and approvals; safety evaluations of sealed sources and devices; generally licensed device registrations; and certain inspections. The following guidelines apply to these charges:

(a) *Application and registration fees.* Applications for new materials licenses and export and import licenses; applications to reinstate expired, terminated, or inactive licenses, except those subject to fees assessed at full costs; applications filed by Agreement State licensees to register under the general license provisions of 10 CFR 150.20; and applications for amendments to materials licenses that would place the license in a higher fee category or add a new fee category must be accompanied by the prescribed application fee for each category.

(1) Applications for licenses covering more than one fee category of special nuclear material or source material must be accompanied by the prescribed application fee for the highest fee category.

(2) Applications for new licenses that cover both byproduct material and special nuclear material in sealed sources for use in gauging devices will pay the appropriate application fee for fee Category 1.C. only.

(b) *Licensing fees.* Fees for reviews of applications for new licenses, renewals, and amendments to existing licenses, pre-application consultations and other documents submitted to the NRC for review, and project manager time for fee categories subject to full cost fees are due upon notification by the Commission in accordance with § 170.12(b).

(c) *Amendment fees.* Applications for amendments to export and import licenses must be accompanied by the prescribed amendment fee for each license affected. An application for an amendment to an export or import license or approval classified in more than one fee category must be accompanied by the prescribed amendment fee for the category affected by the amendment, unless the amendment is applicable to two or more fee categories, in which case the amendment fee for the highest fee category would apply.

(d) *Inspection fees.* Inspections resulting from investigations conducted by the Office of Investigations and non-routine inspections that result from third-party allegations are not subject to fees. Inspection fees are due upon notification by the Commission in accordance with § 170.12(c).

(e) *Generally licensed device registrations under 10 CFR 31.5.* Submittals of registration information must be accompanied by the prescribed fee.

[2] Fees will not be charged for orders related to civil penalties or other civil sanctions issued by the Commission under 10 CFR 2.202 or for amendments resulting specifically from the requirements of these orders. For orders unrelated to civil penalties or other civil sanctions, fees will be charged for any resulting licensee-specific activities not otherwise exempted from fees under this chapter. Fees will be charged for approvals issued under a specific exemption provision of the Commission's regulations under Title 10 of the Code of Federal Regulations (e.g., 10 CFR 30.11, 40.14, 70.14, 73.5, and any other sections in effect now or in the future), regardless of whether the approval is in the form of a license amendment, letter of approval, safety evaluation report, or other form. In addition to the fee shown, an applicant may be assessed an additional fee for sealed source and device evaluations as shown in Categories 9.A. through 9.D.

[3] Full cost fees will be determined based on the professional staff time multiplied by the appropriate professional hourly rate established in § 170.20 in effect when the service is provided, and the appropriate contractual support services expended. For applications currently on file for which review costs have reached an applicable fee ceiling established by the June 20, 1984 and July 2, 1990 rules, but are still pending completion of the review, the cost incurred after any applicable ceiling was reached through January 29, 1989 will not be billed to the applicant. Any professional staff-hours expended above those ceilings on or after January 30, 1989 will be assessed at the applicable rates established by § 170.20, as appropriate, except for topical reports for which costs exceed $50,000. Costs which exceed $50,000 for each topical report, amendment, revision, or supplement to a topical report completed or under review from January 30, 1989 through August 8, 1991 will not be billed to the applicant. Any professional hours expended on or after August 9, 1991 will be assessed at the applicable rate established in § 170.20.

[4] Licensees paying fees under Categories 1.A., 1.B., and 1.E. are not subject to fees under Categories 1.C. and 1.D. for sealed sources authorized in the same license, except for an application that deals only with the sealed sources authorized by the license.

[5] For a combined import and export license application for material listed in Appendix P to part 110 of this chapter, only the higher of the two applicable fee amounts must be paid.

[6] Persons who possess radium sources that are used for operational purposes in another fee category are not also subject to the fees in this category. (This exception does not apply if the radium sources are possessed for storage only.)

PART 171—ANNUAL FEES FOR REACTOR LICENSES AND FUEL CYCLE LICENSES AND MATERIALS LICENSES, INCLUDING HOLDERS OF CERTIFICATES OF COMPLIANCE, REGISTRATIONS, AND QUALITY ASSURANCE PROGRAM APPROVALS AND GOVERNMENT AGENCIES LICENSED BY THE NRC.

6. The authority citation for part 171 continues to read as follows:

Authority: Section 7601, Pub. L. 99–272, 100 Stat. 146, as amended by sec. 5601, Pub. L. 100–203, 101 Stat. 1330, as amended by sec. 3201, Pub. L. 101–239, 103 Stat. 2132, as amended by sec. 6101, Pub. L. 101–508, 104 Stat. 1388, as amended by sec. 2903a, Pub. L. 102–486, 106 Stat. 3125 (42 U.S.C. 2213, 2214), and as amended by Title IV, Pub. L. 109–103, 119 Stat. 2283 (42 U.S.C. 2214); sec. 301, Pub. L. 92–314, 86 Stat. 227 (42 U.S.C. 2201w); sec. 201, Pub. L. 93–438, 88 Stat. 1242, as amended (42 U.S.C. 5841); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note), sec. 651(e), Pub. L. 109–58, 119 Stat. 806–810 (42 U.S.C. 2014, 2021, 2021b, 2111).

7. In § 171.15, paragraph (b)(1), the introductory text of paragraph (b)(2), paragraph (c)(1), the introductory text of paragraph (c)(2) and the introductory text of paragraph (d)(1), and paragraphs (d)(2), (d)(3), and paragraph (e), are revised to read as follows:

§ 171.15 Annual fees: Reactor licenses and independent spent fuel storage licenses.

* * * * *

(b)(1) The FY 2010 annual fee for each operating power reactor which must be collected by September 30, 2010 is $4,719,000.

(2) The FY 2010 annual fee is comprised of a base annual fee for power reactors licensed to operate, a base spent fuel storage/reactor decommissioning annual fee, and associated additional charges (fee-relief adjustment). The activities comprising the spent storage/reactor decommissioning base annual fee are shown in paragraphs (c)(2)(i) and (ii) of this section. The activities comprising the FY 2010 fee-relief adjustment are shown in paragraph (d)(1) of this section. The activities comprising the FY 2010 base annual fee for operating power reactors are as follows:

* * * * *

(c)(1) The FY 2010 annual fee for each power reactor holding a 10 CFR part 50 license that is in a decommissioning or possession-only status and has spent fuel onsite, and for each independent spent fuel storage 10 CFR part 72 licensee who does not hold a 10 CFR part 50 license, is $143,000.

(2) The FY 2010 annual fee is comprised of a base spent fuel storage/reactor decommissioning annual fee (which is also included in the operating power reactor annual fee shown in paragraph (b) of this section) and an additional charge (fee-relief adjustment). The activities comprising the FY 2010 fee-relief adjustment are shown in paragraph (d)(1) of this section. The activities comprising the FY 2010 spent fuel storage/reactor decommissioning rebaselined annual fee are:

* * * * *

(d)(1) The fee-relief adjustment allocated to annual fees includes a surcharge for the activities listed in paragraph (d)(1)(i) of this section, plus the amount remaining after total budgeted resources for the activities included in paragraphs (d)(1)(ii) and (d)(1)(iii) of this section are reduced by the appropriations the NRC receives for these types of activities. If the NRC's appropriations for these types of activities are greater than the budgeted resources for the activities included in paragraphs (d)(1)(ii) and (d)(1)(iii) of this section for a given FY, annual fees will be reduced. The activities comprising the FY 2010 fee-relief adjustment are as follows:

* * * * *

(2) The total FY 2010 fee-relief adjustment allocated to the operating power reactor class of licenses is $7.5 million, not including the amount allocated to the spent fuel storage/reactor decommissioning class. The FY 2010 operating power reactor fee-relief adjustment to be assessed to each operating power reactor is approximately $72,300. This amount is calculated by dividing the total operating power reactor fee-relief adjustment ($7.5 million) by the number of operating power reactors (104).

(3) The FY 2010 fee-relief adjustment allocated to the spent fuel storage/reactor decommissioning class of licenses is $194,500. The FY 2010 spent fuel storage/reactor decommissioning fee-relief adjustment to be assessed to each operating power reactor, each power reactor in decommissioning or possession-only status that has spent fuel onsite, and to each independent spent fuel storage 10 CFR part 72 licensee who does not hold a 10 CFR part 50 license, is approximately $1,581. This amount is calculated by dividing the total fee-relief adjustment costs allocated to this class by the total number of power reactor licenses, except those that permanently ceased operations and have no fuel onsite, and 10 CFR part 72 licensees who do not hold a 10 CFR part 50 license.

(e) The FY 2010 annual fees for licensees authorized to operate a test and research (non-power) reactor licensed under part 50 of this chapter, unless the reactor is exempted from fees under § 171.11(a), are as follows:

Research reactor	$81,800
Test reactor	$81,800

8. In § 171.16, the introductory text of paragraph (b), paragraphs (c) and (d),

and the introductory text of paragraph (e) are revised to read as follows:

§ 171.16 Annual fees: Materials licensees, holders of certificates of compliance, holders of sealed source and device registrations, holders of quality assurance program approvals, and government agencies licensed by the NRC.

* * * * *

(b) The annual fee is comprised of a base annual fee and an allocation for fee-relief adjustment. The activities comprising the fee-relief adjustment are shown in paragraph (e) of this section. The base annual fee is the sum of budgeted costs for the following activities:

* * * * *

(c) A licensee who is required to pay an annual fee under this section may qualify as a small entity. If a licensee qualifies as a small entity and provides the Commission with the proper certification along with its annual fee payment, the licensee may pay reduced annual fees as shown in the following table. Failure to file a small entity certification in a timely manner could result in the receipt of a delinquent invoice requesting the outstanding balance due and/or denial of any refund that might otherwise be due. The small entity fees are as follows:

	Maximum annual fee per licensed category
Small Businesses Not Engaged in Manufacturing (Average gross receipts over last 3 completed fiscal years):	
$450,000 to $6.5 million	$1,900
Less than $450,000	400
Small Not-For-Profit Organizations (Annual Gross Receipts):	
$450,000 to $6.5 million	1,900
Less than $450,000	400
Manufacturing entities that have an average of 500 employees or fewer:	
35 to 500 employees	1,900
Fewer than 35 employees	400
Small Governmental Jurisdictions (Including publicly supported educational institutions) (Population):	
20,000 to 50,000	1,900
Fewer than 20,000	400
Educational Institutions that are not State or Publicly Supported, and have 500 Employees or Fewer:	
35 to 500 employees	1,900
Fewer than 35 employees	400

(d) The FY 2010 annual fees are comprised of a base annual fee and an allocation for fee-relief adjustment. The activities comprising the FY 2010 fee-relief adjustment are shown for convenience in paragraph (e) of this section. The FY 2010 annual fees for materials licensees and holders of certificates, registrations, or approvals subject to fees under this section are shown in the following table:

SCHEDULE OF MATERIALS ANNUAL FEES AND FEES FOR GOVERNMENT AGENCIES LICENSED BY NRC

[See footnotes at end of table]

Category of materials licenses	Annual fees [1] [2] [3]
1. Special nuclear material:	
A. (1) Licenses for possession and use of U–235 or plutonium for fuel fabrication activities:	
(a) Strategic Special Nuclear Material (High Enriched Uranium) [Program Code(s): 21130]	$5,442,000
(b) Low Enriched Uranium in Dispersible Form sed for Fabrication of Power Reactor Fuel [Program Code(s): 21210]	2,048,000
(2) All other special nuclear materials licenses not included in Category 1.A.(1) which are licensed for fuel cycle activities:	
(a) Facilities with limited operations [Program Code(s): 21310, 21320]	702,000
(b) Gas centrifuge enrichment demonstration facilities	1,053,000
(c) Others, including hot cell facilities	527,000
B. Licenses for receipt and storage of spent fuel and reactor-related Greater than Class C (GTCC) waste at an independent spent fuel storage installation (ISFSI) [Program Code(s): 23200]	[11] N/A
C. Licenses for possession and use of special nuclear material in sealed sources contained in devices used in industrial measuring systems, including x-ray fluorescence analyzers [Program Code(s): 22140]	3,300
D. All other special nuclear material licenses, except licenses authorizing special nuclear material in unsealed form in combination that would constitute a critical quantity, as defined in § 150.11 of this chapter, for which the licensee shall pay the same fees as those for Category 1.A.(2) [Program Code(s): 22110, 22111, 22120, 22131, 22136, 22150, 22151, 22161, 22163, 22170, 23100, 23300, 23310]	9,300
E. Licenses or certificates for the operation of a uranium enrichment facility [Program Code(s): 21200]	2,809,000
2. Source material:	
A. (1) Licenses for possession and use of source material for refining uranium mill concentrates to uranium hexafluoride [Program Code(s): 11400]	1,112,000
(2) Licenses for possession and use of source material in recovery operations such as milling, in-situ recovery, heap-leaching, ore buying stations, ion-exchange facilities and in-processing of ores containing source material for extraction of metals other than uranium or thorium, including licenses authorizing the possession of byproduct waste material (tailings) from source material recovery operations, as well as licenses authorizing the possession and maintenance of a facility in a standby mode:	
(a) Conventional and Heap Leach facilities [Program Code(s): 11100]	38,300
(b) Basic In Situ Recovery facilities [Program Code(s): 11500]	36,300
(c) Expanded In Situ Recovery facilities [Program Code(s): 11510]	41,100

SCHEDULE OF MATERIALS ANNUAL FEES AND FEES FOR GOVERNMENT AGENCIES LICENSED BY NRC—Continued

[See footnotes at end of table]

Category of materials licenses	Annual fees [1] [2] [3]
(d) In Situ Recovery Resin facilities [Program Code(s): 11550]	34,400
(e) Resin Toll Milling facilities [Program Code(s): 11555]	[5] N/A
(f) Other facilities [4] [Program Code(s): 11700]	[5] N/A
(3) Licenses that authorize the receipt of byproduct material, as defined in Section 11e.(2) of the Atomic Energy Act, from other persons for possession and disposal, except those licenses subject to the fees in Category 2.A.(2) or Category 2.A.(4) [Program Code(s): 11600, 12000]	[5] N/A
(4) Licenses that authorize the receipt of byproduct material, as defined in Section 11e.(2) of the Atomic Energy Act, from other persons for possession and disposal incidental to the disposal of the uranium waste tailings generated by the licensee's milling operations, except those licenses subject to the fees in Category 2.A.(2) [Program Code(s): 12010]	12,400
(5) Licenses that authorize the possession of source material related to removal of contaminants (source material) from drinking water [Program Code(s): 11820]	8,600
B. Licenses that authorize only the possession, use, and/or installation of source material for shielding [Program Code(s): 11210]	1,600
C. All other source material licenses [Program Code(s): 11200, 11220, 11221, 11230, 11300, 11800, 11810]	21,100
3. Byproduct material:	
A. Licenses of broad scope for possession and use of byproduct material issued under parts 30 and 33 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution [Program Code(s): 03211, 03212, 03213]	49,200
B. Other licenses for possession and use of byproduct material issued under part 30 of this chapter for processing or manufacturing of items containing byproduct material for commercial distribution [Program Code(s): 03214, 03215, 22135, 22162]	12,700
C. Licenses issued under §§ 32.72 and/or 32.74 of this chapter authorizing the processing or manufacturing and distribution or redistribution of radiopharmaceuticals, generators, reagent kits, and/or sources and devices containing byproduct material. This category also includes the possession and use of source material for shielding authorized under part 40 of this chapter when included on the same license. This category does not apply to licenses issued to nonprofit educational institutions whose processing or manufacturing is exempt under § 171.11(a)(1). These licenses are covered by fee under Category 3.D. [Program Code(s): 02500, 02511, 02513]	16,700
D. Licenses and approvals issued under §§ 32.72 and/or 32.74 of this chapter authorizing distribution or redistribution of radiopharmaceuticals, generators, reagent kits and/or sources or devices not involving processing of byproduct material. This category includes licenses issued under §§ 32.72 and 32.74 of this chapter to nonprofit educational institutions whose processing or manufacturing is exempt under § 171.11(a)(1). This category also includes the possession and use of source material for shielding authorized under part 40 of this chapter when included on the same license [Program Code(s): 02512, 02514]	10,600
E. Licenses for possession and use of byproduct material in sealed sources for irradiation of materials in which the source is not removed from its shield (self-shielded units) [Program Code(s): 03510, 03520]	8,200
F. Licenses for possession and use of less than 10,000 curies of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes. This category also includes underwater irradiators for irradiation of materials in which the source is not exposed for irradiation purposes [Program Code(s): 03511]	15,500
G. Licenses for possession and use of 10,000 curies or more of byproduct material in sealed sources for irradiation of materials in which the source is exposed for irradiation purposes. This category also includes underwater irradiators for irradiation of materials in which the source is not exposed for irradiation purposes [Program Code(s): 03521]	76,900
H. Licenses issued under Subpart A of part 32 of this chapter to distribute items containing byproduct material that require device review to persons exempt from the licensing requirements of part 30 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of part 30 of this chapter [Program Code(s): 03254, 03255]	9,900
I. Licenses issued under Subpart A of part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require device evaluation to persons exempt from the licensing requirements of part 30 of this chapter, except for specific licenses authorizing redistribution of items that have been authorized for distribution to persons exempt from the licensing requirements of part 30 of this chapter [Program Code(s): 03250, 03251, 03252, 03253, 03256]	18,100
J. Licenses issued under Subpart B of part 32 of this chapter to distribute items containing byproduct material that require sealed source and/or device review to persons generally licensed under part 31 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons generally licensed under part 31 of this chapter [Program Code(s): 03240, 03241, 03243]	4,200
K. Licenses issued under Subpart B of part 32 of this chapter to distribute items containing byproduct material or quantities of byproduct material that do not require sealed source and/or device review to persons generally licensed under part 31 of this chapter, except specific licenses authorizing redistribution of items that have been authorized for distribution to persons generally licensed under part 31 of this chapter [Program Code(s): 03242, 03244]	3,000
L. Licenses of broad scope for possession and use of byproduct material issued under parts 30 and 33 of this chapter for research and development that do not authorize commercial distribution [Program Code(s): 01100, 01110, 01120, 03610, 03611, 03612, 03613]	24,300
M. Other licenses for possession and use of byproduct material issued under part 30 of this chapter for research and development that do not authorize commercial distribution [Program Code(s): 03620]	9,100
N. Licenses that authorize services for other licensees, except: (1) Licenses that authorize only calibration and/or leak testing services are subject to the fees specified in fee Category 3.P.; and (2) Licenses that authorize waste disposal services are subject to the fees specified in fee categories 4.A., 4.B., and 4.C. [Program Code(s): 03219, 03225, 03226]	13,800
O. Licenses for possession and use of byproduct material issued under part 34 of this chapter for industrial radiography operations. This category also includes the possession and use of source material for shielding authorized under part 40 of this chapter when authorized on the same license [Program Code(s): 03310, 03320]	28,200

SCHEDULE OF MATERIALS ANNUAL FEES AND FEES FOR GOVERNMENT AGENCIES LICENSED BY NRC—Continued

[See footnotes at end of table]

Category of materials licenses	Annual fees [1] [2] [3]
P. All other specific byproduct material licenses, except those in Categories 4.A. through 9.D. [Program Code(s): 02400, 02410, 03120, 03121, 03122, 03123, 03124, 03220, 03221, 03222, 03800, 03810, 22130]	4,500
Q. Registration of devices generally licensed under part 31 of this chapter	[13] N/A
R. Possession of items or products containing radium–226 identified in 10 CFR 31.12 which exceed the number of items or limits specified in that section:[14]	
1. Possession of quantities exceeding the number of items or limits in 10 CFR 31.12(a)(4), or (5) but less than or equal to 10 times the number of items or limits specified [Program Code(s): 02700]	4,100
2. Possession of quantities exceeding 10 times the number of items or limits specified in 10 CFR 31.12(a)(4), or (5) [Program Code(s): 02710]	4,500
S. Licenses for production of accelerator-produced radionuclides [Program Code(s): 03210]	15,000
4. Waste disposal and processing:	
A. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of contingency storage or commercial land disposal by the licensee; or licenses authorizing contingency storage of low-level radioactive waste at the site of nuclear power reactors; or licenses for receipt of waste from other persons for incineration or other treatment, packaging of resulting waste and residues, and transfer of packages to another person authorized to receive or dispose of waste material [Program Code(s): 03231, 03233, 03235, 03236, 06100, 06101]	[5] N/A
B. Licenses specifically authorizing the receipt of waste byproduct material, source material, or special nuclear material from other persons for the purpose of packaging or repackaging the material. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material [Program Code(s): 03234]	23,100
C. Licenses specifically authorizing the receipt of prepackaged waste byproduct material, source material, or special nuclear material from other persons. The licensee will dispose of the material by transfer to another person authorized to receive or dispose of the material [Program Code(s): 03232]	14,600
5. Well logging:	
A. Licenses for possession and use of byproduct material, source material, and/or special nuclear material for well logging, well surveys, and tracer studies other than field flooding tracer studies [Program Code(s): 03110, 03111, 03112]	12,000
B. Licenses for possession and use of byproduct material for field flooding tracer studies [Program Code(s): 03113]	[5] N/A
6. Nuclear laundries:	
A. Licenses for commercial collection and laundry of items contaminated with byproduct material, source material, or special nuclear material [Program Code(s): 03218]	42,900
7. Medical licenses:	
A. Licenses issued under parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material, or special nuclear material in sealed sources contained in gamma stereotactic radiosurgery units, teletherapy devices, or similar beam therapy devices. This category also includes the possession and use of source material for shielding when authorized on the same license [Program Code(s): 02300, 02310]	21,300
B. Licenses of broad scope issued to medical institutions or two or more physicians under parts 30, 33, 35, 40, and 70 of this chapter authorizing research and development, including human use of byproduct material, except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices. This category also includes the possession and use of source material for shielding when authorized on the same license.[9] [Program Code(s): 02110]	45,100
C. Other licenses issued under parts 30, 35, 40, and 70 of this chapter for human use of byproduct material, source material, and/or special nuclear material, except licenses for byproduct material, source material, or special nuclear material in sealed sources contained in teletherapy devices. This category also includes the possession and use of source material for shielding when authorized on the same license.[9] [Program Code(s): 02120, 02121, 02200, 02201, 02210, 02220, 02230, 02231, 02240, 22160]	7,600
8. Civil defense:	
A. Licenses for possession and use of byproduct material, source material, or special nuclear material for civil defense activities [Program Code(s): 03710]	4,100
9. Device, product, or sealed source safety evaluation:	
A. Registrations issued for the safety evaluation of devices or products containing byproduct material, source material, or special nuclear material, except reactor fuel devices, for commercial distribution	12,600
B. Registrations issued for the safety evaluation of devices or products containing byproduct material, source material, or special nuclear material manufactured in accordance with the unique specifications of, and for use by, a single applicant, except reactor fuel devices	12,600
C. Registrations issued for the safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, except reactor fuel, for commercial distribution	8,800
D. Registrations issued for the safety evaluation of sealed sources containing byproduct material, source material, or special nuclear material, manufactured in accordance with the unique specifications of, and for use by, a single applicant, except reactor fuel	1,500
10. Transportation of radioactive material:	
A. Certificates of Compliance or other package approvals issued for design of casks, packages, and shipping containers	
1. Spent Fuel, High-Level Waste, and plutonium air packages	[6] N/A
2. Other Casks	[6] N/A
B. Quality assurance program approvals issued under part 71 of this chapter	
1. Users and Fabricators	[6] N/A
2. Users	[6] N/A
C. Evaluation of security plans, route approvals, route surveys, and transportation security devices (including immobilization devices)	[6] N/A
11. Standardized spent fuel facilities	[6] N/A
12. Special Projects	[6] N/A

SCHEDULE OF MATERIALS ANNUAL FEES AND FEES FOR GOVERNMENT AGENCIES LICENSED BY NRC—Continued

[See footnotes at end of table]

Category of materials licenses	Annual fees [1] [2] [3]
13. A. Spent fuel storage cask Certificate of Compliance	[6] N/A
B. General licenses for storage of spent fuel under 10 CFR 72.210	[12] N/A
14. Decommissioning/Reclamation:	
A. Byproduct, source, or special nuclear material licenses and other approvals authorizing decommissioning, decontamination, reclamation, or site restoration activities under parts 30, 40, 70, 72, and 76 of this chapter	[7] N/A
B. Site-specific decommissioning activities associated with unlicensed sites, whether or not the sites have been previously licensed	[7] N/A
15. Import and Export licenses	[8] N/A
16. Reciprocity	[8] N/A
17. Master materials licenses of broad scope issued to Government agencies	235,000
18. Department of Energy:	
A. Certificates of Compliance	[10] 886,000
B. Uranium Mill Tailings Radiation Control Act (UMTRCA) activities	590,000

[1] Annual fees will be assessed based on whether a licensee held a valid license with the NRC authorizing possession and use of radioactive material during the current FY. The annual fee is waived for those materials licenses and holders of certificates, registrations, and approvals who either filed for termination of their licenses or approvals or filed for possession only/storage licenses before October 1, 2009, and permanently ceased licensed activities entirely before this date. Annual fees for licensees who filed for termination of a license, downgrade of a license, or for a possession-only license during the FY and for new licenses issued during the FY will be prorated in accordance with the provisions of § 171.17. If a person holds more than one license, certificate, registration, or approval, the annual fee(s) will be assessed for each license, certificate, registration, or approval held by that person. For licenses that authorize more than one activity on a single license (e.g., human use and irradiator activities), annual fees will be assessed for each category applicable to the license. Licensees paying annual fees under Category 1.A.(1) are not subject to the annual fees for Categories 1.C. and 1.D. for sealed sources authorized in the license.

[2] Payment of the prescribed annual fee does not automatically renew the license, certificate, registration, or approval for which the fee is paid. Renewal applications must be filed in accordance with the requirements of parts 30, 40, 70, 71, 72, or 76 of this chapter.

[3] Each FY, fees for these materials licenses will be calculated and assessed in accordance with § 171.13 and will be published in the **Federal Register** for notice and comment.

[4] Other facilities include licenses for extraction of metals, heavy metals, and rare earths.

[5] There are no existing NRC licenses in these fee categories. If NRC issues a license for these categories, the Commission will consider establishing an annual fee for this type of license.

[6] Standardized spent fuel facilities, 10 CFR parts 71 and 72 Certificates of Compliance and related Quality Assurance program approvals, and special reviews, such as topical reports, are not assessed an annual fee because the generic costs of regulating these activities are primarily attributable to users of the designs, certificates, and topical reports.

[7] Licensees in this category are not assessed an annual fee because they are charged an annual fee in other categories while they are licensed to operate.

[8] No annual fee is charged because it is not practical to administer due to the relatively short life or temporary nature of the license.

[9] Separate annual fees will not be assessed for pacemaker licenses issued to medical institutions that also hold nuclear medicine licenses under Categories 7.B. or 7.C.

[10] This includes Certificates of Compliance issued to the Department of Energy that are not funded from the Nuclear Waste Fund.

[11] See § 171.15(c).

[12] See § 171.15(c).

[13] No annual fee is charged for this category because the cost of the general license registration program applicable to licenses in this category will be recovered through 10 CFR part 170 fees.

[14] Persons who possess radium sources that are used for operational purposes in another fee category are not also subject to the fees in this category. (This exception does not apply if the radium sources are possessed for storage only.)

(e) The fee-relief adjustment allocated to annual fees includes the budgeted resources for the activities listed in paragraph (e)(1) of this section, plus the total budgeted resources for the activities included in paragraphs (e)(2) and (e)(3) of this section, as reduced by the appropriations NRC receives for these types of activities. If the NRC's appropriations for these types of activities are greater than the budgeted resources for the activities included in paragraphs (e)(2) and (e)(3) of this section for a given FY, a negative fee-relief adjustment (or annual fee reduction) will be allocated to annual fees. The activities comprising the FY 2010 fee-relief adjustment are as follows:

* * * * *

Dated at Rockville, Maryland, this 23rd day of February 2010.

For the Nuclear Regulatory Commission.

J.E. Dyer,

Chief Financial Officer.

Note: This Appendix will not appear in the Code of Federal Regulations.

Appendix A to This Proposed Rule—Regulatory Flexibility Analysis for the Final Amendments to 10 CFR Part 170 (License Fees) and 10 CFR Part 171 (Annual Fees)

I. Background

The Regulatory Flexibility Act (RFA), as amended 5 U.S.C. 601 *et seq.,* requires that agencies consider the impact of their rulemakings on small entities and, consistent with applicable statutes, consider alternatives to minimize these impacts on the businesses, organizations, and government jurisdictions to which they apply.

The NRC has established standards for determining which NRC licensees qualify as small entities (10 CFR 2.810). These standards were based on the Small Business Administration's most common receipts-based size standards and provides for business concerns that are manufacturing entities. The NRC uses the size standards to reduce the impact of annual fees on small entities by establishing a licensee's eligibility to qualify for a maximum small entity fee. The small entity fee categories in § 171.16(c) of this proposed rule are based on the NRC's size standards.

The NRC is required each year, under OBRA–90, as amended, to recover approximately 90 percent of its budget authority (less amounts appropriated from the NWF and for other activities specifically removed from the fee base), through fees to NRC licensees and applicants. In total, the NRC is required to bill approximately $911.1 million in fees for FY 2010.

OBRA–90 requires that the schedule of charges established by rulemaking should fairly and equitably allocate the total amount to be recovered from the NRC's licensees and be assessed under the principle that licensees who require the greatest expenditure of

agency resources pay the greatest annual charges. Since FY 1991, the NRC has complied with OBRA–90 by issuing a final rule that amends its fee regulations. These final rules have established the methodology used by the NRC in identifying and determining the fees to be assessed and collected in any given FY.

The Commission is proposing to rebaseline its 10 CFR part 171 annual fees in FY 2010. Rebaselining fees results in higher annual fees for five classes of licensees (power reactors, spent fuel storage/reactor decommissioning, transportation, uranium recovery and materials users), and lower for one class of licensees (non-power reactors). Within the fuel facilities fee class, annual fees for most licensees increase, while the annual fee for one fee category decreases.

The Small Business Regulatory Enforcement Fairness Act (SBREFA) provides Congress with the opportunity to review agency rules before they go into effect. Under this legislation, the NRC annual fee rule is considered a "major" rule and must be reviewed by Congress and the Comptroller General before the rule becomes effective.

The SBREFA also requires that an agency prepare a guide to assist small entities in complying with each rule for which a final RFA is prepared. As required by law, this analysis and the small entity compliance guide (Attachment 1) have been prepared for the FY 2010 fee rule, as required by law.

II. Impact on Small Entities

The fee rule results in substantial fees charged to those individuals, organizations, and companies licensed by the NRC, including those licensed under the NRC materials program. Comments received on previous proposed fee rules and the small entity certifications in response to previous final fee rules indicate that licensees qualifying as small entities under the NRC's size standards are primarily materials licensees. Therefore, this analysis will focus on the economic impact of fees on materials licensees. In FY 2009, about 26 percent of these licensees (approximately 1,000 licensees) qualified as small entities.

Commenters on previous fee rulemakings consistently indicated that the following would occur if the proposed annual fees were not modified:

1. Large firms would gain an unfair competitive advantage over small entities. Commenters noted that small and very small companies ("Mom and Pop" operations) would find it more difficult to absorb the annual fee than a large corporation or a high-volume type of operation. In competitive markets, such as soil testing, annual fees would put small licensees at an extreme competitive disadvantage with their much larger competitors because the proposed fees would be identical for both small and large firms.

2. Some firms would be forced to cancel their licenses. A licensee with receipts of less than $500,000 per year stated that the proposed rule would, in effect, force it to relinquish its soil density gauge and license, thereby reducing its ability to do its work effectively. Other licensees, especially well-loggers, noted that the increased fees would force small businesses to abandon the materials license altogether. Commenters estimated that the proposed rule would cause roughly 10 percent of the well-logging licensees to terminate their licenses immediately and approximately 25 percent to terminate before the next annual assessment.

3. Some companies would go out of business.

4. Some companies would have budget problems. Many medical licensees noted that, along with reduced reimbursements, the proposed increase of the existing fees and the introduction of additional fees would significantly affect their budgets. Others noted that, in view of the cuts by Medicare and other third party carriers, the fees would produce a hardship difficult for some facilities to meet.

Over 3,000 licenses, approvals, and registration terminations have been requested since the NRC first established annual fees for materials licenses. Although some terminations were requested because the license was no longer needed or could be combined with registrations, indications are that the economic impact of the fees caused other terminations.

To alleviate the significant impact of the annual fees on a substantial number of small entities, the NRC considered the following alternatives in accordance with the RFA in developing each of its fee rules since FY 1991.

1. Base fees on some measure of the amount of radioactivity possessed by the licensee (e.g., number of sources).

2. Base fees on frequency of use of licensed radioactive material (e.g., volume of patients).

3. Base fees on the NRC size standards for small entities.

The NRC has reexamined its previous evaluations of these alternatives and continues to believe that a maximum fee for small entities is the most appropriate and effective option for reducing the impact of fees on small entities.

III. Maximum Fee

The SBREFA and its implementing guidance do not provide specific guidelines on what constitutes a significant economic impact on a small entity; therefore, the NRC has no benchmark to assist it in determining the amount or percent of gross receipts that should be charged to a small entity. In developing the maximum small entity annual fee in FY 1991, the NRC examined 10 CFR part 170 licensing and inspection fees and Agreement State fees for fee categories which were expected to have a substantial number of small entities. Six Agreement States (Washington, Texas, Illinois, Nebraska, New York, and Utah), were used as benchmarks in the establishment of the maximum small entity annual fee in FY 1991.

The NRC maximum small entity fee was established as an annual fee only. In addition to the annual fee, NRC small entity licensees were required to pay amendment, renewal and inspection fees. In setting the small entity annual fee, NRC ensured that the total amount small entities paid would not exceed the maximum paid in the six benchmark Agreement States.

Of the six benchmark states, the NRC used Washington's maximum Agreement State fee of $3,800 as the ceiling for total fees. Thus NRC's small entity fee was developed to ensure that the total fees paid by NRC small entities would not exceed $3,800. Given the NRC's FY 1991 fee structure for inspections, amendments, and renewals, a small entity annual fee established at $1,800 allowed the total fee (small entity annual fee plus yearly average for inspections, amendments, and renewal fees) for all categories to fall under the $3,800 ceiling.

In FY 1992, the NRC introduced a second, lower tier to the small entity fee in response to concerns that the $1,800 fee, when added to the license and inspection fees, still imposed a significant impact on small entities with relatively low gross annual receipts. For purposes of the annual fee, each small entity size standard was divided into an upper and lower tier. Small entity licensees in the upper tier continued to pay an annual fee of $1,800, while those in the lower tier paid an annual fee of $400.

Based on the changes that had occurred since FY 1991, the NRC re-analyzed its maximum small entity annual fees in FY 2000 and determined that the small entity fees should be increased by 25 percent to reflect the increase in the average fees paid by other materials licensees since FY 1991, as well as changes in the fee structure for materials licensees. The structure of fees NRC charged its materials licensees changed during the period between 1991 and 1999. Costs for materials license inspections, renewals, and amendments, which were previously recovered through part 170 fees for services, are now included in the part 171 annual fees assessed to materials licensees. Because of the 25 percent increase, in FY 2000 the maximum small entity annual fee increased from $1,800 to $2,300. However, despite the increase, total fees for many small entities were reduced because they no longer paid part 170 fees. Costs not recovered from small entities were allocated to other materials licensees and to power reactors.

While reducing the impact on many small entities, the NRC determined that the maximum annual fee of $2,300 for small entities could continue to have a significant impact on materials licensees with relatively low annual gross receipts. Therefore, the NRC continued to provide the lower-tier small entity annual fee for small entities with relatively low gross annual receipts, manufacturing concerns, and for educational institutions not State or publicly supported with fewer than 35 employees. The NRC also increased the lower tier small entity fee by 25 percent, the same percentage increase to the maximum small entity annual fee, resulting in the lower tier small entity fee increasing from $400 to $500 in FY 2000.

The NRC stated in the RFA for the FY 2001 final fee rule that it would re-examine the small entity fees every two years, in the same years in which it conducts the biennial review of fees as required by the Chief Financial Officers Act. Accordingly, the NRC examined the small entity fees again in FY 2003 and FY 2005, determining that a change was not warranted to those fees established in FY 2001.

As part of the small entity review in FY 2007, the NRC also considered whether it should establish reduced fees for small entities under part 170. The NRC received one comment requesting that small entity fees be considered for certain export licenses, particularly in light of the recent increases to part 170 fees for these licenses. Because the NRC's part 170 fees are not assessed to a licensee or applicant on a regular basis (i.e., they are only assessed when a licensee or applicant requests a specific service from the NRC), the NRC does not believe that the impact of its part 170 fees warrants a fee reduction for small entities, in addition to the part 171 small entity fee reduction. Regarding export licenses, the NRC notes that interested parties can submit a single application for a broad scope, multi-year license that permits exports to multiple countries. Because the NRC charges fees per application, this process minimizes the fees for export applicants. Because a single NRC fee can cover numerous exports, and because there are a limited number of entities who apply for these licenses, the NRC does not anticipate that the part 170 export fees will have a significant impact on a substantial number of small entities. Therefore, the NRC retained the $2,300 small entity annual fee and the $500 lower tier small entity annual fee for FY 2007 and FY 2008.

The NRC conducted an in-depth biennial review of the FY 2009 small entity fees. The review noted significant changes between FY 2000 and FY 2008 in both the external and internal environment which impacted fees for NRC's small materials users licensees. Since FY 2000, small entity licensees in the upper tier had increased approximately 53 percent. In addition, due to changes in the law, NRC is now only required to recover 90 percent of its budget authority compared to 100 percent recovery required in FY 2000. This ten percent fee relief has influenced the small materials users' annual fees. A decrease in the NRC's budget allocation to the small materials users also influenced annual fees in FY 2007 and FY 2008.

Based on the review, the NRC changed the methodology for reviewing small entity fees. The NRC determined the maximum small entity fee should be adjusted each biennial year using a fixed percentage of 39 percent applied to the prior two-year weighted average of small materials users fees for all fee categories which have small entity licensees. The 39 percent was based on the small entity annual fee for FY 2005, which was first year the NRC was required to recover only 90 percent of its budget authority. The FY 2005 small entity annual fee of $2,300 was 39 percent of the two-year weighted average for all fee categories in FY 2005 and FY 2006 that had an upper tier small entity licensee. The new methodology allows small entity licensees to be able to predict changes in their fee in the biennial year based on the small materials fees for the previous two years. Using a two-year weighted average smoothes the fluctuations caused by programmatic and budget variables and reflects the importance of the fee categories with the majority of small entities. The agency also determined the lower tier annual fee should remain at 22 percent of the maximum small entity annual fee.

Therefore, for FY 2009 the NRC decreased the maximum small entity fee from $2,300 to $1,900 and decreased the lower tier annual fee from $500 to $400. The NRC is not proposing changes to these fees in FY 2010 and plans to re-examine the small entity fees again in FY 2011.

IV. Summary

The NRC has determined that the 10 CFR part 171 annual fees significantly impact a substantial number of small entities. A maximum fee for small entities strikes a balance between the requirement to recover 90 percent of the NRC budget and the requirement to consider means of reducing the impact of the fee on small entities. Based on its regulatory flexibility analysis, the NRC concludes that a maximum annual fee of $1,900 for small entities and a lower-tier small entity annual fee of $400 for small businesses and not-for-profit organizations with gross annual receipts of less than $450,000, small governmental jurisdictions with a population of fewer than 20,000, small manufacturing entities that have fewer than 35 employees, and educational institutions that are not State or publicly supported and have fewer than 35 employees, reduces the impact on small entities. At the same time, these reduced annual fees are consistent with the objectives of OBRA–90. Thus, the fees for small entities maintain a balance between the objectives of OBRA–90 and the RFA. Therefore, the analysis and conclusions previously established remain valid for FY 2010.

Attachment 1 to Appendix A—U.S. Nuclear Regulatory Commission Small Entity Compliance Guide; Fiscal Year 2010

Contents

Introduction

The Congressional Review Act requires all Federal agencies to prepare a written guide for each "major" final rule, as defined by the Act. The NRC's fee rule, published annually to comply with the Omnibus Budget Reconciliation Act of 1990 (OBRA–90), as amended, is considered a "major" rule under the Congressional Review Act. Therefore, in compliance with the law, this guide has been prepared to assist NRC materials licensees in complying with the FY 2010 fee rule.

Licensees may use this guide to determine whether they qualify as a small entity under NRC regulations and are eligible to pay reduced FY 2010 annual fees assessed under 10 CFR part 171. The NRC has established two tiers of annual fees for those materials licensees who qualify as small entities under the NRC's size standards.

Licensees who meet the NRC's size standards for a small entity (listed in 10 CFR 2.810) must submit a completed NRC Form 526 "Certification of Small Entity Status for the Purposes of Annual Fees Imposed under 10 CFR Part 171" to qualify for the reduced annual fee. This form can be accessed on the NRC's Web site at *http://www.nrc.gov.* The form can then be accessed by selecting "Business with NRC," then "NRC Forms," selecting NRC Form 526. For licensees who cannot access the NRC's Web site, NRC Form 526 may be obtained through the local point of contact listed in the NRC's "Materials Annual Fee Billing Handbook," NUREG/BR–0238, which is enclosed with each annual fee billing. Alternatively, the form may be obtained by calling the fee staff at 301–415–7554, or by e-mailing the fee staff at *fees.resource@nrc.gov.*

The completed form, the appropriate small entity fee, and the payment copy of the invoice should be mailed to the U.S. Nuclear Regulatory Commission, Accounts Receivable/Payable Branch, at the address indicated on the invoice. Failure to file the NRC small entity certification Form 526 in a timely manner may result in the denial of any refund that might otherwise be due.

NRC Definition of Small Entity

For purposes of compliance with its regulations (10 CFR 2.810), the NRC has defined a small entity as follows:

(1) *Small business*—a for-profit concern that provides a service, or a concern that is not engaged in manufacturing, with average gross receipts of $6.5 million or less over its last 3 completed fiscal years;

(2) *Manufacturing industry*—a manufacturing concern with an average of 500 or fewer employees based on employment during each pay period for the preceding 12 calendar months;

(3) *Small organizations*—a not-for-profit organization that is independently owned and operated and has annual gross receipts of $6.5 million or less;

(4) *Small governmental jurisdiction*—a government of a city, county, town, township, village, school district, or special district, with a population of fewer than 50,000;

(5) *Small educational institution*—an educational institution supported by a qualifying small governmental jurisdiction, or one that is not State or publicly supported and has 500 or fewer employees.[1]

To further assist licensees in determining if they qualify as a small entity, the following guidelines are provided, which are based on the Small Business Administration's regulations (13 CFR part 121).

(1) A small business concern is an independently owned and operated entity which is not considered dominant in its field of operations.

(2) The number of employees means the total number of employees in the parent company, any subsidiaries and/or affiliates, including both foreign and domestic locations (i.e., not solely the number of employees working for the licensee or conducting NRC-licensed activities for the company).

(3) Gross annual receipts include all revenue received or accrued from any source,

[1] An educational institution referred to in the size standards is an entity whose primary function is education, whose programs are accredited by a nationally recognized accrediting agency or association, who is legally authorized to provide a program of organized instruction or study, who provides an educational program for which it awards academic degrees, and whose educational programs are available to the public.

including receipts of the parent company, any subsidiaries and/or affiliates, and account for both foreign and domestic locations. Receipts include all revenues from sales of products and services, interest, rent, fees, and commissions from whatever sources derived (i.e., not solely receipts from NRC-licensed activities).

(4) A licensee who is a subsidiary of a large entity, including a foreign entity, does not qualify as a small entity.

NRC Small Entity Fees

In 10 CFR 171.16(c), the NRC has established two tiers of fees for licensees that qualify as a small entity under the NRC's size standards. The fees are as follows:

	Maximum annual fee per licensed category
Small Businesses Not Engaged in Manufacturing (Average gross receipts over last 3 completed fiscal years):	
$450,000 to $6.5 million	$1,900
Less than $450,000	400
Small Not-For-Profit Organizations (Annual Gross Receipts):	
$450,000 to $6.5 million	1,900
Less than $450,000	400
Manufacturing entities that have an average of 500 employees or fewer:	
35 to 500 employees	1,900
Fewer than 35 employees	400
Small Governmental Jurisdictions (Including publicly supported educational institutions) (Population):	
20,000 to 50,000	1,900
Fewer than 20,000	400
Educational Institutions that are not State or Publicly Supported, and have 500 Employees or Fewer:	
35 to 500 employees	1,900
Fewer than 35 employees	400

Instructions for Completing NRC Small Entity Form 526

1. Complete all items on NRC Form 526 as follows: (**Note:** Incomplete or improperly completed forms will be returned as unacceptable.)

(a) Enter the license number and invoice number exactly as they appear on the annual fee invoice.

(b) Enter the North American Industry Classification System (NAICS).

(c) Enter the licensee's name and address exactly as they appear on the invoice. Annotate name and/or address changes for billing purposes on the payment copy of the invoice—include contact's name, telephone number, e-mail address, and company Web site address. Correcting the name and/or address on NRC Form 526 or on the invoice does not constitute a request to amend the license.

(d) Check the appropriate size standard under which the licensee qualifies as a small entity. Check one box only. Note the following:

(i) A licensee who is a subsidiary of a large entity, including foreign entities, does not qualify as a small entity. The calculation of a firm's size includes the employees or receipts of all affiliates. Affiliation with another concern is based on the power to control, whether exercised or not. Such factors as common ownership, common management, and identity of interest (often found in members of the same family), among others, are indications of affiliation. The affiliated business concerns need not be in the same line of business.

(ii) Gross annual receipts, as used in the size standards, include all revenue received or accrued by your company from all sources, regardless of the form of the revenue and not solely receipts from licensed activities.

(iii) NRC's size standards on a small entity are based on the Small Business Administration's regulations (13 CFR part 121).

(iv) The size standards apply to the licensee, not to the individual authorized users who may be listed in the license.

2. If the invoice states the "Amount Billed Represents 50% Proration," the amount due is not the prorated amount shown on the invoice but rather one-half of the maximum small entity annual fee shown on NRC Form 526 for the size standard under which the licensee qualifies (either $950 or $200) for each category billed.

3. If the invoice amount is less than the reduced small entity annual fee shown on this form, pay the amount on the invoice; there is no further reduction. In this case, do not file NRC Form 526. However, if the invoice amount is greater than the reduced small entity annual fee, file NRC Form 526 and pay the amount applicable to the size standard you checked on the form.

4. The completed NRC Form 526 must be submitted with the required annual fee payment and the "Payment Copy" of the invoice to the address shown on the invoice.

5. 10 CFR 171.16(c)(3) states licensees shall submit a new certification with its annual fee payment each year. Failure to submit NRC Form 526 at the time the annual fee is paid will require the licensee to pay the full amount of the invoice.

The NRC sends invoices to its licensees for the full annual fee, even though some licensees qualify for reduced fees as small entities. Licensees who qualify as small entities and file NRC Form 526, which certifies eligibility for small entity fees, may pay the reduced fee, which is either $1,900 or $400 for a full year, depending on the size of the entity, for each fee category shown on the invoice. Licensees granted a license during the first 6 months of the fiscal year, and licensees who file for termination or for a "possession-only" license and permanently cease licensed activities during the first 6 months of the fiscal year, pay only 50 percent of the annual fee for that year. Such invoices state that the "amount billed represents 50% proration."

Licensees must file a new small entity form (NRC Form 526) with the NRC each fiscal year to qualify for reduced fees in that year. Because a licensee's "size," or the size standards, may change from year to year, the invoice reflects the full fee, and licensees must complete and return NRC Form 526 for the fee to be reduced to the small entity fee amount. Licensees will not receive a new invoice for the reduced amount. The completed NRC Form 526, the payment of the appropriate small entity fee, and the "Payment Copy" of the invoice should be mailed to the U.S. Nuclear Regulatory Commission, Accounts Receivable/Payable Branch, at the address indicated on the invoice.

If you have questions regarding the NRC's annual fees, please contact the license fee staff at 301–415–7554, e-mail the fee staff at *fees.resource@nrc.gov,* or write to the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, *Attention:* Office of the Chief Financial Officer.

False certification of small entity status could result in civil sanctions being imposed by the NRC under the Program Fraud Civil Remedies Act, 31 U.S.C. 3801 *et seq.* NRC's implementing regulations are found at 10 CFR part 13.

[FR Doc. 2010–4528 Filed 3–9–10; 8:45 am]

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Part V

Environmental Protection Agency

Certain New Chemicals; Receipt and Status Information; Notices

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2010–0112; FRL–8814–1]

Certain New Chemicals; Receipt and Status Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5 of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory) to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a premanufacture notice (PMN) or an application for a test marketing exemption (TME), and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from October 26, 2009 through January 22, 2010, consists of the PMNs and TME, both pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

DATES: Comments identified by the specific PMN number or TME number, must be received on or before April 9, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2010–0112, 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–2010–0112. 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–2010–0112. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

Docket: All documents in the docket are listed in the 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 Federal 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: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division, Office of Pollution Prevention and Toxics (7408M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; 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 action is directed to the public in general. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitter of the premanufacture notices addressed in the 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 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. Why is EPA Taking this Action?

Section 5 of TSCA requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a PMN or an application for a TME and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from October 26, 2009 through January 22, 2010, consists of the PMNs and TME, both pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

III. Receipt and Status Report for PMNs

This status report identifies the PMNs and TME, both pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period. If you are interested in information that is not included in the following tables, you may contact EPA as described in Unit I. to access additional non-CBI information that may be available.

In Table I of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the PMNs received by EPA during this period: the EPA case number assigned to the PMN; the date the PMN was received by EPA; the projected end date for EPA's review of the PMN; the submitting manufacturer; the potential uses identified by the manufacturer in the PMN; and the chemical identity.

I. 161 PREMANUFACTURE NOTICES RECEIVED FROM: 10/26/09 TO 1/22/10

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–10–0022	10/26/09	01/23/10	H.B. Fuller	(G) Industrial adhesive	(G) Isocyanate-functional polyurethane prepolymer
P–10–0023	10/26/09	01/23/10	CBI	(S) Pigment derivative used in ink contained in ink jet printer cartridges	(G) Benzenesulfonic acid, 4-amino, azo pigment
P–10–0024	10/26/09	01/23/10	CBI	(G) Precursor to another chemical substance, destructive use	(G) Substituted benzoyl chloride
P–10–0025	10/26/09	01/23/10	CBI	(G) Precursor to another chemical substance, destructive use	(G) Substituted pyrazolone
P–10–0026	10/26/09	01/23/10	CBI	(G) Precursor to another chemical substance, destructive use	(G) Salt of condensation product of substituted pyrazolone
P–10–0027	10/26/09	01/23/10	CBI	(G) Precursor to another chemical substance, destructive use	(G) Substituted benzoic acid
P–10–0028	10/26/09	01/23/10	CBI	(G) Precursor to another chemical substance, destructive use	(G) Substituted benzoic acid
P–10–0029	10/28/09	01/25/10	CBI	(S) Acrylic polymer used in the manufacture of adhesive tapes	(G) Acrylic polymer
P–10–0030	10/28/09	01/25/10	PPG Industries, Inc.	(G) Component of a coating	(G) Aromatic polyurethane
P–10–0031	10/28/09	01/25/10	Reichhold, Inc.	(G) Flexibilizing resin, non-dispersive	(G) Alkanediol, polymer with alkyleneamine, isocyanate and glycol
P–10–0032	10/27/09	01/24/10	CBI	(G) Dewaxing aid	(G) Alkylester, polymer with alkyl acrylate
P–10–0033	10/27/09	01/24/10	CBI	(G) Gear oil additive	(G) Aromatic hydrogenated poly alkyldiene containing poly alkyl methacrylate
P–10–0034	10/27/09	01/24/10	Firmenich Inc.	(S) Aroma for use in fragrance mixtures, which in turn are used in perfumes, soaps, cleansers, etc.	(S) 1(2*H*)-naphthalenone, octahydro-2,3,81-trimethyl-, (3R, 4AR, 8AR)-rel-
P–10–0035	10/29/09	01/26/10	CBI	(G) Conditioning agent	(G) Sodium carboxylate
P–10–0036	10/30/09	01/27/10	CBI	(S) Polyester filament and staple	(G) Substituted polyethylene terephtalate
P–10–0037	10/30/09	01/27/10	CBI	(S) Flame retardant in polyester filament and staple	(G) Substituted propionic acid
P–10–0038	11/02/09	01/30/10	CBI	(S) Flame retardant for use in adhesives and coatings	(G) Heterocyclic salt
P–10–0039	11/03/09	01/31/10	Nanocomp Technologies, Inc.	(G) For all applications listed here the field is composite structures for aerospace	(S) Carbon
P–10–0040	11/03/09	01/31/10	Nanocomp Technologies, Inc.	(G) For all applications listed here the field is aerospace	(S) Carbon
P–10–0041	11/03/09	01/31/10	Huntsman Corporation	(G) Dispersing agent	(G) Polyether polyacid comb polymer

I. 161 PREMANUFACTURE NOTICES RECEIVED FROM: 10/26/09 TO 1/22/10—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–10–0042	11/03/09	01/31/10	CBI	(S) Laminating adhesive	(G) Polyester polyurethane
P–10–0043	11/03/09	01/31/10	CBI	(S) Coatings application	(G) Silicone modified alkyd resin
P–10–0044	11/04/09	02/01/10	Green Era Solutions	(S) Fragrance ingredient	(S) Extractives and their physically modified derivatives. *Callitropsis nootkatensis*. Oil, *callitropsis nootkatensis*
P–10–0045	11/04/09	02/01/10	CBI	(G) Adhesives	(G) Solvent free adhesives
P–10–0046	11/04/09	02/01/10	Coim USA Inc.	(S) Foam insulation	(S) 1,4-benzenedicarboxylic acid, polymer with 2,2-bis(hydroxymethyl)-1,3-propanediol, hexanedioic acid, .alpha.-hydro-.omega.-hydroxypoly(oxy-1,2-ethanediyl), 1,3-isobenzofurandione and 2,2′-oxybis[ethanol], benzoate
P–10–0047	11/05/09	02/02/10	CBI	(S) Curing agent for epoxy resin in protective coatings	(G) Alkenoic acid, 2-methyl-, 2-oxiranylmethyl ester, reaction products with 4,4′-methylenebis (cyclohexanamine)
P–10–0048	11/05/09	02/02/10	CBI	(G) Pigment dispersant; drilling fluid dispersant	(G) Sulfonated SMA
P–10–0049	11/06/09	02/03/10	CBI	(S) Resin for coatings for metal	(G) Polyester polyurethane
P–10–0050	11/09/09	02/06/10	CBI	(G) Component in corrosion inhibitor formulation for oil field use	(G) Amine salts of fatty acids
P–10–0051	11/09/09	02/06/10	Cognis Corporation	(S) Performance additive for hard surface cleaners	(S) Starch, 2-carboxyethyl 2-methyl-3-oxo-3-[[3-(trimethylammonio)propyl]amino]propyl ether, chloride
P–10–0052	11/09/09	02/06/10	CBI	(G) Fuel additive intermediate	(G) Aryl polyolefin
P–10–0053	11/10/09	02/07/10	CBI	(S) Reactant for the manufacture of a pesticide	(G) Halogenated aromatic amine
P–10–0054	11/10/09	02/07/10	DIC International (USA) LLC	(G) Additive for lubricating oil	(G) Fluorinated acrylic acid ester copolymer (telomer type)
P–10–0055	11/09/09	02/06/10	CBI	(S) Ingredient in fragrance compound	(S) Butanoic acid, 3-hydroxy-, 5-methyl-2-(1-methylethyl)cyclohexyl ester
P–10–0056	11/09/09	02/06/10	CBI	(S) Ingredient in fragrance compound	(S) Butanoic acid, 3-mercapo-2-methyl-, ethyl ester
P–10–0057	11/09/09	02/06/10	CBI	(G) Fuel additive	(G) Polyolefin aryl amine
P–10–0058	11/12/09	02/09/10	CBI	(G) Intermediate	(G) Partially fluorinated alcohol substituted glycol
P–10–0059	11/12/09	02/09/10	CBI	(G) Intermediate	(G) Partially fluorinated alcohol substituted glycol
P–10–0060	11/12/09	02/09/10	CBI	(G) Surface active agent	(G) Partially fluorinated alcohol substituted glycol
P–10–0061	11/13/09	02/10/10	CBI	(G) Chemical intermediate - destructive use	(G) Alkyl thiol, manufacture of, by-products from, distant lights
P–10–0062	11/13/09	02/10/10	CBI	(G) Chemical intermediate - destructive use	(G) Alkyl thiol, manufacture of, by-products from, distant residues
P–10–0063	11/12/09	02/09/10	Mitsui Chemicals America, Inc.	(S) Binder for toner	(G) Aromatic discarboxylic acid, polymer with 1,3-diisocyanatomethylbenzene, .alpha., .alpha′.-[(1-methylethylidene)di-4,1-phenylene]bis[.omega.-hydroxypoly[oxy(methyl-1-2, ethanediyl)]] and 2,2′-oxybis[etehanol]
P–10–0064	11/16/09	02/13/10	CBI	(G) Curing aid	(G) Amidosilane
P–10–0065	11/16/09	02/13/10	CBI	(G) Additive, open, non-dispersive use	(G) Polyether modified polyurea
P–10–0066	11/16/09	02/13/10	CBI	(G) Ethoxylation initiator	(G) Partially fluorinated ortho-ester
P–10–0067	11/16/09	02/13/10	CBI	(G) Used in the manufacture of polyurethane foam	(G) Organotin compound
P–10–0068	11/17/09	02/14/10	CBI	(S) Additive for rubber articles	(G) Sulfur silane

I. 161 PREMANUFACTURE NOTICES RECEIVED FROM: 10/26/09 TO 1/22/10—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–10–0069	11/17/09	02/14/10	CBI	(G) Used in adhesive products	(G) alkyl acrylate, polymer with aliphatic acid vinyl ester, vinyl monomer, acrylate and hydroxyalkyl acrylate
P–10–0070	11/17/09	02/14/10	CBI	(G) Used in adhesive products	(G) acrylate, polymer with aliphatic acid vinyl ester, vinyl monomer and hydroxyalkyl acrylate
P–10–0071	11/17/09	02/14/10	CBI	(G) Used in adhesive products	(G) alkyl acrylate, polymer with aliphatic acid vinyl ester, acrylate hydroxyalkyl acrylate, alkanenitrile and acrylate
P–10–0072	11/13/09	02/10/10	The Dow Chemical Company	(S) Monomer inhibitor	(G) Substituted oxidized piperidinyl derivative
P–10–0073	11/17/09	02/14/10	CBI	(G) Hardener for industrial coatings	(G) Blocked polyisocyanate
P–10–0074	11/17/09	02/14/10	Alberdingk Boley, Inc.	(S) For special metal coatings	(G) Butanoic acid, 3-oxo-, 2-[(2-methyl-1-oxo-2-propen -1-yl)oxy]ethyl ester, polymer with butyl 2-methyl-2-propenoate, ethenylbenzene, 2-ethylhexyl 2-propenoate, methyl 2-methyl-2-propenoate, phosphoric acid, di-ester with hydroxy ethyl methacrylate and 2-(phosphonooxy) ethyl 2-methyl-2-propenoate
P–10–0075	11/18/09	02/15/10	CBI	(G) Resin for use in manufacture of reinforced composite products	(G) Brominated aromatic polyether polyester
P–10–0076	11/18/09	02/15/10	CBI	(S) Raw material used for production of 1,1-biphenyl, 3,3′,4,4′-tetramethyl	(S) Benzene, 4-bromo-1,2-dimethyl-
P–10–0077	11/18/09	02/15/10	CBI	(G) Automotive coatings	(G) Linear hydroxy funtional polyester
P–10–0078	11/18/09	02/15/10	Dow Chemical Company	(G) Adhesive component	(G) Capped polyurethane adduct
P–10–0079	11/18/09	02/15/10	CBI	(G) Colorant	(G) Substituted naphthalene mixed salt
P–10–0080	11/19/09	02/16/10	CBI	(G) Adhesive	(G) Mdi modified polyester resin
P–10–0081	11/18/09	02/15/10	CBI	(S) Curing agent for epoxy resin in protective coatings	(G) Phenol, polymer with formaldehyde, glycidyl ether, reaction products with 5-amino-1,3,3-trialkylcycloalkanemethanamine
P–10–0082	11/18/09	02/15/10	CBI	(G) Multi-purpose additive	(S) 1,2,3-propanetriol, homopolymer, hexadecanoate octadecanoate
P–10–0083	11/05/09	02/02/10	CBI	(G) Resin component	(G) Hydroxy-aryl, polymer with substituted benzene, cyanate
P–10–0084	11/20/09	02/17/10	CBI	(G) Dispersion additive for printing ink	(G) Carbazole violet sulfonamide derivate
P–10–0085	11/23/09	02/20/10	CBI	(G) Non-dispersive use	(G) Bismuth salt of lactic acid
P–10–0086	11/23/09	02/20/10	CBI	(G) Laminate resin viscosity modifier	(G) Epoxidized benzoxazine
P–10–0087	11/23/09	02/20/10	CBI	(G) Destructive use	(G) Octylated phenyl-alpha-naphthylamine
P–10–0088	11/24/09	02/21/10	Frx Polymers, Inc.	(G) Frx co-polymers are non-halogenated polyphosphonate-co-polycarbonate flame retardant polymers that address the need to replace the current commercial bromine-containing flame retardants that are being phased out due to environmental regulation. Flame retardants are required to meet fire safety standards in order to reduce flammability of combustible materials. Use sectors are: consumer electronics as well as building and construction lighting.	(G) Polyphosphonate-co-polycarbonate
P–10–0089	11/25/09	02/22/10	CBI	(G) Solvent / curing agent	(G) Dialkyl imidazolium salt

I. 161 PREMANUFACTURE NOTICES RECEIVED FROM: 10/26/09 TO 1/22/10—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–10–0090	11/24/09	02/21/10	CBI	(G) Polymer additive laundry care products	(S) Fatty acids, C_{18}-unsaturated, dimers, hydrogenated, polymers with 1,6-diisocyanatohexane, polypropylene glycol diamine and polypropylene glycol mono(2-aminomethylethyl) ether ether with trimethylolpropane (3:1)
P–10–0091	11/24/09	02/21/10	CBI	(G) Polymer additive laundry care products	(S) Fatty acids, C_{18}-unsaturated, dimers, hydrogenated, polymers with 4-aminobenzoic acid, 1,6-diisocyanatohexane, polypropylene glycol diamine and polypropylene glycol mono(2-aminomethylethyl) ether ether with trimethylolpropane (3:1)
P–10–0092	11/24/09	02/21/10	CBI	(G) Polymer additive laundry care products	(S) Fatty acids, C_{18}-unsaturated, dimers, hydrogenated, polymers with polymethylenepolyphenylene isocyanate, polypropylene glycol diamine and polypropylene glycol mono(2-aminomethylethyl) ether ether with trimethylolpropane (3:1)
P–10–0093	11/24/09	02/21/10	CBI	(G) Polymer additive laundry care products	(S) Fatty acids, C_{18}-unsaturated, dimers, hydrogenated, polymers with 4-aminobenzoic acid, polymethylenepolyphenylene isocyanate, polypropylene glycol diamine and polypropylene glycol mono(2-aminomethylethyl) ether ether with trimethylolpropane (3:1)
P–10–0094	11/24/09	02/21/10	CBI	(G) Polymer additive laundry care products	(S) Fatty acids, C_{18}-unsaturated, dimers, polymers with 4-aminobenzoic acid, 1,6-diisocyanatohexane, polypropylene glycol diamine and polypropylene glycol mono(2-aminomethylethyl) ether ether with trimethylolpropane (3:1)
P–10–0095	11/24/09	02/21/10	CBI	(G) Polymer additive laundry care products	(S) Fatty acids, C_{18}-unsaturated, dimers, polymers with 4-aminobenzoic acid, polymethylenepolyphenylene isocyanate, polypropylene glycol diamine and polypropylene glycol mono(2-aminomethylethyl) ether ether with trimethylolpropane (3:1)
P–10–0096	11/30/09	02/27/10	CBI	(G) Industrial coating binder	(G) Aminated epoxy salts
P–10–0097	11/30/09	02/27/10	CBI	(G) Industrial coating additive for electrocoat	(G) Aminated epoxy salt
P–10–0098	11/25/09	02/22/10	CBI	(G) Additive for pigment ink	(G) 2-propenoic acid, 2-methyl-, polymer with substituted esters with acrylic acid and 2-propenoic acid
P–10–0099	12/02/09	03/01/10	CBI	(G) Modifier for polymers	(S) Phosphonic acid, p-octyl-, lanthanum(3+) salt (2:1)
P–10–0100	12/03/09	03/02/10	CBI	(G) Additive, open, non-dispersive use	(G) Polyester amine compound
P–10–0101	12/03/09	03/02/10	CBI	(G) Chemical intermediate	(G) Aromatic polyester
P–10–0102	12/03/09	03/02/10	Robertet, Inc.	(S) As an odoriferous component of fragrance compounds	(S) Definition: Extractives and their physically modified derivatives jasminum sambac.
P–10–0102	12/03/09	03/02/10	Robertet, Inc.	(S) As an odoriferous component of fragrance compounds	(S) Oils, jasmine, jasminum sambac

I. 161 PREMANUFACTURE NOTICES RECEIVED FROM: 10/26/09 TO 1/22/10—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–10–0103	12/04/09	03/03/10	CBI	(G) Resin for ultra violet curable adhesives	(S) Fatty acids, C_{18}-unsaturated, dime esters, hydrogenated, polymers with diethylene glycol, 1,6-diisocyanato-2,2,4-trimethylhexane, 1,6-diisocyanato-2,4,4-trimethylhexane, 2-heptyl-3,4-bis(9-isocyanatononyl)-1-pentylcyclohexane, 1,1′-methylenebis[4-isocyanatobenzene], 2-oxepanone and tricyclodecanedimethanol, 2-hydroxyethyl acrylate-blocked
P–10–0104	12/08/09	03/07/10	Henkel Corporation	(S) Fragrance for fabric softener	(S) Silicic acid, 1-ethenylhexyl ethyl ester
P–10–0105	12/09/09	03/08/10	CBI	(S) Plasticizer for use with pvc and rubber	(S) 1,2-cyclohexane dicarboxylic acid bis (2-ethylhexyl) ester
P–10–0106	12/10/09	03/09/10	Instrumental Polymer Technologies, LLC	(G) Resin for coatings	(G) Hydroxyl - terminated aliphatic polycarbonate
P–10–0107	12/10/09	03/09/10	CBI	(G) (1) Polymer composites : Open, non-dispersive use; (2) Liquid dispersions : Open, non-dispersive use; (3) Liquid dispersion : Contained use	(S) Multiwall carbon nanotubes
P–10–0108	12/10/09	03/09/10	CBI	(S) Antioxidant for plastic articles	(G) Thioether antioxidant
P–10–0109	12/08/09	03/07/10	CBI	(G) Coating additive	(G) Urethane acrylate oligomer
P–10–0110	12/11/09	03/10/10	CBI	(G) Detergent	(G) Polyester
P–10–0111	12/10/09	03/09/10	The Dow Chemical Company	(S) Component rigid polyurethane foams for construction panels; component rigid polyurethane foam for appliances; component rigid foam spray applications	(G) Benzene dicarboxylic acid, polyester with glycol and polyethylene glycol
P–10–0112	12/10/09	03/09/10	The Dow Chemical Company	(S) Component rigid polyurethane foams for construction panels; component rigid polyurethane foam for appliances; component rigid foam spray applications	(G) Benzene dicarboxylic acid, polyester with glycol and polyethylene glycol
P–10–0113	12/10/09	03/09/10	The Dow chemical Company	(S) Component rigid polyurethane foams for construction panels; component rigid polyurethane foam for appliances; component rigid foam spray applications	(G) Benzene dicarboxylic acid, polyester with glycol and polyethylene glycol
P–10–0114	12/10/09	03/09/10	The Dow Chemical Company	(S) Component rigid polyurethane foams for construction panels; component rigid polyurethane foam for appliances; component rigid foam spray applications	(G) Benzene dicarboxylic acid, polyester with glycol and polyethylene glycol
P–10–0115	12/11/09	03/10/10	CBI	(S) Electrical conductivity additive for composites; mechanical reinforcement for composites; additive for battery electrodes	(S) Nanofiber type: PR-19 (nanofiber grade: XT-PS
P–10–0116	12/11/09	03/10/10	CBI	(S) Electrical conductivity additive for composites; mechanical reinforcement for composites; additive for battery electrodes	(S) Nanofiber type: PR-19 (nanofiber grade: XT-LHT)
P–10–0117	12/11/09	03/10/10	CBI	(S) Electrical conductivity additive for composites; mechanical reinforcement for composites; additive for battery electrodes	(S) Nanofiber type: PR-19 (nanofiber grade: XT-HHT)
P–10–0118	12/11/09	03/10/10	CBI	(S) Electrical conductivity additive for composites; mechanical reinforcement for composites; additive for battery electrodes	(S) Nanofiber type: PR-24 (nanofiber grade: XT-PS)
P–10–0119	12/11/09	03/10/10	CBI	(S) Electrical conductivity additive for composites; mechanical reinforcement for composites; additive for battery electrodes	(S) Nanofiber type: PR-24 (nanofiber grade: XT-LHT)
P–10–0120	12/11/09	03/10/10	CBI	(S) Electrical conductivity additive for composites; mechanical reinforcement for composites; additive for battery electrodes	(S) Nanofiber type: PR-24 (nanofiber grade: XT-HHT)

I. 161 PREMANUFACTURE NOTICES RECEIVED FROM: 10/26/09 TO 1/22/10—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–10–0121	12/11/09	03/10/10	CBI	(S) Electrical conductivity additive for composites; mechanical reinforcement for composites; additive for battery electrodes	(S) Nanofiber type: PR-19 (nanofiber grade: XT-PS-AM)
P–10–0122	12/11/09	03/10/10	CBI	(S) Electrical conductivity additive for composites; mechanical reinforcement for composites; additive for battery electrodes	(S) Nanofiber type: PR-19 (nanofiber grade: XT-LHT-AM)
P–10–0123	12/11/09	03/10/10	CBI	(S) Electrical conductivity additive for composites; mechanical reinforcement for composites; additive for battery electrodes	(S) Nanofiber type: PR-19 (nanofiber grade: XT-HHT-AM)
P–10–0124	12/11/09	03/10/10	CBI	(S) Electrical conductivity additive for composites; mechanical reinforcement for composites; additive for battery electrodes	(S) Nanofiber type: PR-24 (nanofiber grade: XT-PS-AM)
P–10–0125	12/11/09	03/10/10	CBI	(S) Electrical conductivity additive for composites; mechanical reinforcement for composites; additive for battery electrodes	(S) Nanofiber type: PR-24 (nanofiber grade: XT-LHT-AM)
P–10–0126	12/11/09	03/10/10	CBI	(S) Electrical conductivity additive for composites; mechanical reinforcement for composites; additive for battery electrodes	(S) Nanofiber type: PR-24 (nanofiber grade: XT-HHT-AM)
P–10–0127	12/14/09	03/13/10	CBI	(G) Industrial coating binder	(G) Blocked isocyanate crosslinker
P–10–0128	12/14/09	03/13/10	CBI	(G) Filling material	(S) Siloxanes and silicones, di-me, 3-hydroxypropyl group-terminated, ethoxylated, polymers with 1,6-diisocyanato-2,2,4-trimethylhexane, 1,6-diisocyanato-2,4,4-trimethylhexane, polypropylene glycol ether with glycerol (3:1) and polypropylene glycol ether with pentaerythritol (4:1), polypropylene glycol mono-bu ether-blocked
P–10–0129	12/16/09	03/15/10	Henkel Corporation	(S) A polymerizable component of industrial adhesive and sealant	(S) Benzene, 1,3-bis(1-chloro-1-methylethyl)-, reaction products with polyisobtutylene and trimethyl-2-propen-1-ylsilane
P–10–0130	12/16/09	03/15/10	Alberdingk Boley, Inc.	(S) Polyurethane coating for wood	(G) Linseed oil, ester with pentaerythritol, polymer with .alpha.-hydro-.omega.-hydroxypoly(oxy-1,4-butanediyl), 3-hydroxy-2-(hydroxymethyl) 2-methylpropanoic acid and 5-isocyanato-1-(isocyanatomethyl)-alkylcyclohexane, compounds with triethylamine
P–10–0131	12/16/09	03/15/10	CBI	(G) Rheological additive for paints	(G) Polyester salt of hydrogenated dimer of fatty acids and glycerol.
P–10–0132	12/16/09	03/15/10	CBI	(S) Catalyst complexing agent	(G) Aromatic hydrocarbon
P–10–0133	12/17/09	03/16/10	CBI	(G) Chemical intermediate - destructive use	(G) Alkyl sulfide, manufacture of, by-products from, distant lights
P–10–0134	12/17/09	03/16/10	CBI	(G) Chemical intermediate - destructive use	(G) Alkyl sulfide, manufacture of, by-products from, distant lights
P–10–0135	12/17/09	03/16/10	3M Company	(G) Heat transfer fluid	(G) Fluoroketone
P–10–0136	12/17/09	03/16/10	CBI	(G) Monomer for industrial paints, coatings, ink and adhesives	(G) Polythiol
P–10–0137	12/18/09	03/17/10	CBI	(G) Coating agent	(G) Substituted polyethyleneimine
P–10–0138	12/18/09	03/17/10	CBI	(G) Perfoemance chemical for oilfield applications	(G) Long chain alkylacrylate, homopolymers
P–10–0139	12/18/09	03/17/10	CBI	(G) Perfoemance chemical for oilfield applications	(G) Long chain alkylacrylate, homopolymers
P–10–0140	12/18/09	03/17/10	CBI	(G) Adhesive for car	(G) Urethane modified epoxy resin
P–10–0141	12/18/09	03/17/10	CBI	(G) Adhesive component	(G) Carbohydrate
P–10–0142	12/22/09	03/21/10	CBI	(G) Component of fragrance mixture for highly-dispersive applications	(G) Furan, 2-(1,1-dimethylethyl)-2, 5-dihydro-alkyl substituted
P–10–0143	12/22/09	03/21/10	Instrumental Polymer Technologies, LLC	(G) Resin for coatings	(G) Hydroxyl-terminated aliphatic polycarbonate

I. 161 PREMANUFACTURE NOTICES RECEIVED FROM: 10/26/09 TO 1/22/10—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–10–0144	12/22/09	03/21/10	Wacker Chemical Corporation	(S) Additive for paper and foil coatings and bonding agents	(G) Methyl-phenyl silicone resin with alkoxy groups
P–10–0145	12/23/09	03/22/10	Henkel Corporation	(S) Fragrance for fabric softener	(S) Silicic acid, 9-decen-1-yl ethyl ester
P–10–0146	12/23/09	03/22/10	CBI	(G) Processing aid	(G) Alkyl substituted polyamide
P–10–0147	12/23/09	03/22/10	Huntsman Corporation	(G) Intermediate amine	(G) Alkoxylated alkylamine
P–10–0148	12/23/09	03/22/10	CBI	(G) Ethoxylation initiator	(G) Partially fluorinated borate ester
P–10–0149	12/23/09	03/22/10	Huntsman Corporation	(G) Grinding aid	(G) Alkoxylated alkylamine salt
P–10–0150	12/24/09	03/23/10	Instrumental polymer technologies, LLC	(G) Resin for coatings	(G) Hydroxy - terminated; aliphatic polycarbonate
P–10–0151	12/23/09	03/22/10	Henkel Corporation	(S) Cure accelerator in industrial adhesive formulations	(S) 1,2-propanediol, 3-(3,4-dihydro-1(2*H*)-quinolinyl)-
P–10–0152	12/24/09	03/23/10	CBI	(G) Filler dispersant	(G) Phosphated polyalkoxylate
P–10–0153	12/24/09	03/23/10	Sachem, Inc.	(G) Chemical intermediate	(S) 1*H*-imidazole, 1-(1-methylethyl)-
P–10–0154	12/23/09	03/22/10	Henkel Corporation	(S) Cure modifier in industrial adhesive formulations	(S) Quinoline, 1-butyl-1,2,3,4-tetrahydro-
P–10–0155	12/24/09	03/23/10	CBI	(G) Open, non-dispersive use.	(G) Acid-functional oligomer
P–10–0156	12/23/09	03/22/10	Huntsman International, LLC	(S) Disperse dye for polyester fabrics	(G) Substituted phenyl azo substituted phenyl alkyl substituted indole
P–10–0157	12/28/09	03/27/10	Henkel Corporation	(S) A polymerizable component in novel adhesive and sealant formulations	(S) 2-propenoic acid, 2-methyl-, octahydro-4, 7-methano-1h-inden-5-yl ester
P–10–0158	12/28/09	03/27/10	Henkel Corporation	(S) A polymerizable component in industrial adhesive formulations	(S) Disiloxane, 1,1,3,3-tetramethyl-, polymer with 1,7-octadiene
P–10–0159	12/29/09	03/28/10	CBI	(G) Coatings additive	(G) Polycyclic polyamine diester organometallic compound
P–10–0160	01/04/10	04/03/10	CBI	(G) Lithographic inks	(G) Polyester acrylate
P–10–0161	01/04/10	04/03/10	Gelest, Inc.	(S) Conversion to isopropyldimethylchlorosilane; Research	(S) Silane, dimethyl(1-methylethyl)-
P–10–0162	01/04/10	04/03/10	Gelest, Inc.	(S) Conversion to (3-isopropyldimethylsiloxy)prop-1-yl chloride; Research	(S) Silane, chlorodimethyl(1-methylethyl)-
P–10–0163	01/04/10	04/03/10	Gelest, Inc.	(S) Conversion to lithium reagent; Research	(S) Silane, (3-chloropropoxy)dimethyl(1-methylethyl)-
P–10–0164	01/05/10	04/04/10	Worwag Coatings LLC	(S) Automotive part paint additive	(G) Aliphatic diisocyanates, modified dimer fatty acid, polyesterpolyol, bishydroxymethylpropionic acid polymer
P–10–0165	01/06/10	04/05/10	CBI	(G) Printing additive	(G) Polyester resin
P–10–0166	01/07/10	04/06/10	CBI	(G) Adhesive component	(G) 1,1′-methylenebis[isocyanatobenzene], polymer with polyester polyols and a polyether polyol
P–10–0167	01/08/10	04/07/10	CBI	(G) Flame retardant	(G) Brominated aromatic oligomer
P–10–0168	01/11/10	04/10/10	CBI	(S) Resin for coatings for metal	(G) Polyester polyurethane
P–10–0169	01/11/10	04/10/10	CBI	(G) Chemical intermediate - destructive use	(G) Alkyl thiols, manufacturer of, by-products from, distant heavies
P–10–0170	01/12/10	04/11/10	CBI	(G) Coatings	(G) Urethane acrylate
P–10–0171	01/13/10	04/12/10	Sachem, Inc.	(G) Chemical intermediate	(S) 1*H*-imidazolium, 1,3-bis(1-methylethyl)-, bromide
P–10–0172	01/13/10	04/12/10	Sachem, Inc.	(G) Destructive use catalyst	(S) 1*H*-imidazolin, 1,3-bis(1-methylethyl)-, hydroxide
P–10–0173	01/14/10	04/13/10	The Shepherd Chemical Company	(G) Automotive additive	(G) Vinylimidazole (VIMA) grafted poly alpha olefin (PAO) complexed with diisopropoxy titanium bis-acetylacetonate
P–10–0174	01/14/10	04/13/10	The Shepherd Chemical Company	(G) Automotive additive	(G) Vinylimidazole (VIMA) grafted poly alpha olefin (PAO) complexed with molybdenum borate neodecanoate
P–10–0175	01/14/10	04/13/10	CBI	(G) Open nondispersive (component in polyurethane coating)	(G) Aliphatic hydroxyfunctional polyester-polyurethane dispersion

I. 161 PREMANUFACTURE NOTICES RECEIVED FROM: 10/26/09 TO 1/22/10—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–10–0176	01/15/10	04/14/10	CBI	(G) Electrographic toner	(G) Aliphatic polycarboxylic acid, polymer with aromatic polycarboxylic acid and aliphatic polyol
P–10–0177	01/19/10	04/18/10	Umicore Precious Metals NJ, LLC	(S) Inhibited curing agent	(G) PT carbonyl cyclosiloxane
P–10–0178	01/19/10	04/18/10	Hitachi Chemical Co. America, Ltd.	(S) Adhesive for semiconductor packages	(S) 2-propenoic acid, 2-methyl-, 2-oxiranylmethyl ester, polymer with butyl 2-propenoate, ethyl 2-propenoate and 2-propenenitrile
P–10–0179	01/19/10	04/18/10	CBI	(G) Industrial liquid coatings	(G) Polymer of tall oil fatty acid, aliphatic diols, aliphatic polyols, and aromatic acids
P–10–0180	01/19/10	04/18/10	CBI	(S) Curing agent or accelerator for epoxy resin	(G) Alkanediamines polymer with 1,6-diisocyanatohexane, 1*H*-imidazole-1-propanamine -blocked
P–10–0181	01/19/10	04/18/10	The Dow Chemical Company	(G) Component of electrical laminates	(G) Phenyl glycidyl ether derivative
P–10–0182	01/19/10	04/18/10	CBI	(G) Coated particles for support	(G) Aromatic isocyanate reaction product with sand

In Table II of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the TME received:

II. 1 TEST MARKETING EXEMPTION NOTICES RECEIVED FROM: 10/26/09 TO 1/22/10

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
T–10–0001	10/28/09	12/11/09	PPG Industries, Inc.	(G) Component of a coating	(G) Aromatic polyurethane

In Table III of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the Notices of Commencement to manufacture received:

III. 117 NOTICES OF COMMENCEMENT FROM: 10/26/09 TO 1/22/10

Case No.	Received Date	Commencement Notice End Date	Chemical
P–04–0179	11/17/09	11/10/09	(G) Tertiary amine carboxylic acid compound
P–04–0426	12/01/09	10/27/09	(G) Dithiophosphate alkyl ester
P–04–0456	11/04/09	10/23/09	(G) Neutralized acrylic polymer
P–05–0080	12/28/09	12/08/09	(G) Chemical 1: Paraffinic light base oil
P–05–0081	12/28/09	12/08/09	(G) Paraffinic heavy base oil
P–05–0082	12/28/09	12/08/09	(G) Hydrotreated middle distillate
P–05–0083	12/28/09	12/08/09	(G) Light catalytic cracked distillate
P–05–0084	12/28/09	12/08/09	(G) Hydrocracked light distillate
P–05–0085	12/28/09	12/08/09	(G) Hydrotreated light distillate
P–05–0086	12/28/09	12/08/09	(G) Hydrocracked heavy distillate
P–05–0088	11/16/09	10/24/09	(G) Branched and linear hydrocarbons
P–05–0090	12/28/09	12/08/09	(G) Chemical 1: Heavy naphtha
P–05–0091	12/28/09	12/08/09	(G) Chemical 2: Hydrocracked heavy naphtha
P–05–0092	12/28/09	12/08/09	(G) Hydrodesulfurized heavy naphtha
P–05–0093	12/28/09	12/08/09	(G) Neutralized light naphtha
P–05–0094	12/28/09	12/08/09	(G) Hydrotreated heavy naphtha
P–05–0095	12/28/09	12/08/09	(G) Catalytic cracked heavy naphtha
P–05–0096	12/28/09	12/08/09	(G) Chemical 1: Light naphtha
P–05–0097	12/28/09	12/08/09	(G) Chemical 2: Hydrocracked light naphtha
P–05–0098	12/28/09	12/08/09	(G) Hydrodesulfurized light naphtha
P–05–0099	12/28/09	12/08/09	(G) Neutralized light naphtha
P–05–0100	12/28/09	12/08/09	(G) Catalytic cracked light naphtha
P–05–0101	12/28/09	12/08/09	(G) Hydrotreated light naphtha
P–07–0013	01/06/10	12/07/09	(G) Alkylphenol novolak modified with amine and epoxy
P–07–0356	12/23/09	12/14/09	(G) Polymer with aliphatic diisocyanates, polycarbonatediol and bishydroxymethylproionic acid

III. 117 NOTICES OF COMMENCEMENT FROM: 10/26/09 TO 1/22/10—Continued

Case No.	Received Date	Commencement Notice End Date	Chemical
P–07–0358	01/06/10	12/18/09	(G) Hexitol, anhydro-, bis[[(1-oxo-2-propenyl)oxy]benzoate], polymer with phenylene bis[[(1-oxo-2-propenyl)oxy]alkyl(C_1-C*10*)oxy benzoate]
P–07–0418	10/28/09	09/16/09	(G) Hydrogenated polyalphaolefins
P–07–0435	12/23/09	12/14/09	(G) Copolymer of acrylic acrylates, methacrylates and acid
P–07–0586	11/10/09	10/30/09	(G) Polydimethysaline
P–07–0622	11/02/09	10/23/09	(G) Alkanoldioic acid, dialkyl ester
P–08–0046	11/30/09	11/20/09	(G) Mixed metal oxide complex
P–08–0047	11/30/09	11/11/09	(G) Metal oxide complex
P–08–0069	12/07/09	11/18/09	(G) Alkenyl succinimide
P–08–0179	12/15/09	12/03/09	(G) 1,2,3-propanetricarboxamide derivative
P–08–0219	12/30/09	12/28/09	(S) 1,3-cyclopentadiene, 5-butyl-
P–08–0238	11/02/09	10/12/09	(G) Water-borne silicone grafted (meth)acrylic copolymer
P–08–0508	10/26/09	10/05/09	(G) Perfluorinated aliphatic carboxylic acid
P–08–0631	11/16/09	11/04/09	(G) Alkenoic acid polymer with (poly)hydroxy substituted alkane, ester with acryloylcarbamic acid
P–08–0669	11/10/09	11/03/09	(G) Urethane acrylate
P–08–0670	12/11/09	11/03/09	(G) Urethane acrylate
P–08–0707	11/19/09	11/01/09	(S) 2*H*-2,4*A*-methanonaphthalen-1(5*H*)-one, hexahydro-5,5-dimethyl-
P–09–0048	10/28/09	10/06/09	(G) Surface modified ceramic particles
P–09–0061	12/11/09	12/08/09	(G) Hydroxy-chloro-cyclopropyl-heteromonocycliccarboxylic acid
P–09–0075	11/03/09	10/09/09	(G) Aliphatic, aromatic unsaturated bicyclic derivative
P–09–0076	12/08/09	11/26/09	(G) Diamino - (substituted phenylazo) - benzene sulfonic acid, salt
P–09–0115	11/02/09	10/07/09	(G) Alkanedioic acid, polymer with *N*-(aminoalkyl)-alkyldiamine, (chloromethyl)oxirane and alkylpolyol, acid salt
P–09–0120	01/05/10	12/14/09	(G) Epoxidized siloxane
P–09–0127	01/11/10	12/19/09	(G) Aliphatic polyurethane resin aqueous dispersion
P–09–0141	01/19/10	12/18/09	(G) 1,3-ethyl, methylimidazolium undecafluoro substituted ionic methalic species
P–09–0160	12/07/09	11/26/09	(G) 2-propenoic acid, polymer with butyl 2-propenoate, (2,3,4,5,6-pentabromophenyl) methyl 2-propenoate and substitute acrylates
P–09–0165	11/03/09	07/07/09	(G) Modified, saturated polyester resin
P–09–0166	11/16/09	11/10/09	(G) Butylated melamine
P–09–0172	12/15/09	12/04/09	(G) Substituted carboxylic acid reaction product with substituted amine and amide, acetates
P–09–0174	12/09/09	11/13/09	(G) Perfluoroalkylethylmethacrylate copolymer
P–09–0200	01/14/10	11/15/09	(G) Alkanoic acid, potassium salt
P–09–0210	12/08/09	11/23/09	(G) Furandione polymer with ethenylbenzene, alkyl ester
P–09–0245	12/16/09	12/14/09	(G) Partially fluorinated alcohol, reaction products with phosphorus oxide (P2O5), ammonium salts
P–09–0246	12/29/09	12/22/09	(G) Partially fluorinated alcohol, reaction products with phosphorus oxide (P2O5)
P–09–0247	12/28/09	12/05/09	(G) Acrylamide-based copolymer
P–09–0253	12/11/09	11/27/09	(G) Polyether polyester copolymer phosphate
P–09–0254	11/06/09	11/02/09	(G) Polyacrylate, modified with siloxanes
P–09–0257	11/24/09	10/18/09	(S) Multi-wall carbon nanotube
P–09–0271	11/27/09	11/17/09	(G) Aryl alkylphosphonate
P–09–0279	11/02/09	10/29/09	(G) Styrene-maleic anhydride copolymer, reaction product with amino compounds
P–09–0286	11/06/09	10/28/09	(G) Poly(oxyalkylenediyl), a-substituted carbomonocycle-.omega.-substituted carbomonocycle
P–09–0289	10/27/09	08/05/09	(G) Solid epoxy resin
P–09–0308	11/16/09	11/05/09	(G) Amine modified polyester acrylate
P–09–0347	11/05/09	10/09/09	(G) Alkyl diphenyl ether
P–09–0374	11/23/09	10/30/09	(G) Fatty acids, polymers with adipic acid, 1,6-hexandiol, 3-hydroxy-2-(hydroxymethyl)-2-methylpropanoic acid and 1,1′-methylenebis[4-isocyanatocyclohexane], compounds with triethylamine
P–09–0379	11/03/09	09/15/09	(G) High molecular weight polyester
P–09–0386	11/09/09	10/14/09	(G) Alkenyl succinic anhydride
P–09–0409	10/27/09	10/16/09	(G) Urethane acrylate
P–09–0414	12/01/09	11/04/09	(G) Polyester resin
P–09–0427	11/03/09	10/28/09	(G) Phenol, 4,4′-(1-methylethylidene)bis-, polymer with 2-(chloromethyl)oxirane, reaction products with dithiol
P–09–0428	12/17/09	12/10/09	(G) Mixed metal oxide complex
P–09–0435	11/10/09	11/02/09	(S) 6,8-dimethyl-7-nonenal
P–09–0451	12/22/09	12/09/09	(G) Butanamide, *N*-[substituted phenyl]-[(alkoxynitrophenyl)diazenyl]-3-oxo-
P–09–0453	11/04/09	10/27/09	(G) Urethane prepolymer
P–09–0454	01/05/10	11/16/09	(G) Polyurethane
P–09–0477	11/12/09	11/06/09	(G) Fluoroalkyl sulfonamide
P–09–0478	12/23/09	12/10/09	(G) Modified polyol
P–09–0481	12/22/09	12/02/09	(G) Fluorinated polymer
P–09–0485	11/13/09	11/07/09	(G) Fluorinated sulfonamide alcohol
P–09–0490	12/09/09	11/18/09	(S) 2*H*-1,5-benzodioxepin-3 (4*H*)-one, 7-(1-methylethyl)-

III. 117 NOTICES OF COMMENCEMENT FROM: 10/26/09 TO 1/22/10—Continued

Case No.	Received Date	Commencement Notice End Date	Chemical
P–09–0498	12/14/09	12/07/09	(G) Aromatic dicarboxylic acid, polymer with cycloaliphatic diamine, 2-(chloromethyl)oxirane, alkyldioic acid and an aryl diphenol
P–09–0499	12/30/09	10/21/09	(G) Aromatic polyether polymer
P–09–0511	12/08/09	12/03/09	(G) Fluoroalkyl acrylate copolymer
P–09–0531	11/30/09	11/12/09	(G) Acrylic solution polymer
P–09–0534	01/05/10	11/16/09	(G) Carbamic acid, (methylenedicyclohexanediyl)bis-mixed diesters with polyethylene glycol and polyethylene glycol mono ethers
P–09–0536	01/05/10	11/16/09	(G) Carbamic acid, (methylenedicyclohexanediyl)bis-mixed diesters with unsaturated alcohols, polyethylene glycol and polyethylene glycol mono ethers
P–09–0537	01/05/10	11/16/09	(G) Polyethylene glycol, alpha, alpha′, alpha″-propanetrilmonoesters with [[[carboxyaminitrimethylcyclohexyl]methyl]amino]carbonyl]-octadecenyloxy)polyethylene glycol
P–09–0538	01/05/10	11/16/09	(G) Carbamic acid, (methylenedicyclohexanediyl)bis-mixed diesters with isoalcohols, polyethylene glycol and polyethylene glycol mono ethers
P–09–0539	01/05/10	11/16/09	(G) Carbamic acid, (trimethylhexanediyl)bis-mixed diesters with unsaturated alcohols, isoalcohols and polyethylene glycol
P–09–0544	12/10/09	12/01/09	(G) Polyalkyleneglycol, reaction products with hydroxyalkyl acrylate, dihydroxyalkyl alkanoic acid, sodium-aminoalkyl-alaninate, sodium salt
P–09–0555	11/30/09	11/18/09	(G) Acrylate, polymer with aromatic vinyl monomer and acrylates
P–09–0564	12/07/09	11/20/09	(G) Polyurethane prepolymer
P–09–0570	12/28/09	12/04/09	(G) Alkyl thiol, manufacturer of, by-products from, distant heavies
P–09–0572	12/23/09	12/10/09	(G) Alkyl thiol, manufacturer of, by-products from, distant heavies
P–09–0573	12/23/09	12/04/09	(G) Alkyl thiol, manufacturer of, by-products from, distant residues heavies
P–09–0575	12/18/09	12/13/09	(G) Naphthalenesulfonic acid, [(chloro-methyl-sulfophenyl)diazenyl]-hydroxy-metal salt
P–09–0578	12/18/09	12/13/09	(G) Naphthalenesulfonic acid, [(methyl-sulfophenyl)diazenyl]-hydroxy-metal salt
P–09–0581	12/30/09	12/16/09	(G) Styrenyl surface treated manganese ferrite
P–09–0582	12/30/09	12/16/09	(G) Acrylate polymer stabilized manganese ferrite
P–09–0583	01/14/10	12/16/09	(G) Anthraquinone acid dye salt
P–09–0584	01/14/10	12/16/09	(G) Copper phthalocyanine direct dye salt
P–09–0585	12/07/09	11/20/09	(G) Polymer of aliphatic cyclic methacrylic acid and aliphatic methacrylic acid ester
P–09–0587	12/08/09	11/24/09	(S) Butanedioic acid, 2-methylene-, monoisooctadecyl ester
P–09–0588	12/08/09	11/25/09	(S) Butanedioic acid, 2-methylene-, monoisooctadecyl ester, palladium(2+) salt (2:1)
P–09–0592	01/13/10	12/22/09	(G) Aqueous polyurethane resin dispersion
P–09–0598	12/18/09	12/07/09	(G) Alkyl acrylic acid, polymer with alkyl acrylate alkyl ester and alkyldiyl diacrylate
P–09–0600	12/30/09	11/29/09	(G) Alkyl thiol, manufacturer of, by-products from, distant lights
P–09–0612	12/07/09	11/30/09	(G) Silane treated glass
P–09–0615	01/19/10	01/07/10	(S) Alkenes, C_{26-30} .alpha.-, polyoumd.
P–10–0003	01/19/10	01/12/10	(G) Alkyl thiol, manufacturer of by-products from, distant lights
P–10–0004	01/19/10	01/12/10	(G) Alkyl thiol, manufacturer of by-products from, distant residues
P–97–1011	12/14/09	06/05/98	(S) Oxirane, 2,2′-(methylenebis ((2,6-dimethyl-4,1phenylene) oxymethylene))bis-
P–98–0543	01/13/10	12/31/09	(G) Polyurethane with carboxy functions

List of Subjects

Environmental protection, Chemicals, Premanufacturer notices.

Dated: March 1, 2010.

Chandler Sirmons,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2010–5129 Filed 3–9–10; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2010–0171; FRL–8814–8]

Certain New Chemicals; Receipt and Status Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5 of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory) to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a premanufacture notice (PMN) or an application for a test marketing exemption (TME), and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from January 25, 2010 through February 12, 2010, consists of the PMNs pending or expired, and the notices of commencement tomanufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

DATES: Comments identified by the specific PMN number or TME number, must be received on or before April 9, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2010–0171, 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–2010–0171. 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–2010–0171. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

Docket: All documents in the docket are listed in the 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 Federal 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: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division, Office of Pollution Prevention and Toxics (7408M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; 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 action is directed to the public in general. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitter of the premanufacture notices addressed in the 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 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. Why is EPA Taking this Action?

Section 5 of TSCA requires any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Inventory to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under sections 5(d)(2) and 5(d)(3) of TSCA, EPA is required to publish a notice of receipt of a PMN or an application for a TME and to publish periodic status reports on the chemicals under review and the receipt of notices of commencement to manufacture those chemicals. This status report, which covers the period from January 25, 2010 through February 12, 2010, consists of the PMNs pending or expired, and the notices of commencement to manufacture a new chemical that the

Agency has received under TSCA section 5 during this time period.

III. Receipt and Status Report for PMNs

This status report identifies the PMNs, pending or expired, and the notices of commencement to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period. If you are interested in information that is not included in the following tables, you may contact EPA as described in Unit I. to access additional non-CBI information that may be available.

In Table I of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the PMNs received by EPA during this period: the EPA case number assigned to the PMN; the date the PMN was received by EPA; the projected end date for EPA's review of the PMN; the submitting manufacturer; the potential uses identified by the manufacturer in the PMN; and the chemical identity.

I. 34 PREMANUFACTURE NOTICES RECEIVED FROM: 1/25/10 TO 2/12/10

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–10–0189	01/25/10	04/24/10	CBI	(G) Lubricant additive	(G) Molybdenum alkoxyalkyl-alkyldithiocarbamate
P–10–0190	01/25/10	04/24/10	CBI	(S) Tackifier in the rubber / tires industry	(G) Rosin, polymer with phenols and formaldehyde
P–10–0191	01/25/10	04/24/10	CBI	(S) Tackifier in the rubber / tires industry	(G) Rosin, polymer with phenols and formaldehyde
P–10–0192	01/25/10	04/24/10	CBI	(S) Tackifier in the rubber / tires industry	(G) Rosin, polymer with phenols and formaldehyde
P–10–0193	01/25/10	04/24/10	CBI	(S) Tackifier in the rubber / tires industry	(G) Rosin, polymer with phenols and formaldehyde
P–10–0194	01/25/10	04/24/10	CBI	(S) Tackifier in the rubber / tires industry	(G) Rosin, polymer with phenols and formaldehyde
P–10–0195	01/25/10	04/24/10	CBI	(S) Tackifier in the rubber / tires industry	(G) Rosin, polymer with phenols and formaldehyde
P–10–0196	01/25/10	04/24/10	Kemira Chemicals, Inc.	(S) Scale inhibition for crude oil and gas production	(G) Polycarboxylic acid derivative
P–10–0197	01/28/10	04/27/10	CBI	(G) Adhesives	(G) MDI modified polyester resin
P–10–0198	01/26/10	04/25/10	CBI	(G) Component of foam	(G) Fatty acid polymer with aliphatic diol and aromatic diacid
P–10–0199	01/26/10	04/25/10	Cognis corporation	(S) Leather cleaner formulation	(S) Isononanoic acid, $C_{16–18}$ alkyl esters
P–10–0200	01/26/10	04/25/10	CBI	(G) Oilfield polymer	(G) Hydroxypropyl methacrylate, reaction products with propylene oxide and ethylene oxide, copolymer with *N*-vinyl caprolactam
P–10–0201	01/27/10	04/26/10	CBI	(S) Polymer for floor coatings	(G) Polyether polyurethane
P–10–0202	01/27/10	04/26/10	CBI	(S) Light stabilizer for plastic articles	(G) Substituted piperidinol, alkanoate
P–10–0203	01/29/10	04/28/10	CBI	(G) Polyurethane dispersion for coatings	(G) Aqueous, aliphatic polyurethane dispersion
P–10–0204	01/29/10	04/28/10	CBI	(S) Resin for ultraviolet or electron beam radiation curable coatings for wood	(G) Acrylate capped polyurethane oligomer
P–10–0205	01/29/10	04/28/10	CBI	(S) (1) Compound for use in producing films that will be applied to plastic substrates (open / non-dipersive use); (2) Compound for use in producing reinforced plastic parts (open / non-dispersive use)	(G) Poly(aryl ether) polymers
P–10–0206	01/29/10	04/28/10	CBI	(S) (1) Compound for use in producing films that will be applied to plastic substrates (open / non-dipersive use); (2) Compound for use in producing reinforced plastic parts (open / non-dispersive use)	(G) Poly(aryl ether) polymers
P–10–0207	01/29/10	04/28/10	CBI	(S) (1) Compound for use in producing films that will be applied to plastic substrates (open / non-dipersive use); (2) Compound for use in producing reinforced plastic parts (open / non-dispersive use)	(G) Poly(aryl ether) polymers
P–10–0208	01/29/10	04/28/10	CBI	(G) Formulated agricultural product for export	(G) Coal gasification products
P–10–0209	02/02/10	05/02/10	CBI	(S) Reactive hotmelt adhesive	(G) Polyurethane resin
P–10–0210	02/02/10	05/02/10	CBI	(S) Reactive hotmelt adhesive	(G) Polyurethane resin
P–10–0211	02/02/10	05/02/10	CBI	(S) Reactive hotmelt adhesive	(G) Polyurethane resin
P–10–0212	02/02/10	05/02/10	CBI	(S) Reactive hotmelt adhesive	(G) Polyurethane resin
P–10–0213	02/02/10	05/02/10	CBI	(S) Reactive hotmelt adhesive	(G) Polyurethane resin

I. 34 PREMANUFACTURE NOTICES RECEIVED FROM: 1/25/10 TO 2/12/10—Continued

Case No.	Received Date	Projected Notice End Date	Manufacturer/Importer	Use	Chemical
P–10–0214	02/03/10	05/03/10	Best Sanitizers, Inc.	(S) Surfactant	(S) Palm oil, mixed *D*-glucose and oleic acid, candida bombicola-fermented
P–10–0215	02/03/10	05/03/10	CBI	(G) 1. Sealant for construction industry; 2. Adhesive for graphic art application	(G) Silane modified polymer
P–10–0216	02/04/10	05/04/10	Coim usa inc.	(S) Packaging adhesives	(S) 1,3-benzenedicarboxylic acid, polymer with hexanedioic acid, .alpha.-hydro-.omega.-hydroxypoly[oxy(methyl-1,2-ethanediyl)], 1,3-isobenzofurandione and 2,2′-oxybis[ethanol]
P–10–0217	02/04/10	05/04/10	Loba-Wakol LLC	(S) Wood floor treatment, finisher	(G) Fatty acid trimetllitate alkyld polymer
P–10–0218	02/04/10	05/04/10	Loba-Wakol LLC	(S) Wood floor treatment, finisher	(G) Aliphatic diisocyanate, polycarbonate, polyesterpolyol polymer
P–10–0219	02/04/10	05/04/10	Loba-Wakol LLC	(S) Wood floor treatment, finisher	(G) Aliphatic diisocyanate, polyesterpolyol, bishydroxymethylalkanoic acid polymer
P–10–0220	02/04/10	05/04/10	Solvay Fluorides, LLC - A subsidiary of Solvay Chemicals, Inc.	(G) Raw material	(S) 3-buten-2-one, 4-ethoxy-1,1,1-trifluoro-, (3*E*)-
P–10–0221	02/05/10	05/05/10	Coim USA Inc.	(S) Packaging adhesives	(S) 1,3-benzenedicarboxylic acid, polymer with hexanedioic acid, .alpha.-hydro-.omega.-hydroxypoly[oxy(methyl-1,2-ethanediyl)], 1,3-isobenzofurandione and 2,2′-oxybis[ethanol], *N*-[[(isocyanatophenyl)methyl] phenyl]carbamate
P–10–0222	02/05/10	05/05/10	CBI	(G) Alkylating agent	(G) Alkyltin halide

In Table II of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the Notices of Commencement to manufacture received:

II. 16 NOTICES OF COMMENCEMENT FROM: 1/25/10 TO 2/12/10

Case No.	Received Date	Commencement Notice End Date	Chemical
P–02–0988	01/26/10	01/13/10	(G) Urethane modified acyrlate
P–08–0556	02/02/10	01/19/10	(G) Aromatic prepolymer based on tdi
P–08–0611	02/01/10	01/13/10	(G) Isocyanate polymer
P–09–0004	02/01/10	01/14/10	(G) Isocyanate polymer
P–09–0037	01/27/10	01/20/10	(G) Fluoroalkyl methacrylate copolymer
P–09–0071	01/22/10	01/13/10	(G) *N,N*-dialkylamine
P–09–0239	02/01/10	01/15/10	(G) Siloxanes and silicones, di-me, polymers with (chloromethylsilyl)-functional alkane, vinyl-group terminated
P–09–0241	01/28/10	01/25/10	(S) 1,2-ethanediol, reaction products with epichlorohydrin
P–09–0281	01/22/10	01/15/10	(G) Styrene-maleic anhydride copolymer, reaction product with amino compounds
P–09–0285	01/25/10	09/23/09	(G) Unsaturated polyester resin
P–09–0350	02/03/10	01/22/10	(S) Oils, *Evodia Rutaecarpa*
P–09–0440	01/27/10	11/06/09	(G) Unsaturated polyester resin
P–09–0489	02/03/10	01/22/10	(S) Definition: Extractives and their physically modified derivatives. *Periploca Sepium*
P–09–0489	02/03/10	01/22/10	(S) Oils, *Periploca Sepium*
P–09–0630	01/25/10	01/19/10	(G) Silane derivative
P–10–0006	01/28/10	01/20/10	(G) Aliphatic alcohol, polymer with 1,3-diisocyanatomethylbenzene and .alpha.-hydro-.omega.-hydroxypoly (oxy-1,4-butanediyl), 2-hydroxypropyl methacrylate-blocked

II. 16 NOTICES OF COMMENCEMENT FROM: 1/25/10 TO 2/12/10—Continued

Case No.	Received Date	Commencement Notice End Date	Chemical
P–10–0009	02/01/10	01/26/10	(G) Diglycidylaniline

List of Subjects

Environmental protection, Chemicals, Premanufacturer notices.

Dated: March 1, 2010.

Chandler Sirmons,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2010–5131 Filed 3–9–10; 8:45 am]

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